IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GQEBERHA)

(Exercising its Admiralty Jurisdiction)

CASE NO.: AC 2764/2023

Matter heard on: 28th March 2024

Judgment delivered on: 23rd April 2024

NAME OF SHIP: MV 'TAI HARMONY'

In the matter between: -

SURE SUCCESS STEAMSHIP S.A. Applicant

and

MV 'TAI HARMONY' First Respondent

TAI HARMONY MARITIME LIMITED Second Respondent

PERFECT BULK LIMITED Third Respondent

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

…… **……**

Signature **Date**

JUDGMENT

ROSSI AJ:

[1.] This is an application for an increase in security in terms of s 5(2)(d) of the Admiralty Jurisdiction Regulation Act, 105 of 1983, as amended (the '***Admiralty Act***'), which application was launched on an urgent basis.

[2.] The Applicant seeks an order directing the Respondents to furnish increased security in the amount of USD435 508.50 in respect of the latter's claim for payment of bunkers, which forms the subject matter of a London arbitration.

[3.] It is apposite at this stage to detail the history of the application.

Background to the application

[4.] On 19th May 2022 the Applicant, the registered owner of the MV 'Ever Success' ('**the Ship Concerned**') and the Third Respondent (**'PBL-Belize'**) as charterer, concluded a Time Charter Party (the **'Charter Party'**)[1] for a firm time charter period *'of about 11 months / about 14 months'*[2] in respect of the Ship Concerned.

[5.] In terms of clause 7 of the Charter Party, while the vessel is on hire, the charterer shall provide and pay for all bunkers[3] except as otherwise agreed.

[1] A Charter Party is a document recording an agreement between a ship owner and someone who rents all or part of a ship for a particular voyage or a period of time.
[2] In terms of clause 1 of the Charter Party *'about'* means *'15 days more or less Charterers' option.'*
[3] *'Bunkers'* refers to marine fuel oil, marine diesel oil or marine gas oil supplied to vessels for their propulsion. It is the general name for fuel used on vessels.

[6.] Clause 23 provides that the charterer will not directly or indirectly suffer, nor permit to be continued, any *lien* or encumbrance, which might have priority over the title and interest of the owners in the vessel. The charterer undertakes that during the period of this Charter Party, they will not procure any supplies or necessaries or services, including any port expenses and bunkers, on the credit of owners or in the owner's time.

[7.] Provision was also made in the Charter Party for payment by the charterer of hire charges for the vessel.[4]

[8.] In the event of a dispute arising from the Charter Party, clause 45 states that the contract would be governed by and construed in accordance with English Law and any disputes arising therefrom would be referred to arbitration in London in accordance with the Arbitration Act 1996.

[9.] The London proceedings were issued in respect of the Applicant's claims for losses suffered arising out of PBL-Belize's breach of its obligations in terms of the Charter Party, *inter alia*, for the failure to pay hire due and owing under the Charter Party as well as the breach of the Charter Party in respect of claims for unpaid bunkers. This application concerns increased security for the latter.

[10.] The Ship Concerned was delivered to PBL-Belize on the 29th June 2022 and re-delivered to the Applicant on the 9th May 2023.

[11.] A dispute arose between the Applicant and PBL-Belize arising from unpaid hire charges and relevant to this application, a bunker stem which occurred in Vizag, India on or about 31st December 2022 to 1st January 2023. The bunker stem comprised of the provision of approximately 999.95 mt VLSFO.[5]

[4] Clause 76 of the Charter Party.
[5] Which is an abbreviation for a very low form of sulfur fuel oil.

[12.] On the 18th August 2023 the Applicant arrested the Tai Harmony as an Associated Ship of the Ship Concerned, as security for claims which it had advanced in the London proceedings against PBL-Belize. The order comprising a security arrest under s 5(3) of the Admiralty Act (the *'arrest application'*) was granted by Makaula J in this court, an aspect to which I return later.

[13.] The MV Tai Harmony[6] is the First Respondent in the application, and its owner, the Second Respondent. The First and Second Respondents oppose this application and are collectively referred to herein as the *'Respondents'.* PBL-Belize, although cited, has not entered the fray of this litigation.

[14.] At the time of the arrest of the Associated Ship the unpaid bunker claim had not crystalised as the Applicant had not yet suffered any quantifiable losses in respect of this claim. For that reason, the quantum of security sought in the arrest application related only to the unpaid hire claim. In the founding affidavit in the arrest application, the Applicant reserved its right to obtain increased security in respect of the unpaid bunker claim.

[15.] On the 22nd August 2023 security in respect of the unpaid hire claim was put up by the Respondents by way of a Gard letter of undertaking, so as to procure the release of associated ship. Security in the amount not exceeding USD876 000.84 was provided.

[16.] On the 18th September 2023 the Respondents brought an application to set aside the arrest of the Tai Harmony on the grounds that the vessel is not an Associated Ship of the Ship Concerned.[7] This shall be referred to as the

---

[6] A bulk carrier which is flagged in Hong Kong.

[7] Paragraph 7 of the arrest order of 18th August 2023 reads *'The Respondents and any person who may provide security for the release of the vessel from the arrest, shall bring any application to vary or set aside this order within a period of one calendar month from the date upon which security is furnished or within such period as this Honourable Court may order on good cause shown, failing which they shall not be entitled to apply or vary or set aside the order.'*

'main application', which is set down for hearing in this court on 9th May 2024 and has informed the urgency of this application.

[17.] I now address the bunkers claim. The Applicant became aware of a potential bunkers claim in April 2023, when it received a letter of demand from the contractual suppliers of the bunkers, Three Fifty Markets Limited.

