

**IN THE HIGH COURT OF SOUTH AFRICA  
DURBAN AND COAST LOCAL DIVISION**

**(EXERCISING ITS ADMIRALTY JURISDICTION)**

**CASE NO : A55/2003**

**NAME OF SHIP : mv 'ATLANTIC SPIRIT'**

**In the matter between :**

**AMERIQUEST SHIPPING INC.**

**APPLICANT/FIRST RESPONDENT**

**And**

**UNISHIPPING SA**

**RESPONDENT / APPELLANT**

**AND IN THE MATTER of an application for  
and order varying the order of this  
Honourable Court made on 11<sup>th</sup> April 2003,  
seeking an order that the Respondent  
(Applicant) in the initial application) provide  
security and for further or alternative relief.**

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**JUDGMENT**

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**MSIMANG, J**

This is an application for an order varying the order granted by this Court on 11 April 2003 to the extent that the security required to be put up by the applicant to obtain the release of the vessel MV "ATLANTIC SPIRIT" ("the Vessel") be reduced to the amount of US \$13 913,95 as regards the capital and for an order directing the Respondent to provide security in the sum of US \$55 654,03 for the Applicant's claim or counter-claim to be determined in the arbitration proceedings to be held in LONDON plus the security for the costs of the said arbitration in the amount of US \$40 000,00. Initially the application was opposed by the Respondent but during argument MR HARPUR, who appeared for the Respondent, conceded that the Applicant had made out a sufficient case for an order directing the Respondent to provide the said security and to provide security for the costs of arbitration proceedings. However, he persisted with Respondent's opposition to that part of the application seeking the reduction of the amount of security which had been previously fixed by this Court.

The Applicant in these proceedings is AMERIQUEST SHIPPING INCORPORATED, a ship owning company registered in Panama and the owner of the vessel which is presently berthed in the DURBAN HARBOUR where it had apparently been undergoing certain repairs. The Respondent is UNISHIPPING SA, a company incorporated in FRANCE and carrying on business of chartering ships. On 22 October 2002 the parties concluded a charterparty agreement ("charterparty") in terms of which the Respondent hired the vessel from the Applicant. In terms of the charterparty the

latter warranted that the vessel would, during the currency of the charterparty, be able to steam at a certain speed if fully laden and at a certain speed if she was empty and that, at those speeds, she would consume fuel at a certain rate per day. The Respondent alleges that the vessel underperformed in terms of the said warranty with the result that, on a voyage, in which she carried a cargo of 5000 mt of cornmeal from LAKE CHARLES in the UNITED STATES to BEIRA in MOCAMBIQUE in terms of the agreement subsequently entered into by and between TRANSPORT DIVISION OFFICE OF PROCUREMENT OF THE UNITED STATES AGENCY for INTERNATIONAL DEVELOPMENT AID ("AID"), it took the vessel a period of 60 days, which was apparently 25 days over the 35 day limited stipulated in the said agreement. Relying on the calculations made and the conclusions reached by OCEAN ROUTES, the Respondent avers that the vessel had taken 395,40 hours longer than she should have performed in terms of the charterparty. As a result of the said underperformance the Respondent alleges that it suffered damages in the sum of US \$13 913,95 in respect of general damages and further that it incurred a penalty which is in the sum of US \$63 758,00 higher than it would have been had the vessel performed in terms of the warranty.

It was for this reason that on 11 April 2003 the Respondent launched an *ex parte* application before this Court and obtained an order for the arrest of the vessel which, at the time, berthed at No. 2 repair jetty, DURBAN HARBOUR, the arrest being for the

purposes of providing security to the Respondent in the sum of, *inter alia*, US \$77 671,95, of which a sum of US \$13 913,95 was Respondent's calculation of the hire allegedly overpaid to the Applicant in consequence of the vessel having underperformed contrary to the provisions of the charterparty and the sum of US \$63 758,00 being in respect of the penalty levied by AID against the Respondent.

