

IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

(In the Exercise of its Admiralty Jurisdiction)

Name of Ship" 'MILLENNIUM AMANDA'

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DATE 28.3.2002

In the matter between:

T M T COAL CO INC

Applicant

and

NORMARINE LIMITED

Respondent

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NOR MARINE A S

Intervening Respondent

J U D G M E N T

KROON, J

INTRODUCTION

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(1) This judgment concerns an interlocutory application for an order relating to the furnishing of security for costs.

(2) For the sake of convenience the parties will be referred to as in the main application.

(3) The applicant is a company incorporated according to the laws of the United States of America. The respondent is a company registered in accordance with the laws of Gibraltar. A company referred to in the papers as "the intervening respondent", incorporated according to the laws of Norway, has sought leave

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to intervene in the proceedings as a further respondent. As will appear below, the application for that leave is still to be heard.

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- (4) The papers in the main application disclose that the applicant and the respondent entered into a charter party of affreightment in terms of which the respondent undertook to carry by sea certain quantities of coal between certain locations for and on behalf of the applicant. A contractual dispute between those parties arose. The applicant declared an arbitration as provided for in the charter party. The arbitration, conducted in New York, United States of America, proceeded in default of the respondent's participation therein. The upshot was an award in favour of the applicant against the respondent in respect of portions of the former's claims, viz., in a total sum of US\$ 234 967,83. The enforcement of that claim, together with interest on the said capital sum, is what the applicant seeks in the present litigation. 5 10
- (5) It is not in dispute that the applicant's claim against the respondent is a maritime claim as envisaged in the Admiralty Jurisdiction Regulation Act No. 105 of 1983, The Act. 15

ATTACHMENT TO FOUND JURISDICTION

- (6) On 6 August 2001 the MV Millennium Amanda, ("the motor vessel") docked in the Port Elizabeth Harbour. 20
- (7) Invoking the arbitration award in its favour and the allegation that the respondent, as charterer of the motor vessel, was the owner of the fuel bunkers thereon, the applicant, on an urgent and ex parte basis, approached this Court on that date for an attachment order in respect of the bunkers and further ancillary relief. 25
- (8) Pursuant thereto this Court, exercising its admiralty jurisdiction,

inter alia, issued a rule nisi returnable on 22 August 2001 calling upon all interested persons to show cause why it should not be ordered:

- (a) that the sheriff be authorised and directed to 5
attach the respondent's right, title and interest
in and to the bunkers for the purpose of founding
the jurisdiction of this court in an action to be
instituted by the applicant against the respondent
for payment of the sum of US\$ 234 967,83, plus 10
interest accrued and accruing thereon at the rate
of 8% per annum, and costs;
- (b) that the property so attached be released from
attachment on the respondent's providing security to
the satisfaction of the applicant or the Registrar 15
of this Court for payment of the principal sum, in-
terest and such costs as may be given in the case;
- (c) that the applicant be granted leave to sue the
respondent by admiralty summons in personam for
payment of the said amounts or alternative relief. 20

It was further ordered that the relief referred to in (a) and
(b) operate as interim orders pending the return day.

- (9) Security as envisaged in the order was forthcoming. It was in fact
furnished by the intervening respondent. The attachment was lifted
and the motor vessel sailed from Port Elizabeth. 25
- (10) On 22 August 2001, by which date the intervening respondent

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had signified its intention to seek leave to intervene in the proceedings, the matter was postponed by the Court until 22 November 2001.

Directions for the filing of further papers, including what was referred to as the intervening respondent's answering affidavit, and the applicant's replying affidavit, were given.