[18.] In this regard the contractual suppliers referred to clauses 3(c) and 4(c) of its General Terms and Conditions, which provides that an order for the outstanding bunkers are deemed to have emanated from the Master of the vessel (being the Applicant), which in turn has the result of creating a primary *lien* on the vessel.

[19.] On the 7th November 2023 the Applicant received a further demand from attorneys for the contractual suppliers calling upon the Applicant to furnish security for the contractual suppliers' best reasonably arguable claim in the amount of USD1 425 000. It was further recorded that as the Ship Concerned was imminently due to call at the Port Elizabeth (Gqeberha) port on the 10th November 2023, if such security could not be agreed upon, an arrest of the Ship Concerned would be considered.

[20.] Despite an initial protestation of liability, the Applicant in an effort to mitigate its damages, and for commercial reasons, commenced negotiation with the commercial suppliers relating to the provision of security and/or settlement of the claim, so as to prevent the threatened arrest.

[21.] In parallel to this, the Applicant put PBL-Belize on notice that all losses suffered by the Applicant arising out of the provision of security or settlement of the unpaid bunkers would be for the account of PBL-Belize. The Applicant contended that PBL-Belize was in breach of the Charter Party insofar as it allowed a *lien* to be created over the Ship Concerned by its

failure to pay for the bunkers, and which exposed the Ship Concerned and the Applicant to threat of an arrest.

[22.] In response thereto, PBL-Belize denied liability for any losses on several grounds. It contended *inter alia* that it was not involved in the bunker stem and that as a matter of English law, no *lien* could be created over the Ship Concerned arising out of time charter / sub-charterer.

[23.] Ultimately on 13th November 2023, a settlement was reached between the Applicant and the contractual suppliers in the amount of USD350 000. The Applicant again called upon PBL-Belize to indemnify it for the losses suffered. No response was received.

[24.] The Applicant took steps to incorporate this further breach of the Charter Party in its claim before the London Arbitration proceedings against PBL-Belize and on 19th January 2024 sought leave to amend its claim submissions. The proposed amended claim submissions forms part of the application papers before me.

[25.] This brings me to the application for increased security. The Applicant contends that the security already furnished is no longer sufficient given the settlement of the unpaid bunker claim. The Applicant seeks increased security and relies on s 5(2)(d) of the Admiralty Act.

[26.] On 4th December 2023 the Applicant addressed a demand to the Respondents' attorneys. The association between the Respondents and PBL-Belize, which is disputed, forms the subject matter of the main application. In a response dated the 6th December 2023, the Respondents deny that they are liable for the increased security. This will be addressed when dealing with the merits of this application.

[27.] Thereafter, this urgent application was instituted. In support of urgency the Applicant contended that due to the imminent enrolment of the main application, the parties having agreed timelines for the filing of their heads of argument by the end of January / middle of February, it is axiomatic that this application must be heard prior to the main application.[8]

[28.] The Applicant obtained a directive for the enrolment of this urgent application on truncated periods in accordance with the Eastern Cape Practice Directives *('Practice Rule')* 12(a). The directive issued on 2nd February 2024 reads as follows:

'Having considered the certificate or urgency placed before me in the abovementioned matter, I hereby issue the following direction(s) with regard to the hearing and further conduct of the matter:

1. *The matter is certified as urgent.*
2. *The application shall be enrolled for hearing on the opposed roll on 28 March 2024.*
3. *The respondents must file answering affidavit(s), if any, on or before 23 February 2024.*
4. *The applicant must file replying affidavit, if any, on or before 8 March 2024.*
5. *The parties must exchange and file heads of argument at least 5 days before 28 March 2024.'*

[29.] In opposing this application, the Respondents have raised a deluge of technical objections to the directive issued. These preliminary aspects will be dealt with before I embark on the merits of its opposition.

<u>The directive issued</u>

[8] Objectively, this contention proved to be sound as an opposed date for hearing, being 9th May 2024, was obtained in conjunction with the Registrar's office in early March 2024. At the time of deposing to the founding affidavit on 29th January 2024, a date had not yet been allocated.

a) <u>The procedure adopted</u>

[30.] Mr Cooke on behalf of the Respondents contended that Practice Rule 12(a)[9] and the procedure adopted by the Applicant in calling it to court, offended the Respondents' rights to a fair hearing which is entrenched by s 34 of the Constitution of the Republic of South Africa, 1996.

[31.] I commence this inquiry against the backdrop of Practice Rule 12,[10] which is replicated hereunder:

> *'(a) In all applications brought other than in the ordinary course in terms of the Rules of Court, the legal practitioner who appears for the applicant must sign a <u>certificate of urgency which is to be filed of record before the papers are placed before the Judge and in which the reasons for urgency are fully set out.</u>*
>
> *(b) The <u>certificate of urgency shall set out the grounds for urgency with sufficient particularity for the question of urgency</u> to be determined solely therefrom without perusing the application papers.*
>
> *(c) In matters contemplated in Rule 12 (a) above, the registrar shall issue the papers and shall place the matter on the roll of cases as may be provided for in the notice of motion commencing the application.*
>
> *(d) In all urgent applications in which it is sought to enrol the matter other than on a day normally reserved for the hearing of motion court matters:*
>
> *(i) The practitioner who appears for the applicant must sign a certificate of urgency which is to be filed of record before the*

[9] A notice in terms of Uniform rule 16A was placed at the offices of the Registrar.

[10] Practice Rule 12(a) in its current form was introduced by way of Court Notice 1 of 2014, with effect from 9th June 2014. My own emphasis by way of <u>underlining</u> has been added.

application papers are placed before the Judge and in which the reasons for urgency are fully set out. In this regard, sufficient particularity is to be set out in the certificate for the question of urgency to be determined solely therefrom and without perusing the application papers.

