

IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION
(EXERCISING ITS ADMIRALTY JURISDICTION)

CASE NO. A130/1999

NAMES OF SHIPS : mv "ACOR" and mv "SALANGO"

In the matter between:

THE mv "SALANGO"

APPLICANT

and

THE OWNERS OF THE mv "ACOR"

RESPONDENT

(Heard at Durban on 24 February 2003)

J U D G M E N T

(Delivered on 27 February 2003)

GALGUT DJP:

On 23 May 1999 a collision between the mv ACOR and the mv SALANGO occurred off the Mozambican coast. As a result the mv ACOR sank and was lost. When the mv SALANGO pulled into the Durban harbour for repairs a few days later, the owners of the mv ACOR ("plaintiff") caused the mv SALANGO ("defendant") to be arrested in an action for damages which is now pending before this court. Having been required to do so, the plaintiff being a *peregrinus*, furnished security for the costs thereof. In turn the defendant, having been required to do so because it is also a *peregrinus* furnished the plaintiff with security for both the plaintiff's claim and costs. It

the same action the defendant filed a counterclaim against the plaintiff in which it claims damages, arising from the same collision, in the sums of R658 446 and US\$349 369. In the instant application, which is brought in terms of section 5(2)(c) of the Admiralty Jurisdiction Regulation Act, No 105 of 1983, as amended, the defendant seeks a further order for security against the plaintiff, this time for payment of the defendant's counterclaim should it succeed.

The authorities lay down that, in considering an application under rule 5(2)(c) a court has a wide discretion. It must weigh all of the competing interests and as I understand the approach, it must in the end see that justice is done.

The plaintiff has neither movable nor immovable assets within the Republic of South Africa, and elsewhere it has access to only limited resources, the mv ACOR having essentially been its only asset. On the papers it is therefore established that if the counterclaim succeeds the defendant will probably not be able to recover such damages as are awarded to it. I therefore accept that on the face of an application for security would ordinarily have been successful.

I appreciate the defendant's concern about not recovering its counterclaim. In addition, as counsel for the defendant stresses, to refuse the application, which will mean that the defendant will be required to conduct the trial without

security for its counterclaim, while the plaintiff is permitted to conduct the trial having security for its claims, will be unfair to the defendant. There is no doubt about the correctness of these complaints, but there are other features that are relevant and that must also therefore be thrown into the scales.

There is one such consideration that seems to me to outweigh the possible prejudice to the defendant. The papers before me establish that the plaintiff will not be able to furnish the security sought, in which event, so the defendant's application makes clear, the defendant will apply to have the plaintiff's claim dismissed, which in turn will mean that the plaintiff will be precluded from presenting its case. If the plaintiff's claim is in truth good, the resultant prejudice is obvious – it will be non-suited without having been permitted to present its case.

There is of course no certainty that the plaintiff's claim is good. On the contrary, the dispute about where the negligence lay in relation to the collision is such that it cannot be decided on the papers before me; it can only be resolved at a trial where the witnesses give oral evidence and are subjected to cross-examination. It is suggested by the defendant's deponent that the plaintiff's case on the question of negligence is obviously weak. On the face of the papers, however, the plaintiff appears at least to have a *prima facie* case.

I repeat therefore that the prejudice that the plaintiff will suffer if it is precluded from presenting a good case outweighs the prejudice to the defendant if it succeeds in its counterclaim and there is no security wherewith to satisfy it. It happens often enough in our courts, however, that a party successfully sues another who, because he is impecunious, cannot meet the judgment. It also occurs to me, although this is not debated on the papers before me, that if the defendant succeeds in its counterclaim it will remain open to the defendant, armed with the judgment, to pursue the satisfaction thereof in other jurisdictions. Even if this is impossible, however, the defendant is secured for its costs, so that there is to that extent an abatement of the prejudice that would otherwise have followed. Finally, the defendant survived the collision, and it is perhaps this very fact that enabled it to furnish security. The plaintiff's ship sank, however, and it strikes me as being unfair that, purely because it lost its only asset, it should be precluded from presenting its case.

The application is refused, with costs.

