Case No 332/93

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the appeal of:

BOCIMAR N V

APPELLANT

versus

KOTOR OVERSEAS SHIPPING LTD

RESPONDENT

CORAM: Corbett CJ, Joubert, Goldstone et Nienaber JJA, et Kriegler AJA.

DATES OF HEARING: 22 and 23 November 1993.

DATE WHEN REASONS FOR JUDGMENT HANDED IN: 9 March 1994

REASONS FOR JUDGMENT

/ CORBETT CJ ....

CORBETT CJ:

After the hearing of this appeal on 22 and 23 November 1993 this Court made an order in the following terms:

> "For reasons to be furnished later the appeal is dismissed with costs, such costs to include those occasioned by the employment of two counsel."

Here are the reasons.

The appellant, Bocimar N V ("Bocimar"), a Belgian corporation, carries on business from Antwerp as an operator and charterer of cargo-carrying vessels. On about 31 July 1992 Bocimar concluded a contract with the International Colombia Resources Corporation of Colombia ("Intercor"), a seller and shipper of coal, in terms of which it (Bocimar) undertook to carry a cargo of between

000 and 64 000 metric tons of coal from Puerto Bolivar, Colombia to Rotterdam in the Netherlands. To this end, Bocimar, having chartered the CRNA GORA, nominated it as the vessel to perform this contract of carriage. Intercor is a subsidiary of the Exxon Coal and Minerals Company, of the United States of America.

The CRNA GORA had since 7 April 1992 been registered in Valetta, Malta. Prior to that it had had a Yugoslavian registration. It was owned and controlled by Zeta Ocean Shipping Limited ("Zeta"), a company recently registered in Malta. Of the 500 issued shares in Zeta 499 were owned by Boka Ocean Shipping Corporation ("Boka"), a company registered in Liberia. At all relevant times the controlling shareholders in Boka were individual persons residing in Montenegro, a constituent republic of Yugoslavia. (Incidentally, "Crna Gora" is the Serbo-Croat name for Montenegro: see Encyclopaedia Britannica, sv "Montenegro".)

The CRNA GORA loaded the coal at Puerto Bolivar on about 23 August 1992 and set off for Rotterdam. The vessel arrived off the Hoek van Holland on 7 September 1992, but was refused entry to the port of Rotterdam by reason of certain economic sanctions imposed by the Security Council of the United Nations Organization in respect of the Federal Republic of Yugoslavia (Serbia and Montenegro) and reinforced by a resolution of the European Community. On the same day application was made on behalf of Bocimar and Enerco B V of Holland ("Enerco"), one of the consignees of the cargo of coal, to the District Court of Rotterdam for an order directing the State of the Netherlands to permit the CRNA GORA to enter the port of Rotterdam and to discharge her cargo. The Court refused to grant the order sought. On 9 September 1992 an application for similar relief was made by Zeta, to the President of the District Court, but this was also refused. On 11 September Enerco made

application to the relevant government department for exemption from the regulations whereunder entry of the vessel had been refused. This application was also unsuccessful; as was recourse to an appeal tribunal.

Eventually on 15 or 16 October 1992 for "humanitarian reasons" the CRNA GORA was permitted to enter the port of Rotterdam, but the authorities refused to allow the cargo of coal to be discharged. So matters rested until the Dutch authorities were persuaded that if the cargo was not discharged there was a serious danger that the coal would ignite spontaneously and cause damage to the vessel, ships in the vicinity and harbour installations. The matter was considered by the Security Council sanctions committee which in early December 1992 resolved that, although sanctions prohibited the provision of port services to a vessel such as the CRNA GORA, it would authorize the unloading of the ship's cargo on condition that, inter alia, the

cargo remained under impoundment by the Netherlands authorities for the duration of the sanctions. Pursuant to this resolution the cargo was discharged between 15 and 18 December 1992, impounded by the authorities and stored for Intercor's account. Finally, on about 10 February 1993 and on the application of Zeta the President of the District Court in Rotterdam ordered the release of the cargo. He regarded the cargo, destined for Dutch, Belgian and German consignees, as "neutral" once it had been discharged from the CRNA GORA and held that there was no lawful ground for its detention.

In the meanwhile these events had given rise to legal claims. On the very day that the CRNA GORA was denied entry to Rotterdam harbour Intercor addressed a letter to Bocimar's representatives in Bogota, Colombia holding Bocimar responsible for all costs and damages arising from this decision of the Government of the Netherlands; and this has continued to be its attitude.

Bocimar, in turn, claimed that it was entitled to recover from Zeta whatever amounts might be payable by it to Intercor by virtue of the vessel's failure to proceed without delay to the port of discharge and there to discharge the cargo as required by the charterparty.

