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the averment of evidence which, if accepted, will establish the claim and the cause of action invoked.

ALEXANDER v JOKL AND OTHERS 1948 (3) SA 269 (W) at 281;  
BOCIMAR MV v KOTOR OVERSEAS SHIPPING LTD 1994 (2) SA 563 (A) at 579E; THE MV LERESTI: AFRIS SHIPPING INTERNATIONAL CORPORATION v MV LERESTI, (DMD MARITIME INTERVENING) 1997 (2) SA 681 (D & C) at 687H.

- (30) The applicant's claim for the purposes of the present proceedings has two facets: 10
- (a) the establishment of its averment that the owner of the bunkers at the relevant time was the respondent, and the correlative rejection of the intervening respondent's assertion to the contrary; 10
  - (b) its entitlement, not only to an award of costs against the intervening respondent occasioned by its application for leave to intervene in the proceedings, but a further order that those costs be taxed on the scale as between attorney and own client. 15
- (31) Fortunately, it is unnecessary to go into the averments made by the applicant in respect of the first facet of its claim referred to in sub-paragraph (a) of the preceding paragraph for the purposes of determining whether the required prima facie case in respect thereof has been made out. Ms De Swart conceded, correctly, that on the papers the applicant had in fact done so. 20 25
- (32) That there was an entitlement vesting in the applicant to have security for its costs simpliciter was also not in dispute. That had

in fact been recognised by the furnishing of the security of R75 000,00 that the intervening respondent has already provided to the applicant.

- (33) Counsel for the intervening respondent strongly argued, however, 5  
that a prima facie case in respect of a claim for security for costs on the punitive scale of attorney and own client had not been made out. Indeed, if I understood her submissions correctly, she went so far as to contend that there was no room for such a finding in a matter such as the present. She made the following 10  
points:
- (a) In the ordinary course an award of attorney and own client costs is not made; special circumstances justifying such an order must be present;
  - (b) Such an order in casu would be dependent not only 15  
on the rejection of Gran's evidence, but also on the further finding that he had been dishonest to the extent of justifying a punitive order for costs;
  - (c) Such further finding would necessitate findings on credibility, in turn dependent, inter alia, on the 20  
assessment of witnesses in the witness box;
  - (d) It was not appropriate for this Court to anticipate such findings. Experience has shown that a prima facie case, even though based on documentary evidence and on the face of it strong, can in the 25  
result, and on a proper ventilation of all the relevant

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aspects, sometimes be demonstrated to be  
 in fact false. Accordingly, this Court is  
 precluded from making a finding that a prima facie  
 case has been made out;

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(e) In the final result, an order for punitive costs  
 would depend on the exercise of a discretion;

(f) To uphold the applicant's claim for security for costs  
 on a punitive scale would be to open the floodgates  
 and invite any litigant simply to allege that the  
 opposing party has been guilty of dishonest conduct  
 in the course of litigation, and even back the  
 allegation up with documentary proof, and then  
 demand that it is entitled to security for costs  
 on a punitive scale.

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(34) In the alternative, again if I understood counsel's argument  
 correctly, it was contended that I should tread very warily before  
 I reach the conclusion that a prima facie case has been made out,  
 in regard to which counsel invoked the same considerations.

(35) The points referred to in paragraph (33)(a) to (c) above, do not  
 of course evoke any quarrel. It is also so that it is certainly  
 not without precedent that seemingly strong prima facie cases  
 collapse when they are probed during a trial action or the hearing  
 of oral evidence in an application and, as already recorded, this  
 Court is not called upon, and in fact it would be inappropriate for  
 it, to anticipate the findings of the trial Court or the Court hearing

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the oral evidence. But I cannot uphold the submission that, because the conclusions of the later Court would have to be founded on credibility findings and the exercise of a discretion, this Court is precluded from deciding whether a prima facie case in respect of the aspect presently under discussion has been made out. It seems to me that whatever the causa invoked by the party seeking security for costs, the principle and the approach remains the same - has a prima facie case been made out for the relief in question?. An application of that principle and approach would not constitute the invitation contended for by counsel for unfounded allegations of dishonesty to be made by litigants. I do perceive, however, that there is merit in counsel's alternative submission. In the light of the considerations adverted to by counsel, I am persuaded that a court should indeed tread warily and cautiously before finding that a prima facie case on an issue such as that presently under discussion, has been established.

