

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION  
(Exercising its admiralty jurisdiction).**

**CASE NO 1249/07**  
(Related to case Nos: 1242/07,  
1245/07 and 1246/07)

NAME OF SHIP: mv "SAFMARINE AGULHAS"

In the matter between:

**MERKUR DELTA SHIPPING CORPORATION**

First Applicant/  
Second Defendant

**SAFMARINE CONTAINER LINES NV**

Second Applicant/  
First Defendant

and

**OSRAM (PROPRIETARY) LIMITED**

First Respondent

**LUK AFRICA (PROPRIETARY) LIMITED**

Second Respondent

**CASE NO. 1249/07**  
(Related to case Nos. 1244/07,  
1247/07 and 1248/07)

NAME OF SHIP: mv "SAFMARINE AGULHAS"

In the matter between:

**MERKUR DELTA SHIPPING CORPORATION**

First Applicant/  
Second Defendant

**SAFMARINE CONTAINER LINES NV**

Second Applicant/  
First Defendant

and

**AERIAL MASTER (PROPRIETARY) LIMITED**

**SPACE TELEVISION CC**

**KGALAGADI BREWERIES LIMITED**

**SAB MILLER AFRICA & ASIA**

**PRE-FORM (PROPRIETARY) LIMITED**

First Respondent  
Second Respondent  
Third Respondent  
Fourth Respondent  
Fifth Respondent

**CASE NO 1258/07**  
(Related to case Nos: 1252/07,  
1253/07, 1254/07, 1255/07,  
1256/07 and 1257/07)

NAME OF SHIP: mv "SAFMARINE AGULHAS"

In the matter between:

**MERKUR DELTA SHIPPING CORPORATION**

and

**WS LLOYD LIMITED**

**CREO MANUFACTURING (PROPRIETARY) LIMITED**

**ABEDARE POWER CABLES (PROPRIETARY) LIMITED**

**NESTLE SOUTH AFRICA (PROPRIETARY) LIMITED**

**HENKEL SA (PROPRIETARY) LIMITED**

**AFROX LIMITED**

**DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB**

**AND AKTIESELSKABET DAMPSKIBSSELSKABET**

**SVENDBORG t/a MAERSK LINES**

**A P MOLLER-MAERSK AS t/a MAERSK LINES**

Applicant/  
Second Defendant

First Respondent  
Second Respondent  
Third Respondent  
Fourth Respondent  
Fifth Respondent  
Sixth Respondent

Seventh Respondent  
Eighth Respondent

**CASE NO: 1291/2007**

NAME OF SHIP: mv "SAFMARINE AGULHAS"

In the matter between:

**MERKUR DELTA SHIPPING CORPORATION**

and

**STANSFIELD GROUP LIMITED**

**DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB**

**AND AKTIESELSKABET DAMPSKIBSSELSKABET**

**SVENDBORG t/a MAERSK LINES**

**A P MOLLER-MAERSK A/S t/a MAERSK LINES**

Applicant/  
Second Defendant

First Respondent

Second Respondent  
Third Respondent

## JUDGMENT

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**SANGONI J:**

### INTRODUCTION

- [1] In the applications before this Court Merkur Delta Shipping Corporation (Merkur), a company duly incorporated in accordance with the laws of Libya, thus a peregrinus of this Court, seeks an order setting aside its joinder to the proceedings against Safmarine Container Lines NV (SCL). In separate cases grouped under case number 1249/07 and other cases against Damskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Swenborg t/a Maersk Lines (Maersk Lines) grouped under number 1258/07 as well as in case number 1291/07/ The orders for joinder were granted on different dates. The applications before Court are based on almost the same set of facts, arising from the same event that it has been agreed that they be heard together for convenience. I will refer to SCL and Maersk Lines as the defendants.
- [2] In the summonses commencing the actions against the defendants, plaintiffs in terms of Rule 2(3) of the Rules regulating the conduct of Admiralty Proceedings, are described as "Bill of Lading Holders Owners and Underwriters and Parties that bore the risk in land to cargo formerly laden on board the "mv Safmarine Agulhas" (vessel). At the time joinder was granted the plaintiffs were still so described. That was the position even on the amended summonses which was sanctioned in the same order as joinder. The names and details of each specific plaintiff were furnished later in response to a Rule 22(4)(b)(i) notice.