(ii) *The certificate of urgency will be placed before the Judge who will make a determination solely from that certificate as to whether or not the matter is sufficiently urgent to be heard at any time other than the normal motion court hours.*

(iii) *Should he/she determine that it is sufficiently urgent, he/she will then give directions as to the time and place, when and where the application is to be heard.*

(iv) *Should he/she decide that the matter is not sufficiently urgent to be heard on a day other than a normal motion court day he/she shall record same on the file whereupon the applicant may deal with the application in accordance with Rule 12 (a) if so advised.'*

[32.] Urgent applications require an Applicant to persuade the court that the non-compliance with the rules, and the extent thereof, is justified on the grounds of urgency. The Applicant must demonstrate *inter alia* that it will suffer real loss or damage were it to rely on the normal procedure.[11]

[33.] Due and proper consideration must be given to the degree of urgency facing a litigant, and the deviation in the notice of motion must be tailored to meet such degree.[12] Lest it not be forgotten that the rules adopted by an Applicant in such an instance must, as far as practicable, be in accordance with the existing rules as to procedure and time periods.[13]

---

[11] ***Voight NO and another v EGH IP (Pty) Ltd and others*** [2021] ZAECGHC 40 ***('Voight')*** par 11-12.
[12] ***Voight*** *supra* par 15, quoting with approval ***Nelson Mandela Metropolitan Municipality v Greyvenouw CC and others*** 2004 (2) SA 81 (SE) par 37, 38 and 40.
[13] ***Voight*** *supra* par 13.

[34.] In the present matter the essence of the urgency is the imminent enrolment of the main application and that this application for increased security must be heard before it, failing which, the Applicant will lose its sanction.

[35.] Following the directive, the notice of motion was issued, and the Respondents were afforded a period of 13 court days to file their answering affidavits, which is two days short of the ordinary period provided for in Uniform rule 6(5)(d)(ii).[14] A hearing date was allocated some six weeks away.

[36.] The Respondents contend that it was unfairly deprived of the opportunity to address the Presiding Judge when seized with the certificate of urgency. In this regard the Respondents sought to draw parallels from several cases where substantive orders were granted on an *ex parte* basis.[15]

[37.] Whilst I have no difficulty in accepting the indispensable value of a fair hearing in our judicial system, I am not persuaded that in the present matter, there has been any violation.

[38.] A directive issued by a Presiding Judge under Practice Rule 12(c) merely directs the Registrar to issue the papers and enrol the application for an urgent hearing. This is apparent from the wording of the rule. A Presiding Judge seized with a certificate of urgency is only required to determine whether the matter should be enrolled on a day other than an ordinary motion court day (Practice Rule 12(d)). There is no requirement for any further order to be made. Insofar as the directive included provisions relating the filing of answering and replying papers, such provisions were superfluous and only serve to repeat what is already contained in the notice of motion.

---

[14] The Respondents, who were already represented in the main application, were not afforded the time period in terms of Uniform rule 6(5)(b)(iii).

[15] Such as in ***Wijnen v Mohamed*** [2014] ZAWCHC 138 which dealt with an *ex parte* order granted in terms of s 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; ***Industrial Development Corporation of South Africa Limited v Bokone Group of Companies*** [2023] ZAGPJHC 837 where a notarial deed was perfected.

[39.] A directive in no way finally disposes of the issue of urgency (or any other issue) which is to be determined in due course by the Judge hearing the application on all the relevant facts and circumstances including those put forward by a Respondent in due course.[16] The purpose of a certificate was explained in ***January v Standard Bank of South Africa,***[17] which *'is to enable the court called upon to deal with the matter to gather, from a perusal of the certificate alone, why the matter is to be regarded as urgent. The certificate should also enable the judge to decide – at least on a prima facie basis – that the matter is in fact urgent enough to warrant immediate attention…The certificate is calculated to ensure efficiency in the administration of justice and to avoid an unnecessary waste of time in dealing with matters which ought to be dealt with other than in the ordinary course.'*

[40.] The Respondents have been afforded a fair hearing. The Respondents filed a comprehensive answering affidavit detailing its opposition at length. Furthermore, the Respondents filed written heads of argument, which argument was fully ventilated in this court. Accordingly, all the issues including that of urgency were adjudicated at the hearing, and not when the directive was issued.

[41.] I accordingly find that there has been no violation of the Respondents' rights to a fair hearing on the basis of the procedure adopted.

(b) <u>The urgency</u>

[42.] I now turn to the contention that a case has not been made out for urgency. As alluded to above, there are varying degrees of urgency. I can do no better

---

[16] ***Voight*** *supra* par 6. See also ***Lumkwana v Superintendent General, Department of Health, Eastern Cape and another*** [2022] ZAECBHC 2 par 19.
[17] ***January v Standard Bank of South Africa*** [2010] ZAECGHC 6 par 40.

than to repeat what was stated by Kroon J in ***Caledon Street Restaurants CC v D'Aviera:***[18]