It was against the background of these facts that the Applicant launched the present application for an order reducing the said amount of security. While it denies that the vessel had underperformed, it concedes that, insofar as its claim for damages for the overpaid hire is concerned, the Respondent had succeeded in satisfying the Court that it has a claim enforceable by an action *in rem* against the vessel and that it has a *prima facie* case in respect of the said claim. However, as regards Respondent's claim based on the penalty levied by AID, the Applicant denies that the said requirements has been satisfied. MR SHAW, who appeared on behalf of the Applicant, argued that at the time when the charterparty was concluded the agreement between AID and the Respondent had not existed and, as AID was not a mercantile organisation, the penalty levied by it could not have been based on a loss of any profits. It was accordingly impossible for any of the parties to the charterparty to have contemplated the imposition of any such penalty. The Respondent has therefore failed to show that it has a *prima facie* case in respect of this claim, the argument concluded.

Having perused and considered the papers filed on behalf of the Respondent in this matter, I am satisfied that sufficient allegations have been made which, if accepted, will sustain a cause of action in the Respondent's claim for damages in respect of the penalty levied by AID and that it has a *prima facie* case as regards that claim. Applicant's argument can therefore not prevail.

MR SHAW argued further that the Respondent could only succeed to obtain an order for arrest of the vessel if it had shown that the claim was an enforceable, not only in terms of the English Law which, pursuant to the charterparty, would apply in the adjudication of disputes between the parties, but also in terms of South African Law, the application having been brought before a South African Court. In the present instance the Respondent has failed to show that the claim is enforceable in terms of the South African Law. It can therefore not be granted an order for security in respect of that claim, MR SHAW contended.

It is significant to note that this ground was not foreshadowed in Respondent's Answering Affidavit neither was it mentioned in the Heads. It was raised for the first time during argument. MR SHAW did not refer me to any authority in support of this argument and I could not find any such authority. As a matter of fact the authority which I have been able to consult within the short space of time available suggests that a party seeking relief need only show that such a claim is enforceable in terms of the

forum where the matter would be adjudicated. For instance, in *CARGO LADEN ON BOARD THE MV THALASSINI AVGI v MV DIMITRIS* 1989 (3) SA 820 AD AT 832 B – C BOTHA JA had the following to say : \_

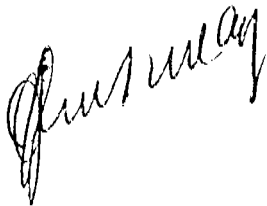
*“This approach applies also to the question of enforceability of the claimant’s claim in the chosen forum. If it is shown prima facie that the foreign Court nominated by the applicant has jurisdiction to hear the case, that would normally be the end of the enquiry into this aspect of the matter.”*

Returning to MR SHAW’S contention, in my view it is sufficient if the party seeking relief has satisfied the Court that its claim is enforceable in the forum before which the matter would be adjudicated. It must therefore follow that this argument also lacks merit.

I accordingly make the following order :

1. That the application for the variation of the order granted by this Court at the instance of the Respondent (Applicant in those proceedings) on the 11 April 2003 is hereby dismissed;

2. That the Respondent provide security for the claim or counter claim of the Applicant, to be determined in the same or separate arbitration proceedings in LONDON, in the amount of US \$55 654,03 plus interest at 8% for 2 years plus security for the costs of the arbitration in the amount of US \$40 000,00;
3. That the Applicant only be obliged to provide security for the Respondent's claim in the amount of US \$77 671,95 plus a provision for interest and costs, on the Respondent providing security for the Applicant's claim as detailed in 2 above and that in the event of the Respondent failing to provide such security within a period of 3 banking days from the time and date of this order, that the vessel be released from arrest;
4. That the costs of this application be reserved for determination in the arbitration proceedings.

A handwritten signature in black ink, appearing to read "Gustav" followed by a stylized flourish.