- [3] It has already been stated that maritime claims were made against the SCL in some cases and in others against Maersk Lines. The claims relate to goods shipped on board vessel "mv Safmarine Agulhas" at various ports in Europe for carriage to and discharge at various ports in South Africa. During the course of the voyage the vessel experienced an engine breakdown at port East London Harbour and ran aground. The cargo suffered wet damage and/or contamination with fuel and/or other oils and/or was damaged during the salvage and wreck removal operation. The claims registered under different case numbers and grouped under three case numbers for purposes of the current application proceedings.

#### **APPLICATION FOR JOINDER**

- [4] On 02 July 2007, 03 July 2007 and 19 July 2007 in case numbers 1249/07, 1258/07 and 1291/07 respectively, plaintiffs, referred to in the founding affidavits as owners, insurers and bill of lading holders of the cargo on board the vessel, applied for joinder of the second respondent/defendant, Merkur Delta Shipping Corporation (Merkur) in terms of section 5(1) of the Admiralty Jurisdiction Regulation Act 105/1983 (the Admiralty Act) which provides:

"A court may in the exercise of its admiralty jurisdiction permit the joinder in proceedings in terms of this Act of any person against whom any party to those proceedings has a claim, whether jointly with, or separately from, any party to those proceedings, or from whom any party to those proceedings is entitled to claim a contribution or an indemnification, or in respect of whom any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between the party and the person to be joined and which should be determined in such a manner as to bind that person, whether or not the claim against the latter is a maritime claim and notwithstanding the fact that

he is not otherwise amenable to the jurisdiction of the court, whether by reason of the absence of attachment of his property or otherwise.”

[5] The defendants (SCL and Maersk Lines) as described by Mr Malcolm Hartwell (Hartwell) in his founding affidavit in support of the order sought, are maritime transporters and contractual carriers of cargo. As recorded in the summonses the basis of action arises out of breach of contractual obligations in regard to contract of carriage, negligence or breach of obligations by defendants as bailee. The claims against Merkur are not based on any contractual relationship but on alleged breach of its duty of care and/or the obligations as bailor. The basis is that the grounding of the vessel and subsequent damage to the cargo arose as a result of negligence on the part of Merkur or its agents. At the time of the damage the vessel was on bareboat charter to Merkur. Hartwell states in his affidavit that Merkur does not have any assets capable of attachment to found and confirm jurisdiction of the South African Court. The only means by which the plaintiff could commence an action against Merkur is joining it to the actions already commenced as it is not amenable to the jurisdiction of the court.

#### **THE CURRENT PROCEEDINGS**

[6] Following the orders, granting the application, the applicants in these proceedings lodged an application on 13 February 2008 seeking an order setting aside the joinder of Merkur to the proceedings. Counsel agreed that the plaintiffs bear the onus of proving that the original applications were correctly granted<sup>1</sup> In case no 1249/07 and cases related thereto the applicants are Merkur and SCL. In

<sup>1</sup> *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (AD)578

cases numbered 1258/07, 1291/07 and related cases the applicant is only Merkur. Nothing turns on the number of applicants. In fact the applications are basically premised on the same allegations and facts. At the hearing they were argued jointly. The ruling on one application will apply to the other. In the orders granting in absentia the joinder of Merkur as second defendant, leave was granted to it to approach court on notice to the applicants and first defendant to set aside the joinder order.