'In the assessment of the validity of a respondent's objection to the procedure adopted by the applicant the following principles are applicable. It is incumbent on the applicant to persuade the court that the non-compliance with the rules and the extent thereof were justified on the grounds of urgency. The intent of the rules is that a modification thereof by the applicant is permissible only in the respects and to the extent that is necessary in the circumstances. The applicant will have to demonstrate sufficient real loss or damage were he to be compelled to rely solely or substantially on the normal procedure. The court is enjoined by rule 6(12) to dispose of an urgent matter by procedures "which shall as far as practicable be in terms of these rules". *That obligation must of necessity be discharged by way of the exercise of a judicial discretion as to the attitude of the court concerning which deviations it will tolerate in a specific case. Practitioners must accordingly again be reminded that the phrase* "which shall as far as practicable be in terms of these rules" *must not be treated as pro non scriptio. The mere existence of some urgency cannot therefore necessarily justify an applicant not using Form 2(a) of the first schedule to the rules. If a deviation is to be permitted, the extent thereof will depend on the circumstances of the case. The principle remains operative even if what the applicant is seeking in the first instance, is merely a rule nisi without interim relief. A respondent is entitled to resist even the grant of such relief. The applicant, or more accurately, his legal advisors, must carefully analyse the facts of each case to determine whether a greater or lesser degree of relaxation of the rules and the ordinary practice of the court is merited and must in all respects responsibly strike a balance between the duty to obey rule 6(5)(a) and the entitlement to deviate therefrom, bearing in mind that that entitlement and the extent thereof, are dependent upon, and are thus limited by, the urgency which prevails.* ***The degree of relaxation of the rules should not be greater than the exigencies of the case demand (and it need hardly be added these exigencies must appear from the papers).*** *On the practical level it will follow that there must be a marked degree of urgency before it is justifiable not to use Form 2(a). It may be that the time elements involved or other circumstances justify dispensing with all prior notice to the respondent. In such a case Form 2 will suffice. Subject to that exception it appears that all requirements of urgency can be*

[18] ***Caledon Street Restaurants CC v D'Aviera*** [1998] JOL 1832 (SE) at 7-9 (my own emphasis).

met by using Form 2(a) with shortened time periods or by another adaptation of the Form, eg advanced nomination of a date for the hearing of the matter, or omitting notice to the registrar accompanied by changed wording where necessary. Adjustment, not abandonment, of Form 2(a) is the method.'

[43.] The urgency lies in the imminent enrolment of the main application. The main application is set down for hearing on 9th May 2024. This influences the hearing of this application as an adjunct thereto. Had this application not proceeded by way of urgent directive, and was heard in the normal course, it would have been determined after the main application. In this sequence the Applicant is deprived of the sanction of asking the court hearing the main application for a dismissal if the increased security is not furnished. In the result, I also do not find this application to be premature.

[44.] The contention that the urgency is self-created similarly stands to be rejected as it was the Respondents that launched the main application, which has influenced the urgency of this application.

[45.] I am also of the view that the degree of relaxation of the rules was no greater than the exigencies demanded by the case. The deviation, which is minimal and effectively two days short of the ordinary period, was appropriate and not overly burdensome in the circumstances.

(c) <u>Non-disclosures in the certificate</u>

[46.] Mr Cooke contended that there were material non-disclosures (which are dealt with below) in the certificate of urgency. Parallels were again drawn to *ex parte* proceedings, where the utmost good faith is to be observed.[19]

[19] ***National Director of Public Prosecutions v Basson and another*** [2002] 2 All SA 255 (A) par 21.

[47.] What a legal representative must observe in the preparation of a certificate of urgency is contained in Practice Rule 12(b). The role of the certificate has been explained above.

[48.] A Presiding Judge when faced with a certificate of urgency will make a prima facie determination as to whether the application appears to be sufficiently urgent to be heard on a truncated basis. It has been said that this places a great deal of trust in the submissions made by Applicant's counsel, without the benefit of insight into the Respondent's position.[20]

[49.] According to the Respondents it should have been disclosed in the Applicant's certificate that it had disputed this court's jurisdiction. Leaving aside that this is an aspect to be determined at the hearing of the main application, it is also outside of the ambit of Practice Rule 12(a). In any event, and for purposes of this application, the complaint of a lack of jurisdiction stands to be rejected.

[50.] This court has already exercised its admiralty jurisdiction by reason of the security arrest of the Associated Ship on 18th August 2023.[21] In terms of this arrest the Respondents furnished security which was accepted by the Applicant. It follows that until such arrest is set aside this court retains jurisdiction to order increased security.

[51.] I say so for another reason. As correctly submitted by Mr Fitzgerald SC for the Applicant, the Respondents, being the Associated Ship and the owner respectively, effectively submitted to the jurisdiction of this court when it filed a notice of intention to defend these proceedings, filed security to the satisfaction of the Applicant, and launched an application for the setting aside

---

[20] ***Van der Merwe and others v Nel NO and others*** [2023] ZAECMKHC 40 par 23.

[21] Paragraph 2 of the order Makaula J reads *'The sheriff of the district of Port Elizabeth West covering jurisdiction Ngqura/Port Elizabeth anchorage (the 'sheriff') is hereby authorised and directed to arrest the motor vessel 'TAI HARMONY' (the 'vessel') in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (as amended) (the 'Admiralty Act') for the purpose of providing security for claims that the Applicant has advanced in London Proceedings against the Third Respondent in the amount of USD430 970.42 plus interest and costs (the 'arbitration').'*

of the arrest (the main application).[22] In ***MV Alina II (No 2) Transnet v Owner of Alina II***,[23] the Supreme Court of Appeal quoted with approval, the *ratio* in the ***Mediterranean Shipping*** case:

'Anyone who invokes the jurisdiction of this court for relief under the Act must be taken – and can hardly be heard to contend otherwise – to have submitted to this jurisdiction…'[24]

[52.] In invoking this court's jurisdiction in the main application, the Respondents subjected themselves to the powers of this court to grant relief under the provisions of the Admiralty Act[25] which includes relief in terms of s 5(2)(d).[26]

[53.] Accordingly, I do not find that it was necessary to make such a disclosure in the certificate. In any event, and in fairness to the Respondents, their objections to jurisdiction were indeed addressed in the founding affidavit.