On 16 October 1992 Bocimar arrested the CRNA GORA in Rotterdam in order to secure its claim against Zeta. At the same time arrests of the vessel were also effected by three banks, mortgagees of the vessel, in order to secure their interest in the vessel. At the time of the hearing in the Court a quo the vessel was still in the port of Rotterdam under arrest.

On 24 December 1992 Bocimar made application ex parte to the Cape of Good Hope Provincial Division, exercising its Admiralty Jurisdiction in terms of Act 105 of 1983 ("the Act"), for an order under sec 5(3) of the Act for the arrest of the M V KORDUN, then at berth in the port of Saldanha Bay, for the purpose of providing

security for Bocimar's claim against the CRNA GORA and Zeta arising from the events at the port of Rotterdam. In the founding affidavit these events were recounted and the averments made that Bocimar's claim against Zeta was a maritime one, as defined in sec 1(1) of the Act, and that Bocimar would be entitled to enforce such claim by an action in rem against the CRNA GORA if such action were to be instituted in South Africa. The founding affidavit also alleged, and explained the grounds for alleging, that the KORDUN was an "associated ship" as defined in sec 3(7) of the Act and, therefore, one against which an action in rem could be brought in order to enforce Bocimar's aforesaid claim. These grounds, which are common cause, are as follows: the KORDUN is owned by a company known as Kotor Overseas Shipping Limited ("Kotor"), registered in Malta and having the same registered address as Zeta. Of the 500 issued shares in Kotor 499 are owned by Boka, which as I have

indicated owns 499 of the 500 issued shares in Zeta. Kotor and Zeta have the same directors. It is accordingly not disputed that the KORDUN is an associated ship, as defined in sec 3(7)(a)(iii) of the Act.

The founding affidavit also pointed out that the charterparty concerned made provision for the resolution of all disputes arising out of it by reference to arbitration in London. To enforce its claim against Zeta, Bocimar, therefore, had the alternatives of arbitration in London or legal proceedings in Malta, the forum domicilii.

In regard to the claim itself, Bocimar stated that Intercor had not quantified its claim against Bocimar, but at that stage there was the possibility of the cargo of coal becoming commercially useless, resulting in a claim of US $2,6m, the estimated value of the cargo. Bocimar further alleged that it had been advised that the claims of the mortgagee banks against

CRNA GORA amounted to US $6,42m and that these claims would rank ahead of its claim. It thus feared that, despite the arrest of the CRNA GORA, this vessel would not provide sufficient security for its claim. There was, accordingly, a genuine and reasonable need for further security in respect of its claim. This would be afforded, so it was averred, by the arrest of the KORDUN in terms of sec 5(3) of the Act.

The application was heard by Scott J who made an order authorising the arrest of the KORDUN for the purpose of providing security in respect of, inter alia, the claim by Bocimar against the CRNA GORA and/or Zeta for payment of, or indemnity for, all amounts payable by Bocimar to Intercor for all costs, damages and other consequences arising from the decision of the Government of the Netherlands not to permit the CRNA GORA to enter Dutch ports for the purpose of discharging Intercor's cargo, together with interest and costs. It was further

ordered that the KORDUN be released from arrest on security being furnished for any amount which the CRNA GORA and/or Zeta might be ordered to pay to Bocimar by either a competent court in Malta or by any competent arbitration tribunal in London; and that any security furnished to Bocimar in respect of the latter's claims against the CRNA GORA and/or Zeta should, pending the outcome of proceedings in Malta or London, be held as security for any judgment obtained by Bocimar in such proceedings.

This order was duly served and the KORDUN arrested. There has been no security furnished in order to obtain the release of the KORDUN from arrest and as at the date of the hearing of the appeal she was still lying inactive at Saldanha Bay, at very considerable cost to her owners.

On 15 March 1993 Kotor filed an application, citing Bocimar as the respondent, in which it claimed an

order setting aside the arrest of the KORDUN and releasing the vessel from arrest, together with certain alternative relief which need not be detailed. The application, which prompted the filing of fairly voluminous affidavits, was eventually heard by Scott J on 19 May 1993 and three subsequent court days. On 28 May the learned Judge gave judgment and ordered the setting aside of the order of arrest and the release of the vessel, with costs. Bocimar appealed to this Court, with the leave of Scott J.