- [7] It is contended on behalf of the applicants that in terms of section 5(1) the court has a discretion to order the joinder of a party which is not otherwise amenable to the jurisdiction of the court. The discretion however has to be exercised judicially<sup>2</sup>. It is however contended that the order for the joinder of Merkur was erroneously granted. The broad principle on which the applicants rely is that the court has no jurisdiction over Merkur and the plaintiffs have not made out a *prima facie* case against Merkur. It is also submitted that the plaintiffs have also not shown that the court has jurisdiction to determine their claims against the defendants. On account of this and other defences that may be raised by the applicants, it is argued that the case against the defendants is a nullity and the court therefore, should not have exercised its discretion in favour of the joinder.

#### JURISDICTION

- [8] As alluded to above the contention by the applicants is that this Court does not have admiralty jurisdiction to determine plaintiffs' claims against the defendants.

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<sup>2</sup> Naylor v Jansen 2007 (1) SA 16 (SCA) at para 14

If it had it is conceded that it would be without merit to pursue the issue of lack of jurisdiction over Merkur in support of the application. As mentioned above the defendants are sued in their capacities as contractual carriers as evidenced by the bills of lading of waybills, whereas the allegations against Merkur as a bareboat charterer are based on delict. At the time the applications for joinder were heard those were the facts before court. In those applications such facts were mentioned. As at the granting of the order for joinder the court was aware of the role of the defendants as well as Merkur.

[9] The plaintiffs allege that before the original summonses were issued the defendants consented to or submitted to the jurisdiction of this Court<sup>3</sup>. This is denied by the defendants. It is apparent that negotiations in this regard were done at the level of the legal representatives of the parties. Mr Hartwell deposed to an affidavit on behalf of the plaintiffs stating that he spoke to Messrs Mackenzie and Dyason regarding the question of consent or submission. In the context of these interactions culminating, in the furnishing of addresses appointed by the defendants for service of any process on them within the jurisdiction of this Court, Mr Hartwell makes a statement that the defendants either consented to or submitted to the jurisdiction of the Court.

[10] Similarly that view is strongly opposed by the defendants. This was followed by a strong and balanced debate at the hearing. I do agree that this issue would need referral to oral evidence for proper resolution. I am of the view that that would

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<sup>3</sup> Section 3(2)(c) of the Act.

appropriately be done at the trial. Mr M Wragge SC, representing the applicants, contends that the provisions of section 5(1) of the Admiralty Act should not be opportunistically invoked seeking to join a party in respect of whom the court may or may not have jurisdiction. He argues that the joinder of Merkur should be based on the court having jurisdiction in the main action. While jurisdiction remains an issue it would be inappropriate for the court to exercise its discretion in favour of joining a foreign entity, not otherwise amenable to its jurisdiction in the main action.

- [11] While I am of the view that the issue of jurisdiction plays a critical role in the consideration of joinder, I however, agree with the contention expressed by Mr Mullins SC, representing the plaintiffs that for present purposes such requirement is satisfied once a reasonably arguable case has been made out for jurisdiction. In other words the issue of jurisdiction should appropriately be settled at trial stage. It suffices in my view, for the joinder application to establish a *prima facie* case that the court has jurisdiction. In the circumstances of this case I would proceed on the basis that while the issue of jurisdiction will be later decided, a reasonably arguable case as regards jurisdiction has been made out for purpose of joinder of Merkur. I will thus exercise my discretion, in this regard, in favour of allowing the joinder to remain. In view of that conclusion I thus consider it not necessary to deal specifically with merits and demerits of the argument pertaining to whether there was or there was not consent or submission to jurisdiction.

[12] It is also unnecessary to express any view on the interpretation given to the words consent and submission by Mr Mullins as appearing in section 3(2)(c) of the Admiralty Act. He contends that a distinction should be drawn between the two epithets. He articulates this distinction as follows:

“To *consent* means “to give permission”. To *submit*, in the context of jurisdiction, means to “agree to refer a matter to a third party for decision or adjudication” and arguably denotes something further than simply a consent to the Court exercising jurisdiction. In short, a *submission* can effectively constitute the foregoing of any right to seek an order in terms of Section 7(1) of Act 105 of 1983.”

Mr Wragge’s counter submission is simply that ‘consent’ covers an express submission to jurisdiction whereas ‘submission’ covers a case when submission is implied from contact.