[54.] The Respondents further contend that it should have been disclosed in the certificate that there was a delay of almost two months before approaching the court for a directive. From the outset it must be said that the certificate and founding affidavit fail to address in any detail the events which took place following the last correspondence on 6th December 2023 and the launching of the application on 2nd February 2024.[27]

[55.] The reason for the delay is addressed in greater detail in reply. The Respondents took umbrage and placed reliance on the general rule against a litigant supplementing its case in reply. This rule is of course not absolute.[28] In urgent applications, courts are commonly sympathetic to an Applicant and

---

[22] ***MV Alina II (No 2) Transnet v Owner of MV Alina II*** 2011 (6) SA 206 (SCA) par 11 to 14.
[23] *Ibid* par 14.
[24] ***Mediterranean Shipping Co v Speedwell Shipping Co Ltd and another*** 1986 (4) SA 329 (D) at 334A.
[25] ***The NYK Isabel*** 2017 (1) SA 25 (SCA) par 50.
[26] The present application for increased security.
[27] Which coincides with the festive season and annual shut down.
[28] ***Finishing Touch 163 (Pty) Ltd v BHB Billiton Energy Coal South Africa*** 2013 (2) SA 204 (SCA) par 26.

often allow papers to be amplified in reply, subject of course to the right of a Respondent to file a further answering affidavit.[29] I hasten to add that the Respondents have not sought an opportunity to file a further affidavit and, in any event, these aspects in reply are not entirely new, as the grounds for urgency were foreshadowed in founding.

[56.] Additionally, in matters of this nature, an Applicant is also afforded a degree of latitude by virtue of Admiralty Rule 9(3)(c)[30] which entitles litigants to adduce new matter in reply.[31]

[57.] Any potential deficiencies in the certificate, and founding affidavit, are tempered against the impending enrolment of the main application which influenced the aspect of urgency. This is canvassed in both the certificate and founding affidavit. Allayed to that is the fact that the *dies* afforded to the Respondents to file its answer, were reasonable and closely resembled the normal period afforded in terms of the rules.

[58.] Accordingly, I do not find the complaint of non-disclosures to hold any merit.

[59.] Lastly, I turn to the objection that it should have been disclosed in the certificate that the Applicant itself had initially disputed the unpaid bunker claims with the contractual suppliers. This aspect is pertinently dealt with on affidavit. The Applicant explains that notwithstanding its initial stance, it ultimately resolved, for commercial reasons and on a without prejudice basis, to settle the claim with the commercial suppliers. The settlement was significantly less[32] than the amount originally demanded.[33]

---

[29] ***Lagoon Beach Hotel (Pty) Ltd v Lehane NO*** 2016 (3) SA 143 (SCA) par 16.
[30] Admiralty Proceedings Rules, GN R571, 18th April 1997 (as amended).
[31]
[32] The unpaid bunker claim was settled in the amount of USD350 000.
[33] The demand as at 7th November 2023 was in the amount of USD760 000 which included accrued interest in the amount of USD152 000.

[60.] The settlement of the unpaid bunker claims with the commercial suppliers makes logical sense. As the Applicant explained, it was at risk of facing an *in rem* and an *in personam* claim. The Applicant's vessel was at risk of an arrest in any other jurisdiction which recognises a foreign maritime *lien*. Such an arrest would have caused significant disruption to the Applicant's business. The settlement of the unpaid bunkers claim also prevented the running up of accrued interest and costs.

[61.] I am satisfied that the Applicant acted fairly and appropriately in mitigating its risk by settling the claim on favourable terms. In any event, the reasonableness of the settled amount, or whether it was a bad debt, forms part of the London arbitration and can be determined in those proceedings.

[62.] Accordingly, and for the reasons set out above, I do not find there to be merit in this further ground.

[63.] A parting remark stands to be made regarding the Respondents' complaint of non-disclosures in the certificate. Had these disclosures been made, I postulate that the Presiding Judge would still have exercised the discretion to issue the directive, as all these aspects are more appropriately dealt with at adjudication stage and not in a preliminary setting.

The Merits

a) Increased security in terms of s 5(2)(d)

[64.] Having disposed of the preliminary skirmishes, I proceed to deal with the substance of this application and the opposition thereto. The Respondents' opposition to the merits is threefold:

[64.1.] It contends this court lacks jurisdiction (which has been dealt with in part above).

[64.2.] The Applicant has failed to make out a prima facie case.

[64.3.] There is no association between PBL-Belize and the Respondents.

[65.] The Tai Harmony was arrested as an Associated Ship by order of this court dated 18th August 2023. The basis for such an arrest is set out in ***Silver Star***.[34] The purpose of the associated-ship arrest provisions is to impose liability for maritime claims where it belonged by virtue of common ownership or common control of vessels.[35]

[66.] The Applicant alleges[36] that the Tai Harmony is an Associated Ship, as there is a common controller of the Respondents and PBL-Belize (the charterer of the Ship Concerned).

[67.] The Respondents dispute that the Tai Harmony is an Associated Ship and have sought to set aside the arrest. This is the subject of the main application.

[68.] Section 5(2)(d) of the Admiralty Act provides that a court may in the exercise of its admiralty jurisdiction order that, in addition to property already vested or attached, further property be arrested or attached in order to provide additional security *for any claim,* and order that such security given be increased, reduced or discharged, subject to such conditions as to the court appears just.

[69.] In order to establish a need for <u>additional</u> security,[37] an Applicant is required to demonstrate that:

---

[34] ***MV Silver Star: Owners of the MV Silver Star v Hilane Ltd*** 2015 (2) SA 331 (SCA) ***('Silver Star')*** par 14 and 16.
[35] ***Silver Star*** *supra* par 13.
[36] In the arrest application and this application.
[37] An arrest having already been made in terms of s 5(3)(a) of the Admiralty Act.

