

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

CASE NO: A62/2005

(Exercising its Admiralty Jurisdiction)

NAME OF SHIP : mv 'BOW NEPTUN'

In the matter between:

STAR TANKERS AS **FIRST APPLICANT**

**THE AMERICAN STEAMSHIP OWNERS MUTUAL
PROTECTION AND INDEMNITY ASSOCIATION INC.** **SECOND APPLICANT**

and

METHYL COMPANY LIMITED **FIRST RESPONDENT**

LOJIT CORPORATION **SECOND RESPONDENT**

REASONS

KRUGER J:

The First Applicant is the owner of the mv "Bow Neptun" and the Respondents, companies who carry on business, *inter alia*, as traders in chemicals.

On the 26th May 2005 the Respondents brought an application, in terms of Section 5(3) of the Admiralty Jurisdiction Regulation Act, No. 105 of 1983 (The Act) for the arrest of the mv "Bow Neptun" as security for proceedings to be pursued by Respondents in London arbitration or in an action before the Commercial Court in Antwerp, Belgium. Such proceedings, the Respondents

contend, arise out of alleged contamination of a consignment of Dimethylformamide on a shipment from Belgium to Taichung and Ulsan on board the vessel "Bow Neptun" under bills of lading in which the Respondents were named as consignee and notify party.

Tshabalala JP granted the arrest order as well as an order to the effect that the vessel was to be released from arrest on the provision of security "to the satisfaction of the Applicants or the Registrar."

Prior to the arrest Second Applicant tendered security for the claim on behalf of the First Applicant. This security was in the form of a P & I Club Letter of undertaking. This tender was however rejected by the Respondents. Following the arrest of the vessel an amended P & I Club Letter of undertaking was tendered by the Second Applicant on behalf of the First Applicant. This tender was also rejected by the Respondents. The primary point of dispute between the parties being the wording of the letter of undertaking. The Respondents insisting that the Applicant submit to Belgian law and jurisdiction in respect of their claims mentioned above. The Applicants contend that the security tendered is in respect of both "a final un-appealable arbitration award or a final un-appealable judgment of the Court of Competent Jurisdiction." This, they contend, is in terms of the arrest order granted on the 26th May 2005. As the matter could not be resolved, the Applicant sought, as a matter of urgency, the release of the vessel against the furnishing of the security tendered by the Second Applicant.

The issue before Court was not the terms and conditions of the letter of undertaking tendered, but whether the said letter of undertaking was adequate security within the ambit of the Act.

On the 27th May 2005 I ordered the release of the vessel, finding that the letter of undertaking tendered was indeed adequate security. Due to the urgency of the matter, reasons were not furnished at the time the order was made and I indicated that I would give reasons for the said order later.

The statutory provisions which are relevant are the following:

Section 5(3)(a) of the Act provides:

“A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned for an action *in rem* against such property or which would be so enforceable but for any such arbitration or proceedings.”

Section 5(3)(b) provides:

“Unless the Court orders otherwise any property so arrested shall be deemed to be property arrested in an action in terms of this Act.”

Section 3(10)(a)(i) provides:

“Property shall be deemed to have been arrested or attached and to be under arrest or attachment at the instance of a person if at any time, whether before or after the arrest or attachment, security or an undertaking has been given to him to prevent the arrest or attachment of the property or to obtain the release thereof from arrest or attachment.”

In terms of Rule 4(5)(a) (Admiralty Jurisdiction Rules):

“Property under arrest shall be released only in terms of a release warrant directed to the Sheriff and issued by the Registrar.”

Rule 4(7)(a) provides that:

“..... A release warrant shall be issued only –

.....

- (ii) On the giving of security in a sum representing the value of the property or the amount of the claims of the person who has caused the arrest to be effected."

There is no dispute between the parties that the arrest was effected in terms of Section 5(3)(a) nor is there a dispute that the vessel was arrested in an action in terms of the Act. The parties are also *ad idem* that irrespective of whether the vessel is released in terms of the furnishing of a bank guarantee or letter of undertaking, the vessel however remains notionally under arrest in terms of the provisions of Section 3(10)(a)(i) of the Act.

There have been instances whereby an arrested vessel has been released upon the provision of security by way of a P & I Club Letter of Undertaking. In the mv "Amfitriti": The Owners and Insurers of the of the Cargo Lately Laden on Board the mv "Amphion" vs mv "Amfitriti" Case No. A84/98 (DCLD) Niles Duner J ordered the release from arrest against provision of a P & I Club Letter of Undertaking furnished on behalf of the United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited.