THE FURTHER PAPERS IN THE MAIN APPLICATION

- (11) On 21 November 2001 the intervening respondent filed its application for leave to intervene, supported by an affidavit, with annexures thereto, deposed to by a Mr Gran, the sole shareholder and director of the intervening respondent. The further relief sought by the intervening respondent was the discharge of the rule nisi granted by this Court on 6 August 2001 and an order that the applicant pay its costs on an attorney and client scale. The essence of the case which Gran's affidavit sought to put forward was the allegation that at the time the attachment order was issued the time charterer of the motor vessel was the intervening respondent, not the respondent. The latter therefore was not the owner of the bunkers. The true owner was in fact another corporate entity, styled Norwegian Bulk Transport A S, of which, co-incidentally, Gran is also the sole shareholder and director, from which entity the intervening respondent had purchased the bunkers subject to the reservation of ownership therein to that entity until payment of the purchase price had been effected, which had not yet, as at the date of the attachment, occurred. Presumably, the intervening respondent is contending that its

locus standi in the matter is founded on its contingent interest in the bunkers.

- (12) On 19 October 2001 the applicant delivered a notice, stated to be in terms of Rule 47 of the Uniform Rules of Court read with section 5(2)(b) of the Act. It required the intervening respondent "to furnish security for the applicant's costs in the amount of R75 000 on the grounds that the intervening respondent is a peregrinus and has no executable assets within the jurisdiction of this Honourable Court within ten (10) days of receipt hereof or of the Registrar's determination of the amount of security, as the case may be, failing which the applicant will apply for an order that such security be given." 5 10
- (13) The intervening respondent complied with the demand and furnished the security required in the form of a bank guarantee in the sum stipulated. 15
- (14) Similarly, the applicant furnished security to the intervening respondent in the form of a bank guarantee in a like sum in respect of its costs. 20
- (15) No answering papers by the respondent in response to the rule nisi were filed.
- (16) The applicant's response, somewhat voluminous, to the intervening respondent's application for leave to intervene, was filed on 8 November 2001. Therein issue was joined with Gran's averment as to the ownership of the bunkers and, on the strength 25

of a wealth of evidence, documentary and otherwise, it was reiterated that the ownership therein vested in the respondent.

Indeed, Gran was accused of dishonesty in various respects:

forgery of documents, attempted subornation of falsification of documents, perjury and misleading of the Court. The dismissal of

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the application for leave to intervene was sought together with an order for costs on the scale as between attorney and own client.

In the alternative, a referral of the matter for the hearing of

oral evidence was mooted.

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- (17) The attorneys for the intervening respondent approached the applicant's attorneys with a request that the matter be postponed on 22 November 2001 to enable instructions to be taken from Gran, and for the intervening respondent to seek leave to file further affidavits to answer the serious allegations of dishonest conduct levelled against Gran. The request was not acceded to. That refusal evoked the filing of a substantive application on behalf of the intervening respondent for a postponement, alternatively a referral of the matter for the hearing of oral evidence.

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- (18) In his affidavit in support of the applicant's opposition to that application, the applicant's Durban attorney, Mr Dwyer, stated, inter alia:

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- (a) that the security which the applicant held from the respondent was for an amount of US\$ 240 000,00 in respect of the capital sum of its claim, interest thereon and costs; that the capital sum

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- of US\$ 234 967,83 was attracting interest at the rate of 7% per annum; that the interest that had already accrued amounted to US\$ 6 534,00; that the sum of US\$ 240 000 had accordingly already been exceeded and such excess would continue to increase; that the applicant was therefore, as it was put, under-secured in respect of the continually increasing interest and even in respect of its party and party costs;
- (b) that in consequence of the intervening respondent's seeking to intervene in the proceedings, the applicant was necessarily incurring additional attorney and client costs;
- (c) that the costs already necessarily expended in securing certain evidence in the United States in respect of the intervention issue amounted to the sum of US\$ 24 175,00, and that in addition thereto his firm's fees and disbursements already totalled approximately US\$ 25 350,00;
- (d) that the intervening creditor had tendered security for costs in the sum of R75 000,00 (or approximately US\$ 7 700,00, i e at the then exchange rate);
- (e) that, instead of affording the intervening respondent an opportunity to file further affidavits, which would still leave disputed facts unresolved, it would be preferable for the Court to refer the matter for the