hearing of oral evidence;

(f) that the likely costs of taking such evidence in New York would be in the region of US$ 28 560,00 and the anticipated further attorney and client fees and disbursements of the applicant in respect of evidence to be led in South African would be not less than R200 000,00 (or approximately US$ 21 000,00 ie at the then exchange rate);

(g) that the applicant had at least made out a prima facie case that Gran had been less than frank with the Court and had indeed endeavoured to mislead it;

(h) that, accordingly, if the Court were minded either to grant the postponement sought by the intervening respondent or to refer the matter for the hearing of oral evidence, it should impose the precondition that the intervening respondent provide security for the applicant's attorney and own client costs in the sum of US$ 100 000,00, being the total of the approximate amounts referred to above.

THE ISSUE OF THE RULE NISI IN RESPECT OF THE SECURITY APPLICATION

(18) The matter came before PETSE, A J on 22 November 2001. In the result, as regards the application for leave to intervene, an order by consent between the parties was granted referring the matter for oral evidence (on the issue of the ownership of the bunkers at the time of the attachment order), such hearing to

commence on 29 April 2002.

(19) The learned Judge then heard argument on the issue whether the intervening respondent should be ordered to furnish security for the applicant's costs on the scale as between attorney and own client. The argument was presented by counsel representing the applicant and the intervening respondent. In this regard Gran made the somewhat cryptic comment in his subsequently filed affidavit that counsel for the applicant insisted on arguing the issue. In response thereto, Mr Shaw, the applicant's Port Elizabeth attorney, stated that what occurred was in accordance with an agreement between the parties, namely that the referral for the hearing of oral evidence be ordered by consent between the parties, and that the issue of security would then be argued. During this morning's hearing Ms de Swart, for the intervening respondent, advised me that, inter alia, the point was taken on behalf of the intervening respondent that the application for security for costs should not be entertained because, as it was contended, the proper procedure had not been followed. Mr PAMMENTER, for the applicant, had then proffered a possible solution, namely that a rule nisi be issued.

(20) PETSE, A J, reserved judgment on the issue.

(21) On inspection of the file on 30 January 2002 Mr Shaw discovered an endorsement to the effect that PETSE A J had decided that a rule nisi should issue with return date 31 January 2002, calling upon the intervening respondent to show cause why it should not

be directed to furnish security in the form and amount to be determined by the Registrar for the applicant's attorney and own client's costs. He had prepared, in manuscript, an order to that effect which, presumably, he had intended to be typed by 5 the Registrar's office and then handed down by another Judge of this Court. However, no such order was ever typed or handed down, presumably as a result of some or other oversight. Mr Shaw telephonically contacted Mr Gough, the intervening respondent's Port Elizabeth attorney, and brought the situation to his attention. 10 Mr Shaw also contacted PETSE, AJ whose acting appointment had come to an end and who had returned to his practice in Umtata. He confirmed that it had been his intention to issue a rule *nisi* in the matter and had prepared an order in manuscript for typing and handing down. At Mr Shaw's request, the Registrar 15 approached my brother JENNETT, the then duty Judge, for directions as to the procedure to be followed. The Registrar, too, secured confirmation from PETSE, A J, as to what had occurred. JENNETT, J intimated that he would be prepared to issue the rule *nisi* with a return date suitable to the intervening respondent's 20 attorneys. (I interpose to record that JENNETT, J has advised me that he was told that such an order would be sought by consent). On Mr Shaw's enquiry, Mr Gough advised him that 14 March 2002 would be a suitable return date. That was conveyed by Mr Shaw to JENNETT, J, who thereupon, on 8 February 2002, issued 25 the following order:

"1. that a rule nisi do hereby issue in terms of section 5(2)(b) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983 calling upon the intervening respondent to show cause, if any, before this court on 14 March 2002 at 09:30 or so soon thereafter as the matter may be heard why it should not be directed to furnish security in a form and in the amount determined by the Registrar for the applicant's attorney and own client costs.

