

was left of the inseparable mixture of those bunkers which were on the vessel when it was delivered to the charterers and those supplied by the charterers, and the bunkers were accordingly owned jointly by the applicant and the charterer: the counter-applicant was entitled as a creditor of the charterer to attach such jointly-owned property. The application was accordingly dismissed and counter-application granted.

There was mention of Voet 2.4.55 by Berman J but it was necessary only in a limited sense in that matter as once the attachment was competent that was the end of the matter given the terms of the bail bond provided. Prior to dealing with that reference it is necessary to look at Voet 41.1.23 which is authority for the proposition that *confusio* occurred where two liquids, of the same class are mixed together by the wish of the owners with the result that the whole is owned by the two owners in proportion to the share which belonged to each before the merger.

The first mentioned reference namely 2.4.55 in Gane's translation reads as follows

'Hence there can be no doubt that a creditor purposing to bring an action rightly arrests a thing that is common to his debtor with another, since the ownership of that thing is in the debtor at least to the extent of the undivided share. So much indeed is this so that arrest is not prevented even by the fact that perhaps the common

thing is in its nature indivisible. In such a case the whole thing can appear to be burdened with arrest. The other owner of the common thing can get his damages in having lost the use of his share from the partner whose default gave cause for the arrest, in a partnership action or one for the division of the common property.'

I agree with Mr Mullins that the passage is authority for the proposition that common property may be arrested to the extent of the debtor's ownership in that common property. I further agree that the whole is only burdened where the property is by its nature indivisible.

Mr Steward submitted that though the same quality fuel was used in the mixed bunkers each was from a separate brand name and was indivisible because the precise fuel could not be separated, molecule-by-molecule. I do not believe that this is a legitimate legal or factual argument. In his learned work SAKEREG Tweede Uitgawe by van der Merwe at page 263 the learned author says the following concerning indivisibility:

"In die geval van *confusio* word die mengsel as onskeibaar beskou indien die individuele stowwe hul identiteit verloor en slegs met groot moeite en koste van die mengsel afgeskei kan word."

The learned author cites as authority for this proposition Voet 41 1 23 and goes on to say that modern law books, and he refers to the German and Swiss Law, require that division should not be too difficult or too costly.

In *Andrews v Rosenbaum & Co* 1908 ECD 419 at 425 Kotze JP spoke of the references to Voet and his treatment of wheat that was mixed by accident. Kotze JP says:

“If under such circumstances one of the two persons retains the whole of the mixed wheat, the other will have a real action for the amount of the wheat belonging to him. It will then be left to the discretion of the judge to determine and estimate the value of the wheat which belonged to each.”

We know in this case the value and quantity of the fuel pumped in before Durban and thereafter. One of the advantages of allowing the applicant to put up monetary security, for the value of the bunkers that were on board, before the vessel reached Durban, is that the court is relieved of the task of dividing it.

Although the chemical purist might balk at dividing the fuel, for all practical and commercial reasons, it is the same fuel. While joint ownership of a motor vehicle is clearly indivisible that of fuel is divisible simply by pumping off the correct quantity. I did not understand Mr Stewart to be arguing that accurate measurement was not possible.

Those that designed the machinery and motors that use the fuel on board

the vessel, specified a type of fuel and as I understand the papers the fuel pumped into the bunkers prior to Durban and in Durban itself was the same type. While the advertising world beguiles us to believe that fuels differ in quality, no such distinction was made in this matter. This fuel was eminently divisible and could have been pumped out into tanks hired for such a purpose in Durban. I am therefore of the view that *confusio* did not take place and that the release of the arrest could be achieved by putting up the money equivalent of the fuel in the bunkers of the vessel, owned by the third respondent, when it arrived in Durban.

Mr Mullins informed the court that there was a delay in approval by the reserve bank for the provision of a bank draft or bank guarantee expressed in US dollars. It was not clear from the papers how long the delay would endure. Mr Mullins asked the court for the order to provide an alternative expressed in South African rands and indicated that the applicant was prepared to increase the amount to the exchange value of US\$65,000 to cater for any fluctuations in the rand/dollar exchange rate.

Although Mr Stewart expressed some misgivings about this, I do not believe that a delay caused by the reserve bank should prejudice the applicant in securing the release of the vessel and the onward transmission of the rice cargo to its destination. The provision for the

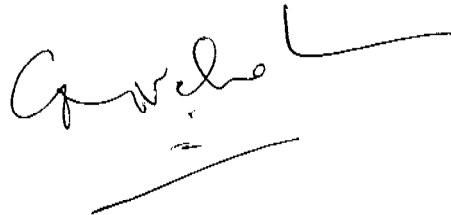
higher amount adequately, in my view, caters for any possible prejudice.

I therefore made the following order on 20 November 2002:

1. Upon the applicant lodging with the registrar of this honorable court security in the sum of \$50, 000 in the form of a bank draft or a bank guarantee in a form to the satisfaction of the registrar:
 - 1.1 Such security shall constitute a fund and shall be deemed to be the bunkers on board the mv "Wisdom" owned by the timecharterer of the mv 'Wisdom';
 - 1.2 The said bunkers arrested at the instance of the second respondent under case number A189/2002 be and are hereby released and discharged from such arrest; and
 - 1.3 The said bunkers, in the form of the aforesaid fund, shall be deemed to be under arrest at the instance of the second respondent;
2. The applicant is granted leave, on notice to the second respondent to substitute the security, if furnished by means of a bank draft with a bank guarantee, provided that it is in a form for the satisfaction of the registrar.
3. The applicant shall be entitled to provide security as referred to in paragraph one above by way of a bank guarantee issued by ABSA

Bank Ltd expressed in rands to a value equivalent, at the rate of exchange current on the date of issue of the bank guarantee, to the sum of US\$65,000 provided that:

- 3.1 ABSA Bank Ltd shall not be required to pay under the said guarantee an amount exceeding the sum of US\$50,000 at the date of payment; and
- 3.2 The applicant shall be entitled to substitute such bank guarantee with a bank guarantee expressed in US dollars and limited to the sum of US\$50,000.
4. Second respondent is ordered to pay the costs of this application.

A handwritten signature in black ink, appearing to read 'G. W. ...', with a horizontal line underneath it.