

foreshadowed in the notice which appears at page 74 of the papers. If that is indeed the case, then the Respondent can suffer no prejudice by the admission of the further affidavits.

It is for all the above reasons that I allowed the further affidavits to be filed.

Considering the papers as a whole, I am satisfied that the Applicant has made out a *prima facie* case that the mv "Ain Temouchant" was both financially and in all probability physically unseaworthy and further that the vessel was not competently manned at the commencement of the voyage which would have made it unseaworthy. Coupled with that there was an unreasonable deviation and an unreasonable delay which gave rise to a claim for damages in the United States.

I am further satisfied that as regards the Bill of Lading, there is nothing to indicate that the Master was acting other than on behalf of the employers when he signed the same and therefore the presumption is that he signed on behalf of the employers. As was submitted by Mr. Pammenter, the crew list which is Annexure "AR16" and appears at page 64 and, in particular, the heading thereto indicated that the Master was employed by the owners.

The Applicant has made out a case on the papers for an association between the Respondent and the mv "Ain Temouchant". It is not the Applicant's case that Progress Bulk Carriers Ltd was the carrier in terms of the Bill of Lading.

It is contended by the Respondent that the Applicant has not shown an association in terms of section 3(7)(a)(i) of the Act. In terms of this section, the applicant must show that the SNTM/CNAN was the owner :

- (a) of the mv "Ain Temouchent" at the time the claim arose; and
- (b) of the mv "Djorf" at the time the proceedings were instituted.

As regards the ownership of the mv "Ain Temouchent", the papers indicate that at the time of publication of the Lloyds List of Shipowners for the period 2000/01, the SNTM/CNAN was the owner of the "Ain Temouchent" and as of the 24 May 2001 the vessel was still owned by the SNTM/CNAN.

The Applicant's cause of action arose when the vessel left Shauiba Kuwait in an unseaworthy condition on the 26 March 2001 and when the vessel did not arrive in time for the spring planting season in the United States i.e. in early May. Accordingly, the probabilities are overwhelming that the mv "Ain Temouchent" was owned by SNTM/CNAN on both these dates i.e. on the 26 March 2001 and early May.

Apropos the ownership of the mv "Djorf", the allegations are made in paragraph 5 of the Founding Affidavit that the vessel was owned by the SNTM/CNAN as was the mv "Ain Temouchent". The affidavit was deposed to on the 29 May 2001 and this was the same day on which the proceedings were instituted and the order obtained. I am accordingly satisfied that the papers indicate an association of the vessels for the purposes of section 3(7)(a)(i) of the Act.

The next question which arises is whether the Respondent is susceptible to an arrest in the light of the provisions of the Foreign States Immunities Act 1981. Section 11(a) of the Foreign States Immunities Act, Act 87 of 1981 provides that a foreign state shall not be immune from the Admiralty Jurisdiction of the South African Courts in an action *in rem* against a ship belonging to the foreign state if at the time when the cause of action arose, the ship was used, or intended for use, for commercial purposes.

Section 11(1) of Act 87 of 1981 reflects the progressive development in international law whereby the restrictive approach to sovereign immunity has won favour. As soon as a vessel owned by a sovereign enters into commercial transaction, it loses its mantle of sovereign immunity. Prior to the legislative intervention, our Courts had favoured the application of the restrictive approach to sovereign immunity on the basis that this was the general rule of International Law. See *Interscience Research and Development Services (Pty) Ltd v Republica Popular de Mozambique* 1980(2) SA 111 (T) and *Kaffraria Province v Government of the Republic of Zambia* 1980(2) SA 709.

The Legislature, in the drafting of the Foreign States Immunities Act 87 of 1981, was clear in its intention. Section 11 has been drafted in pellucid language and there is no ambiguity. A South African Court, once it is satisfied that a ship, at the relevant time, was used or intended for use for commercial purposes, then in that event, irrespective of what other jurisdictions provide by their national legislation, such a ship cannot enjoy

sovereign immunity. It is not for this Court to determine whether the legal position regarding sovereign immunity extant in the United States of America is correct or not.

In this case, the cause of action arose either when the vessel sailed from Shauiba Kuwait on the 26 March 2000 in an unseaworthy condition or when she failed to arrive in the United States in time for the spring planting season in early 2001. From the papers filed of record, it is clear that during this period, not only the mv "Ain Temouchent" but also the Respondent was being used for commercial purposes. Accordingly, and in terms of South African Law, if the mv "Ain Temouchent" was present within the jurisdiction of this Court, it would not have been entitled to sovereign immunity and accordingly the mv "Djor" cannot be immune from arrest.

Accordingly, the application to discharge the security and set aside the arrest is dismissed with costs.



C.N. PATEL

JUDGE OF THE HIGH COURT

DURBAN AND COAST LOCAL DIVISION

Date of Hearing : **7th September 2001**

Date of Judgment : **3rd June 2002**

Counsel for the Applicant : **C.J. Pammenter S.C.**

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