(36) Nevertheless, I find that the required prima facie case has been established. Ms De Swart did not seek to contest that the wide ranging allegations levelled against Gran, if established, do reveal dishonesty of an extremely serious and calculated nature, dishonesty that would have been in the course of the conduct of the litigation. Such conduct would fully justify the punitive costs order at issue.

(37) There was some debate at the Bar as to the nature of the further

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test applicable, i.e. that relating to what requires to be established by the applicant in the matter of its need for the security sought. It was contended in the first place by Mr Pammenter, with reference to certain authority, that I should hold that the security that the applicant was entitled to demand from the intervening respondent was that which would be sufficient to meet the applicant's "reasonably arguable best case". I am unable to uphold the submission. The cases relied upon by counsel are distinguishable as referring to a different enquiry, viz the determination of the quantum of security to be furnished to secure the release of a vessel validly arrested. BOCIMAR MV at 582F-J.

- (38) The test which is applicable, as argued by Ms De Swart and accepted by Mr Pammenter in his alternative argument, is "a genuine and reasonable need" for the security sought, a requirement that the applicant is required to prove on a balance of probabilities. BOCIMAR MV at 581-2; MV LERESTI at 687H, THE CATAMARAN TNT: DEAN CATAMARANS CC v SLUPINSKI (NO. 1) 1997(2) SA 383 (C); MV AKKERMAN:FULLWOOD SHIPPING SA AND ANOTHER v MAGNA HELLAS SHIPPING SA 2000 (4) SA 584 (C) at 596F.

(39) Has the applicant established a genuine and reasonable need for the security in question?

(40) One aspect may be shortly disposed of. The circumstance that, as set out in paragraph (24) above, the intervening respondent has sought added security for costs from the applicant is of no

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assistance to the applicant in the present dispute even accepting, as was contended, that what is sauce for the goose is sauce for the gander and that the applicant, too, would be entitled to added security. The issue there relates to security for costs simpliciter. 5

At issue in the present dispute is not the quantum of security for such costs, but the principle whether different costs, those on an attorney and own client scale, should be covered by any security ordered. It may be noted that it is not suggested that the

security which the applicant has at the moment would also be sufficient to cover the attorney and own client costs which the applicant has incurred and will incur in the matter. 10

(41) In THE YU LONG SHANG: GUANGZHOU MARITIME GROUP COMPANY v DRY BULK SA 1997 (2) SA 455 (D & C) at 463E-F HURT J stated the following: 15

"As long as a defendant and prospective plaintiff in reconvention satisfies the Court that he has a prima facie claim on which he could not execute if successful it seems to me that the need for security in respect of a peregrine plaintiff is established and follows as a matter of course."

In MV AKKERMAN at 592B-F THRING J, following the approach of COMRIE J in MV HEAVY METAL: BELFRY MARINE LTD v PALM BASE MARITIME SDN BHD 2000 (1) SA 286 (C), disagreed with 25

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the view that the need for security in the circumstances postulated follows as a matter of course. I prefer the approach of the Cape cases.

(42) I have, however, another difficulty with the two Cape cases referred to. It was there held (in MV HEAVY METAL at 298F and MV AKKERMAN at 596F) that the decision whether a genuine and reasonable need for security has been established is a matter for the Court's discretion. With respect, I venture to think that the proper approach is that the decision whether or not the applicant has established on a balance of probabilities that it has a genuine and reasonable need for the security sought, would be a finding of fact, albeit that a value judgment may have to be made. It is after that finding of fact has been made in favour of the applicant that the question of the Court's discretion, whether in fact to order the furnishing of the security, would come into play.

(43) Ms De Swart also sought to invoke the following dictum of KING J in SUNNYFACE MARINE LTD v HITOROY LIMITED (TRANS ORIENT STEEL LTD & ANOTHER INTERVENING), SUNNYFACE MARINE LTD v GREAT RIVER SHIPPING INC 1992 (2) SA 653 (C) at 657I-J:

"In any event both Great River and applicant are peregrini. To grant a peregrine plaintiff security for its claim and/or the costs attended thereon, is virtually unheard of at common law. A peregrine defendant will

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