[69.1.] Prima facie, it has such a claim for additional security, which claim is justiciable in this court; and

[69.2.] On a balance of probabilities, it has a genuine and reasonable need for security.[38]

[70.] This court is vested with a wide power, in its discretion, to order that security be furnished for maritime claims.[39] This discretion falls to be exercised upon a consideration of all relevant facts and circumstances.[40] The Admiralty Act is a special statute dealing with maritime matters and is directed at meeting the needs of the shipping industry in enforcing maritime claims.[41] The breadth of these powers take into account the reality that maritime defendants are mobile and transitory in their presence in any particular jurisdiction.[42] To address what has been described as the *'wandering litigants of the world'*[43] the Admiralty Act provides for wide-ranging powers of arrest, both for the purpose of instituting actions in this country and to enable claimants to obtain security for proceedings in other jurisdictions.[44]

[71.] It matters not that the additional security sought by the Applicant is in respect of the London arbitration, and not for proceedings in this court, as the section refers to *'any claim'* which is wide enough to include the pending arbitration abroad.[45] In the result, the objection to jurisdiction must again fail.

b) <u>A prima facie case</u>

[38] ***The NYK Isabel*** supra par 40 to 58. See also ***World Fuel Services (Singapore) Pte Ltd t/a World Fuel Services and another v MV 'Ainaftis' and another ('MV Ainaftis')*** [2020] ZAKZDHC 23 par 20.
[39] ***The NYK Isabel*** *supra* par 43.
[40] ***The NYK Isabel*** supra par 43 with reference to the approach adopted in ***Katagum Wholesale Commodities Co Ltd v The MV Paz ('The Paz')*** 1984 (3) SA 261 (N) at 264A-C.
[41] ***The NYK Isabel*** *supra* par 44.
[42] *Ibid.*
[43] In the colourful expression of Didcott J in ***The Paz*** at 263G-H.
[44] ***The NYK Isabel*** *supra* par 44.
[45] ***The NYK Isabel*** *supra* par 47.

[72.] An Applicant for security under this section must establish that it may be entitled in due course to an order for costs, or that it has a claim against the party from whom security is sought.[46] The existence of a claim need only be established on a prima facie basis i.e., by producing evidence that, if accepted, shows the existence of a cause of action.[47] The Applicant must also show on a prima facie basis that it will be enforceable in the forum in respect of which security is sought.[48]

[73.] The establishment of a prima facie case depends on both facts and law[49] and the starting point is the facts upon which the legal contentions are based.[50]

[74.] In determining whether this threshold has been met, Mr Fitzgerald SC for the Applicant urged the court to apply the *'low-level test'*[51] as explained in ***MT Tigr: Owners of the MT Tigr v Transnet Ltd.***[52]

[75.] It is correct that this low-level test is used in applications for attachment or arrest to found or confirm jurisdiction,[53] however, in the present matter, we are concerned with a security arrest in terms of s 5(3) of the Admiralty Act.[54]

[76.] Whilst the fact that the merits will be considered at a later stage is said to provide justification for the low-level test in applications to found or confirm jurisdiction, it is not relevant to the consideration of an application for a security arrest (and by parity of reasoning, an <u>increase</u> in security) where an arrest is not aimed at establishing jurisdiction but at obtaining final relief in the

---

[46] ***The NYK Isabel*** *supra* par 46.
[47] *Ibid*.
[48] *Ibid.*
[49] ***Imperial Marine Co v MV Pasquale Della Gatta ('MV Pasquale')*** [2012] 1 All SA 491 (SCA) par 19.
[50] *Ibid.*
[51] The test was given expression in ***Bradbury Gretorex Co (Colonial) v Standing Trading Co (Pty) Ltd*** 1953 (3) SA 529 (W) at 533D-E as follows, *'The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even when the probabilities are against him, the requirement would still be satisfied. It is only where it is quite clear that he has no action, or cannot succeed than an attachment should be refused or discharged on the ground here in question.'*
[52] ***MT Tigr: Owners of the MT Tigr v Transnet Ltd*** 1998 (3) SA 861 (SCA) at 868B-H.
[53] ***Hülse-Reutter v and others v Gödde*** [2002] 2 All SA 211 (SCA) par 12.
[54] By order of Makaula J on 18th August 2023.

form of an order that security be provided for the outcome of proceedings in another forum, usually in another jurisdiction.[55]

[77.] For this reason, I found the low-level test not to be of application. The next question then arises, how is the court in this instance to determine whether a prima facie case has been made?

[78.] Guidance is obtained in ***Imperial Marine Co v MV Pasquale Della Gatta***[56] ***('MV Pasquale')*** where Wallis JA explained that it is inappropriate for the court to shut its eyes to admissible and relevant evidence that is not and cannot be disputed[57] and *'where the applicant asks the court to draw factual inferences from the evidence they must be inferences that can reasonably be drawn from it, even if they need not be the only possible inferences from that evidence.'*[58] If they are tenuous or far-reached the onus is not discharged. Second, the drawing of inferences from the facts must be based on the proven facts and not matters of speculation.[59]

[79.] On the facts, the Applicant seeks increased security for the bunker claim. To this end, the Applicant has sought to amend its claim submissions in the London arbitration.[60]

[80.] Plainly, the security already furnished is insufficient as the bunker claim had not yet crystallised and no quantifiable loss had been incurred. This fact is consistent with the timeline. The settlement of the claim with the contractual suppliers took place well after the provision of security on 22nd August 2023.

---

[55] ***Imperial Marine Co v MV Pasquale Della Gatta*** [2012] 1 All SA 491 (SCA) par 23.
[56] *Ibid* par 23.
[57] *Ibid* par 24.
[58] *Ibid.*
[59] *Ibid.*
[60] This proposed amended claim submission is an annexure to the founding affidavit.

[81.] It was for this reason that the Applicant expressly reserved its rights in the arrest application to pursue this application for increased security if such loss materialised.