A similar order was made in the matter of mv "Agamemnon": The Owners and Insurers of the Cargo Lately Laden on Board the mv. "Amphion" vs mv "Agamemnon" Case No. A256/98 (DCLD). In both the aforesaid matters however, no judgments were delivered.

In my "Alam Tenggiri"; Golden Sea Bird Incorporated and Another vs Alam Tengirri SDN BHD and Another 2001(4) SA 1329(SCA) it was noted that Nicholson J authorized the release of the vessel upon the receipt of two letters of undertaking from a P & I Club, namely Assuranceforeningem Skuld. Although the said letters were to be substituted with bank guarantees to be furnished within thirty days of the date of the order the letters of undertaking were deemed sufficient security for the release of the vessel in the interim.

In the Merak S; See Melody Enterprises SA vs Bulktrans (Europe) Corporation, 2002(4) SA 273 (SCA), the Supreme Court Appeal, although faced with an ideal opportunity to rule on the issue, restricted itself to the question (as argued in the Court *a quo*) of whether a bank guarantee was adequate security within the ambit of the Act. Farlam JA (at page 279) held that a bank guarantee was sufficient security within the ambit of the Act. At paragraph B to E he held:

"Counsel were agreed that arrested vessels were almost invariably released in South African marine practice in 1983 on the furnishing of P & I Club Letters or bank guarantees, From a practical point of view, guarantees of the kind in question constituted a security as effectual as cash deposits and bail bonds, and there was no compelling reason which could have induced parliament to restrict the ordinary meaning of

the word security so as to exclude them. Section 3(8) provides, for example, that:

"Property shall not be arrested and security therefore shall not be given more than once in respect of the same maritime claim by the same claimant."

Bearing in mind the prevailing practice at the time of the 1983 Act it can hardly be suggested that the intention was to authorize the arrest or re-arrest of a property after a Club letter of undertaking or a guarantee had been provided."

In arriving at the conclusion, Farlam JA held that notwithstanding the fact the bank guarantee constituted a private contractual undertaking given by the bank to the Respondent in order to secure the Respondent's claims against the Applicant this provision of security was "the almost universal practice".

I am in agreement with the reasoning of Farlam JA and can find no reason why, from a practical point of view, a P & I Club Letter of Undertaking would not constitute adequate security within the ambit of the Act. Both the bank guarantee as well as the P & I Club Letter of undertaking are couched in similar terms. They are both private contractual undertakings given by either the bank or the

Club/insurance company to secure an Applicant's claim against a Respondent either before or after arrest.

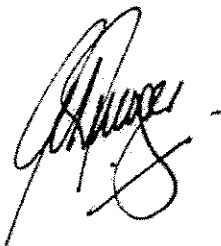
Counsel for the Respondent argued further that in the event that the company which provided the letter of undertaking was sued and refused to pay, the Respondent would be obliged to execute in America. The reasoning being that the club which tendered the letter of undertaking did not have any assets situated within South Africa. This means that the Respondents (as the argument goes) once they obtain an award or a judgment in their favour in the appropriate court, would have to institute proceedings in South Africa in order to obtain a judgment and then institute proceedings in the United States of America in order to enforce that judgment. Counsel further submitted that this would not constitute security as envisaged by the Admiralty Act and Rules in that it was not properly enforceable in South Africa where the arrest of the vessel had taken place. I however do not agree with this submission. It is indeed common practice for foreign banks to issue guarantees or letters of undertaking to secure the release of arrested vessels. In the Alam Tengirri case (*supra*) the Court *a quo* ordered that the P & I Club Letters of Undertaking were to be substituted with bank guarantees "from a first class South African or London bank". In the unlikely event that a foreign bank did not honour its guarantee or undertaking, the Applicants, to whom the guarantee was furnished, would be obliged to execute in that foreign country. Whilst it is conceded that there is indeed a certain amount

of risk involved - for banks collapse as well as P & I Clubs – it is however a risk akin to modern commercial practice.

In conclusion, I am satisfied that the letter of undertaking furnished by the Second Applicant constitutes sufficient security within the ambit of the Admiralty Jurisdiction Regulation Act.

The following order is made:

1. The Registrar is directed to immediately issue a release warrant to release the M.V. "Bow Neptun" from arrest.
2. The costs of this application shall be paid by the Respondents, jointly and severally.

A handwritten signature in black ink, appearing to be 'R. J. ...', written in a cursive style.

21/6/05