2. that service of this order be effected on the intervening respondent's attorneys of record by not later than 14 February 2002."

(22) Today is the postponed return date of that order.

(23) In response to the issue of the rule nisi, papers were filed on behalf of both the intervening respondent and the applicant. Apart from a reference to the history as detailed above, the papers in the main foreshadowed the arguments that were subsequently contained in the heads of argument filed by the respective counsel.

(24) Mr Shaw did, however, also record that on 11 March 2002 the intervening respondent's attorneys addressed the following letter to the applicant's Durban attorneys:

"MILLENIUM AMANDA"

1. The security our client holds for its costs is no longer sufficient.

2. Our client accordingly calls upon yours to establish additional security for our client's costs in the sum of US$ 50,000.00 in terms of Rule 47(6) by way of a supplementary bank guarantee by close of business Monday 18 March 2002, failing which an approach to the Registrar will be made."

POINTS IN LIMINE

(25) Two contentions invoked by the intervening respondent were in the nature of points in limine. The first was that because PETSE, A J, had been seized with the matter, it was not competent for JENNETT, J to issue the order made by him. That order accordingly fell to be rescinded and could not constitute the premise of any further order.

The second contention, which also had as objective the declaration of JENNETT, J's order as invalid, sought to invoke the alleged non-compliance by the applicant with the procedure which, in terms of Rule 47, requires to be followed when one party to litigation wishes another party to furnish security for costs and, specifically, the omission to deliver a notice calling for security as prescribed in Rule 47(1), and thereafter to make a substantive application therefor on notice to the intervening respondent as envisaged in

Rule 47(3), and there had been no condonation sought or granted in respect of such non-compliance.

(26) The first counter of Mr Pammenter to the second point cannot be sustained. It was to the effect that the inference was that 5 JENNETT, J must have been satisfied that there had been sufficient compliance with the provisions of the rules, and had impliedly condoned any departure therefrom. Clearly, JENNETT, J, who proceeded on the basis that the order made by him was being sought by consent, had no thoughts concerning any non- 10 compliance with the rules or the condonation thereof.

Counsel's second counter was, however, prima facie valid, namely that there had in any event in fact been sufficient compliance with the provisions of Rule 47, and that to hold otherwise would be to permit the rules to hold unjustifiable sway. The 15 principle whether security for costs for attorney and own client costs should be ordered, as opposed to the fixing of the nature and the amount thereof, was a matter for the decision of the Court, which had accordingly to be approached therefor. It seems to me, that what was procedurally required in this regard by Rule 20 47, was substantially and adequately constituted by the filing of the affidavit of Mr Dwyer which included the averments referred to in paragraph (17) above.

(27) Be that as it may, there is, in my judgment, a short answer to both points in limine: As Mr Pammenter submitted, the approach to 25 JENNETT, J, in lieu of the parties' seeking the delivery of

a judgment and order by PETSE, A J, (whose acting appointment would have continued for that purpose notwithstanding that the term thereof had otherwise expired) was a matter of convenience to the parties. The proceedings before him took place with the consent of the intervening respondent and without objection by it. Accordingly, it does not lie in the mouth of the intervening respondent now to complain of certain alleged antecedent procedural shortcomings or about the constitution of the Court that issued the rule nisi. (This conclusion renders it unnecessary to consider the further question whether the order of JENNETT J stands unless and until it is set aside on appeal).

THE MERITS

(28) The merits of the application for an order that the intervening respondent furnish security for the applicant's attorney and own client costs in the matter now require to be considered.

(29) Counsel were agreed, correctly, that one requirement that the applicant had to satisfy was the demonstration of a prima facie case. This does not mean that the Court must embark on a consideration of the merits of the applicant's claim, and in any way anticipate the eventual decision thereon, by investigating and weighing up the probabilities of success and the bona fides or otherwise of the claim. It means no more than what is required is