#### CAUSE OF ACTION

[13] It is common cause that the plaintiffs must establish a *prima facie* case on the merits against the party they seek to join to the proceedings. That is Merkur in this case. The applicants contend that for the *prima facie* case to be established evidence has to be adduced. It is indeed settled law that an applicant in joinder proceedings is generally speaking obliged to adduce evidence in order to establish a *prima facie* case<sup>4</sup>. There are however, exceptions registered in our case law. In *Owners of the mt “TIGR” and Another v Transnet Ltd t/a Portnet*<sup>5</sup> and the SA Summit One<sup>6</sup>. In these two cases the requirement of adducing evidence to establish a *prima facie* case was relaxed. The basis for relaxation was

<sup>4</sup> Admiralty Jurisdiction Law and Practice in South Africa by G Hoffmeyr page 61

<sup>5</sup> 1998 (3) SA 861 (SCA)

<sup>6</sup> *Farocean Marine (Pty) Ltd v Malacca Holdings Ltd and Another* 2005 (1) SA 428 (SCA)

that the nature of the application was such that the *prima facie* case sought to be established and other allegations made by the applicant were of necessity mutually destructive. In both cases the court had regard to the allegations in the pleadings in determining that a *prima facie* case had been made out.

[14] It is common cause that at all material times the vessel involved in this matter is owned by Schiffahrts-Gesellschaft Merkur Delta GMBH and was in turn bareboat chartered to Merkur. It was at all times material to this action time chartered to SCL. Maersk Lines, as indicated above, is sued herein in its capacity as a carrier in terms of the relevant bills of lading. The fact that the name cited in the summonses may not be an appropriate one seems to be of no consequence as it has been indicated that an application will be brought for an amendment. The issue then is whether there is any evidence adduced to demonstrate a *prima facie* case based on the merits against Merkur. The claims are based on delict in the sense that Merkur allegedly breached its duty of care and/or its obligation as bailors. This is reflected in the founding affidavit of Mr Hartwell in support of the application for joinder. This of course is a repetition of the averments made in the summonses even before the amended ones. The question is whether this can be taken to be evidence adduced to demonstrate a *prima facie* case or whether the circumstances justify a departure to that rule.

[15] Related to the issue of a *prima facie* case on the merits, the applicants make the point that during the application for joinder no evidence was placed before the court identifying who the real claimants were, the details of the claims and

whether they had *locus standi*. In defence, the plaintiffs rely on the provisions of Rules 2(3) and 22(4)(b)(i) and (ii) for protection. Rule 2(3) provides that generic terms may be used in describing parties and they be described "...as the owner or insurer of the a named ship or of the cargo in or formerly in a named ship or as the owner, master and crew of a ship, or in any other similar manner, and in any such case the party need be further named or described in the pleadings and may sue or be sued as such." The plaintiffs submit that in terms of sub-rule 22(4)(b)(i) and (ii) the information required was furnished within the stipulated period. I find no fault on their part in this regard. They are entitled to act as they did in terms of the Rules. In any event the applicants issued the Rule 22 (4)(b)(i) notice some time after the joinder and the particulars sought were furnished before the current applications were launched. My view is that it would be artificial to say no regard should be paid to the information supplied even though it was already before the court at the time the applications were brought.

- [16] The essential component of the *prima facie* case against Merkur, the applicants' contend, is evidence that demonstrates that the plaintiffs are entitled to proceed in delict against Merkur. That would entail that the plaintiffs must show that they were the owners of the cargoes that are the subject matter of the claims at the time the delicts occurred. Their title to sue, as bill of lading holders, for instance, as is the case in some of the cases involved, would not necessary mean they were owners at the time when the delict was committed<sup>7</sup>. This could be due to plaintiffs not named as consignees on the bill of lading, no physical constructive

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<sup>7</sup> The "Stansin" (par. 38)

delivery of the cargoes etc. I am in agreement with the argument presented on behalf of the plaintiffs. It says that the issue of proving ownership of cargoes is complex and can best be dealt with at trial stage. Many factors are relevant for purposes of deciding the question. It may be the conduct of sale that governs the issue of ownership and in turn the contract of sale itself falls to be governed by the application of various legal systems from various countries where the cargoes originate. To illustrate this kind of reasoning is the fact that under English law the passing of ownership is governed by the intention of the parties.