[82.] At the time the Respondents furnished security, it was aware that the potential unpaid bunker claim may form part and parcel of the London arbitration proceedings, once that claim crystallised.[61] This is borne out of the express wording of the Gard letter of undertaking dated 22nd August 2023.[62] As such I am not persuaded that this was a stratagem by the Applicant to seek increased security owing to deficiencies in the initial claim.

[83.] In turning to the relevant provisions of the Charter Party, and at least of a prima facie basis, I am satisfied that the Applicant has established that PBL-Belize improperly allowed a *lien* to be created over the Ship Concerned.[63] Moreover, it was an obligation on the charterer (being PBL-Belize) to pay for all bunkers.[64] The relevant clauses have been dealt with above.

[84.] Again, the Respondents attack this claim on several grounds. I have dealt with the settlement of the claim, which I believe was appropriate in the circumstances.

[85.] The Respondents contend that PBL-Belize is not associated or related to the Respondents. The difficulty with that submission is that this court has already found an association by virtue of the security arrest.[65] Although there is a

---

[61] The Applicant contends that breaches of the Charter Party are valid claims as a matter of English law. This allegation is not directly challenged by the Respondents.

[62] The letter of undertaking by Gard Limited reads in part *'…for breaches of the Charter Party for alleged failure to pay outstanding hire as well as claims for a declaration and/or indemnity in respect of alleged breaches of the aforesaid Charter Party for allegedly failing to pay for bunkers supplied to the vessel and allegedly improperly allowing a lien to be created over the vessel, which claim remains subject to crystallization and in terms of which the right to obtain top-up security is strictly reserved.'*

[63] Clause 23 of the Charter Party reads *'The charterers will not directly or indirectly suffer, nor permit to be continued, any lien or encumbrance, which might have priority over the title and interest of the owners of the vessel. The charterers undertake that during the period of this Charter Party, they will not procure any supplies or necessaries or services, including any port expenses or bunkers, on the credit of the Owners or in the Owners' time.'*

[64] Clause 7 of the Charter Party.

[65] A security arrest having been ordered in terms of s 5(3) of the Admiralty Act.

setting aside application pending (the main application), the association presently stands.

[86.] The Respondents contend that the bunkers were supplied to a third party, AUM Scrap and Metals Waste Trading LLC, and not PBL-Belize. Ultimately, the bunker stem took place at a time when PBL-Belize was the charterer of the Ship Concerned in terms of the fixed term Charter Party. Insofar as PBL-Belize may have delegated the performance of the bunker stem and payment thereof to a third party, this aspect is more appropriately dealt with in the London proceedings. So too are the various challenges to the settlement of the bunkers claim.

[87.] Accordingly, I am satisfied that in line with the guidelines set out in ***MV Pasquale***, there is sufficient evidence on the papers to establish on a prima facie basis that the Applicant has a claim for increased security against the Respondents.[66]

[88.] I now turn to the second requirement contained in s 5(2)(d) of the Admiralty Act.[67]

(c) <u>A genuine and reasonable need for security</u>

[89.] The Applicant must show a genuine and reasonable need for security.[68] The question concerns whether there is a likelihood that an Applicant for security will be paid if it is successful in obtaining an order for costs or in pursuing its claim.[69]

---

[66] Or in the words of Wallis JA in ***The NYK Isabel*** *supra* par 59 the claim *'is largely speculative or had limited prospects of success'.*

[67] Courts have been warned not to invert or conflate these two independent inquiries, as they deal with separate issues. The latter requirement being dependent on the former - ***The NYK Isabel*** *supra* par 54.

[68] ***The NYK Isabel*** *supra* par 46.

[69] ***The NYK Isabel*** *supra* par 54. Or put differently, the purpose of giving security is to make available assets with which a judgment creditor can satisfy a judgment – ***Zygos Corporation v Salen Rederierna AB ('Zygos')*** 1984 (4) 444 (CPD) at 461E.

[90.] The Applicant's deponent makes the following allegations in its founding affidavit[70] in support of a genuine and reasonable need for increased security:

[90.1.] PBL-Belize is a special purpose vehicle incorporated in Belize, being a jurisdiction with an opaque history.[71]

[90.2.] The Applicant has requested the financial records of PBL-Belize which have not been provided. The Applicant has no form of comfort that PBL-Belize's financial position is such that it can satisfy an arbitral award.

[90.3.] Based on a Seasearcher company report,[72] PBL-Belize is not a ship owning entity and has no identifiable assets.

[90.4.] Despite several demands, PBL-Belize has failed to secure the Applicant's claim and/or the requested increased security.

[90.5.] Despite the arrest of Tai Harmony, PBL-Belize has failed to take any steps to procure the release of the vessel.[73]

[91.] The Respondents' answer to these direct assertions are noticeably thin. Other than to repeat that a lack of association forms the subject matter of the main application, the allegations are not contradicted.

[92.] The aspect of the association will be determined at the main hearing. If the Respondents are successful, their security will lapse.

---

[70] Which averments are mirrored in the arrest application and unchallenged by the Respondents in the main application.
[71] According to the Applicant, very little information regarding the ownership structure of PBL-Belize is available on publicly available sources. This is because Belize is a notoriously opaque registry in terms of which ownership and management of any company registered in Belize is not publicly accessible.
[72] Which report is attached to the application.
[73] The order which effectively found the Tai Harmony to be an Associated Ship of PBL-Belize is the subject-matter of the pending main application.

[93.] The reasons advanced by the Applicant for the increased security, without much dispute from the Respondents, appear to be plausible and sound.

[94.] As explained above, the security already provided is insufficient. In the absence of increased security, there appears to be little prospect of the Applicant obtaining payment of its claims if successful.

[95.] I do not believe that there is another forum that would be better placed to determine this application, given that this court has already ordered the arrest and will imminently hear the main application.[74] Nor do I find that an alternative or less disruptive route was available to the Applicant in pursuing this relief.[75] It bears repeating that the Applicant's request to PBL-Belize and the Respondents for indemnification for this claim was resisted.