It is not in dispute that although Kotor was the applicant in the setting-aside proceedings, Bocimar bore the onus of proving that its original application for the arrest of the KORDUN was correctly granted (see Weissglass NO v Savonnerie Establishment 1992 (3) SA 928 (A), at 936 F-G). What an applicant for a security arrest in terms of sec 5(3) of the Act must prove was laid down by this Court in the case of Cargo Laden and

Lately Laden on Board the M V Thalassini AVGI v M V Dimitris 1989 (3) SA 820 (A) - "the Thalassini case". This decision was given in respect of sec 5(3) prior to its amendment by sec 4(d) of Act 87 of 1992 (which came into operation on 7 August 1992), but since the principal alteration effected by the amendment was simply to include the case where the person seeking the arrest has a claim enforceable by an action in personam, the Thalassini case remains an authoritative exposition of what an applicant must establish to achieve the arrest of a ship to provide security. At p 832 I - 833 A Botha JA summed up the position as follows:

> "A claimant applying for an order for the arrest of a ship in terms of s 5(3)(a) for the purpose of obtaining security in respect of a claim which is the subject of contemplated proceedings to be instituted in a foreign forum is required to satisfy the Court (a) that he has a claim enforceable by an action in rem against

> the ship in question or against a ship of which the ship in question is an associated ship; (b) that he has a prima facie case in respect of such a claim, which is prima facie enforceable in the nominated forum or forums of his choice, in the sense explained above; and (c) that he has a genuine and reasonable need for security in respect of the claim."

In view of the amendment of the subsection, requirement (a) should be expanded to include, as an alternative, that he has a claim enforceable by an action in personam against the owner of the ship concerned or against the owner of the ship in relation to which the ship in question is an associated ship. In regard to requirement (b), Botha JA indicated earlier in his judgment (at 831 H-I) what he meant by a prima facie case, viz that the applicant -

> ".... need show no more than that there is evidence which, if accepted, will establish a cause of action."

This was the standard of proof which applied to the establishment of the applicant's claim (enforceable by action either in personam or in rem) and also to the establishment of its enforceability in the nominated forum or fora of the applicant's choice. Botha JA explained (at 832 C):

> "It is necessary to emphasise that an application under s 5(3)(a) is not an appropriate vehicle for obtaining rulings or decisions on issues that would have to be adjudicated upon by the foreign Court hearing the main proceedings."

The Court further held (at 833 A-C) that if an applicant satisfied these requirements he was entitled to an order in terms of sec 5(3) unless the respondent shipowner placed countervailing material before the Court proving that there was a sound reason for not granting the order. In the present case Scott J held that on the

papers Bocimar had established a prima facie case in regard to its cause of action in rem against Zeta and had established, prima facie, that its claim was enforceable in the contemplated fora. Moreover, as I have indicated, it was common cause that the KORDUN was an associated ship as defined in the Act. None of these findings was challenged by Kotor on appeal.

The learned Judge a quo further held that the onus was on Bocimar to establish on a balance of probabilities that it had a genuine and reasonable need for security in respect of its claim. He pointed out that in the ordinary case where the applicant holds no existing security for his claim this requirement would present no difficulty. In the absence of anything to the contrary, the natural inference would be that there is a need for security. Where, on the other hand, there has already been an arrest of some other vessel and what is sought is additional security, then this inference

does not really arise and in such a case it becomes necessary to consider the adequacy or otherwise of the security already held.

Applying the aforementioned standard of proof, the Judge a quo found that Bocimar had not shown on a balance of probabilities that the security furnished by the arrest of the CRNA GORA was inadequate; and that, accordingly, it had not established a genuine and reasonable need for the security to be provided by the arrest of the KORDUN.

The main point taken by appellant's counsel on appeal was that Scott J erred in placing upon Bocimar the onus of proving the need for security on a balance of probabilities: that it was sufficient if an applicant under sec 5(3) established prima facie that he has a genuine and reasonable need for security. Counsel explained that by this he meant the same standard of proof as that required to establish the applicant's cause

of action against the party whose ship he seeks to attach - as defined by Botha JA in the Thalassini case, supra. Counsel argued, in the Court below and before this Court, that in terms of the Thalassini decision the applicant's claim, including the quantum thereof, had merely to be established prima facie, and that, therefore, the need for security should be proved on a similar basis.