[17] Mr Wragge submits that the test applicable is that where there is a reasonable doubt that the plaintiffs right against the first defendant will be successful, the court should exercise its discretion against permitting the joinder of the party not otherwise amenable to its jurisdiction. In my view this would amount to a test more burdensome than establishing a prima facie case on the merits against the party sought to be joined. Applying the test suggested would actually amount to assessing the prospects of success.

[18] The applicants have raised a few defences open to Merkur on the merits of the main case.. By that they seek support the contention that the actions brought against Merkur are doomed to fail and there can thus be no basis for this Court to exercise its discretion in favour of joinder. These defences relate to, *inter alia*, to the provisions of Clause 4.2 of the bills of lading.

#### **CLAUSE 4.2 OF THE BILL OF LADING**


[19] This is a clause in the terms and conditions of carriage appearing on the bill of lading. This applies to cases where the bills of lading are relied upon for the claims. In terms thereof an undertaking by the merchant (defined as a shipper or holder of the bill of lading, a consignee to **the carrier** etc) that "no claim or allegation whether arising in contract, bailment, tort or otherwise shall be made against any servant, agent, or Sub-Contractor of the carrier which imposes or attempts to impose upon any of them or any vessel owned or chartered by any of them any liability whatsoever in connection with the Goods or the Carriage of the Goods." The plaintiffs fall under the definition of the merchant. In the context of the matters before the court, as submitted on behalf of the applicants, the plaintiffs are obliged to provide an indemnity to Merkur against all consequences of a claim. It is contended on behalf of Merkur that it is protected by the clause by virtue of it assuming the position of a sub-contractor.

[20] Irrespective of whether Merkur correctly assumes the position of a sub-contractor or not, which is debatable, and thus falls within the ambit of the protection of the clause, or whether the Hague-Visby Rules provisions (as contained in Article 111 8 of the schedules to SACOGSA) impact the provisions of the clause, are matters, in my view, not essentially relevant to an application for joinder. Determination of such issues is not a prerequisite and should appropriately be dealt with at the trial in the main action. In conclusion I consider that approach appropriate to the other defences raised. It would be an impossible task to consider an application for joinder of a party if it would mean for the court to exercise its jurisdiction it has to exclude all the potential defences.

[21] Messrs MacWilliam SC and R Gordon appear on behalf of A P Moller Maersk t/a Maersk Lines cited as eighth respondent in case number 1258/07 and third respondent in case number 1291/07. Mr MacWilliam brought to the attention of the court that the party cited in the summonses commencing actions, described as Dampskibsselskabet AF 1912 Aktieselskab and Aktiesskabet Dampskibsselskabet Svenborg t/a Maers Lines does not exist as it has undergone a name change. Nothing turns of this as an intention to apply for amendment has already been indicated in the papers. The party Mr MacWilliams represents does not oppose nor support the applications in which it is featuring. It however disputes that there was consent or submission to jurisdiction. The applicants do not seek even an order of costs against it. No order as to costs will thus be made for or against that party. Regarding the other parties no argument has been advanced as to why costs should not follow the result.

[22] I find no justification for setting aside the joinder and revoking the provisions of the relevant court orders as regards the amendment of summonses issued.

In the result I dismiss the applications with costs.



**C T SANGONI**  
**JUDGE OF THE HIGH COURT**

**(ADMIRALTY JURISDICTION)**

**Date :**

Counsel for the Plaintiffs/respondents :

Attorneys for the Plaintiffs/respondents :

Counsel for the Applicants :

Attorneys for the Applicants :

Date heard :

Date Judgment delivered :