[96.] Accordingly, and on a balance of probabilities, the Applicant is found to have established the requirement of a genuine and reasonable need for such security. [76]

[97.] Beyond these two requirements,[77] a court should not be constrained by a formulaic approach to the exercise of its discretion and is called upon to weigh up all relevant factors and reach a conclusion which is in accordance with the interests of justice.[78]

[98.] In this regard, I have had regard to principles of judicial comity and its role in an admiralty setting, as well as the prospects of the Applicant's claim before the London arbitration and the main application.[79] Weighing these factors, it

---

[74] ***The NYK Isabel*** *supra* par 54.
[75] ***The NYK Isabel*** *supra* par 54.
[76] In ***MV Ainaftis*** *supra* par 20.
[77] Contained in s 5(2)(d) of the Admiralty Act.
[78] ***The NYK Isabel*** *supra* par 51.
[79] Guidance was obtained from ***The NYK Isabel*** *supra* par 58 to 62.

seems to me that the overall interests of justice point towards the granting of the relief.[80]

Quantum

[99.] The quantum sought by the Applicant is comprised of the following amounts which are all motivated on affidavit:

[99.1.] USD364 948.50 (the settlement figure plus legal costs incurred in dealing with and reaching the settlement).[81]

[99.2.] USD38 060 (interest)[82]

[99.3.] USD32 500 (legal costs to be incurred in the London proceeding).[83]

TOTAL USD435 508.50.

[100.] On the papers before me, there is nothing to challenge the computation and quantification of the claim. However, in argument, Mr Cooke contended that the quantum should be limited to the value of the *res* (being the value of the Tai Harmony).[84] There is nothing before me on what this amount would be.

---

[80] ***The NYK Isabel*** *supra* par 62.
[81] This amount is claimed in the amended claim submissions.
[82] This figures comprises of 5 per cent per annum on the capital amount, compounded quarterly, over a period of 2 years.
[83] Inclusive of the costs in preparing the claim submissions, reply and defence to counterclaim submissions, witness evidence, case management and general care and conduct, preparation for and attending trial. The amount of USD32 500 is a 10 per cent uplift of the aforesaid components set out in the previous estimate of costs which is contained in the founding affidavit in the arrest application.
[84] Prior to its amendment, Admiralty Rule 3(5)(a) read *'…any person desiring to obtain the release of any property from arrest may obtain such release with the consent of the person who caused the said arrest to be effected, or on giving security in a sum representing the amount of the value of the relevant property or the amount of the plaintiff's claim <u>whichever is the lower</u>…'* (my own emphasis).

[101.] In any event, the approach in ***The Zlatni Piasatzi***[85] is now interpreted subject to decision of ***The Alina II***,[86] wherein no mention is made of the quantum of security being subject to such a limitation. The reason to my mind appears to be that s 5(3) of the Admiralty Act, which presently governs the process, no longer contains such a limitation, as opposed to the position at the time of ***The Zlatni Piasatzi***.

[102.] The Applicant is entitled to sufficient security to cover the amount of its claim, together with interest and costs on the basis of its *'reasonably arguable best case'.*[87] Accordingly, and on the basis set out above, I am of the opinion that the amount claimed by the Applicant is properly motivated and appropriate.

Costs

[103.] Lastly, on the aspect of costs, the notice of motion originally sought an order that the Respondents pay the costs on an attorney and client scale. The present circumstances do not warrant a punitive award. Mr Fitzgerald SC, on reflection and correctly in my view, sought an order that the costs of this application be in the cause of main application. I consider this to be appropriate.

The order

In the result the following order will issue:

1. The security currently provided to and held by the Applicant in the Gard Letter of Undertaking dated 22nd August 2023 (the 'Gard LOU') be increased by the amount of USD435 508.50, as additional security for the Applicant's unpaid bunker claim against the Third Respondent, in terms of s 5(2)(d) of the Admiralty Jurisdiction Regulation Act, 105 of 1983 (the 'top-up security').

---

[85] ***The Zlatni Piasatzi*** 1997 (2) AS 569 (C) at 575D-E.
[86] ***MV Alina II (No 2) Transnet v Owner of MV Alina II*** 2011 (6) SA 206 (SCA). See also G Hofmeyr ***Admiralty Jurisdiction Law and Practice in South Africa*** (2012) 2 ed at 226-227 and fn 85.
[87] ***Zygos*** *supra* at 458C-D.

2. The top-up security shall be in the form of either:

2.1. An additional letter of undertaking in the amount of USD435 508.50 in respect of the unpaid bunker claim, issued in favour of the Applicant on the same terms as the Gard LOU; or

2.2. A new letter of undertaking in the increased amount of USD1 311 509.34 (being USD876 000.84 in respect of the unpaid hire claim and USD435 508.50 in respect of the unpaid bunker claim) on the same terms as the Gard LOU, but will replace the Gard LOU.

3. The Respondents are directed to furnish the top-up security to the Applicant within 5 (five) court days of the grant of this order, failing which the Applicant is granted leave, on notice to the Respondents to approach this court on the same papers, duly supplemented for an order setting aside the Second Respondent's application to set aside the arrest of the Tai Harmony and/or such further and alternative relief as this court may be deem appropriate.

4. The costs of this application shall be costs in the cause of the setting aside application.

_____

T ROSSI

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:	Mr Fitzgerald SC Counsel for Applicant Instructed by: Chris Baker and Associates Millard Grange Gqeberha
For the First and Second Respondents:	Mr Cooke Counsel for First and Second Respondents Instructed by: Pagdens Attorneys 18 Castle Hill Central Gqeberha