It seems to me that the correct starting-point in this inquiry as to onus is the general principle that in a civil case an applicant (or plaintiff) is generally required to establish the ingredients of his cause of action upon a balance of probabilities. One of the ingredients of a case for the arrest of property under sec 5(3) of the Act is a genuine and reasonable need for the security to be provided by the arrest. It is, therefore, logical that the applicant for the arrest should be required to establish this need on a balance of probabilities. It is true that in the Thalassini case

this Court laid down a less stringent standard of proof, viz a prima facie case (in the above-defined sense), with reference to the establishment of the applicant's claim and its enforceability in the nominated forum, but this was because of the consideration that these were issues which would have to be adjudicated upon in the forum hearing the main action. This rendered an application under sec 5(3) an inappropriate vehicle for obtaining rulings or decisions upon such issues. In my view, there is no good reason to extend this principle of a prima facie case to matters relating exclusively to whether the applicant has made out a good cause of action for arrest under sec 5(3), a matter which would not arise for decision in the main action.

It is clear that an applicant who seeks to arrest an associated ship in terms of sec 3(4), read with sees 3(6) and 3(7), is required to establish that the vessel in question is an associated ship on a balance of

probabilities (see Transgroup Shipping SA (Pty) Ltd v Owners of MV KYOJU MARU 1984 (4) SA 210 (D), at 214 I; Zygos Corporation v Salen Rederierna A B 1985 (2) SA 486 (C) , at 497 A-B) . The same rule as to standard of proof would apply to an application to arrest an associated ship to provide security in terms of sec 5(3). Similarly it has been held that in applications for the attachment of property to found or confirm jurisdiction, either under the common law or in terms of sec 3(2)(b) of the Act, the onus is upon the applicant to prove on a balance of probabilities that the property to be attached belongs to the respondent (Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others 1976 (4) SA 464 (A), at 489 B-C; Sunnyface Marine Ltd v Hitoroy Ltd (Trans Orient Steel Ltd and Another Intervening); Sunnyface Marine Ltd v Great River Shipping Inc 1992 (2) SA 653 (C); Rosenberg and Another v Mbanga and Others (Azaminle Liquor (Pty) Ltd Intervening) 1992 (4) SA 331

(E), at 335 E - 336 D). The same rule would apply to applications to arrest in terms of secs 3(4), (5) and (6) and 5(3) of the Act. This was not in dispute. Like the question whether there is a genuine and reasonable need for security, these are matters relating exclusively to whether the applicant has made out a good cause of action for arrest and, in my view, the same rule as to onus should apply to them all.

As was rightly emphasized by Didcott J in Kataqum Wholesale Commodities Co Ltd v The M V Paz 1984 (3) SA 261 (N), at 269 H -

> "It is a serious business to attach a ship. To stop or delay its departure from one of our ports, to interrupt its voyage for longer than the period it was due to remain, can have and usually has consequences which are commercially damaging to its owner or charterer, not to mention those who are relying upon its arrival at other ports to load or discharge cargo. Especially when the

> attachment is sought ex parte, as can be and almost always is done, the Court must therefore be given sufficient information to show that a measure with results so harmful to others is nevertheless necessary for the protection of the applicant's legitimate interests."

As a matter of policy, therefore, it seems to me that there should be no deviation from the normal standard of proof, i e balance of probabilities, when it comes to the question whether an applicant under sec 5(3) has established a genuine and reasonable need for security.

It was submitted by appellant's counsel that had this Court intended in the Thalassini case (supra) to lay down that an applicant under sec 5(3) must satisfy the Court on a balance of probabilities that he needs security in respect of his claim, it would have been unnecessary to have required him to show that his need for security was both "genuine and reasonable"; for

having established his need for security on a balance of probabilities the applicant would thereby of necessity also have established that his need was genuine and reasonable. Accordingly it must be inferred, so the argument ran, that this Court did not intend that this need should be established on a balance of probabilities. There is, in my view, no substance in this argument. The criterion is that the applicant's need for security must be genuine and reasonable. The onus is upon him to establish this; and in so far as the discharge of this onus involves matters of fact these must be proved by him upon a balance of probabilities. The question of the standard of proof in relation to the need for security did not arise for decision in the Thalassini case. To the extent that any inference can be drawn from what was stated in the judgment of Botha JA at 831 E to 833 A, it seems to me that the use of the expression prima facie case only in relation to the

applicant's claim in the main case and its enforceability in the nominated forum is an indication that in other respects the normal civil onus was to apply.

Appellant's counsel also stressed the difficulties of proving a need for security where there is an existing security since it is then necessary to establish the value of the existing security, the amount of prior claims against it and thus the amount potentially available to satisfy the applicant's claim. He argued that these difficulties militated against the view that proof on a balance of probabilities was required. But, as counsel was constrained to concede, an application under sec 5(3) where there is an existing security is an unusual case - in fact no precedent for it could be found - and the rule must be the same, whether there be an existing security or not. The normal case where there is no existing security does not pose these difficulties; and if an applicant who already holds

security wishes to obtain additional security, then he must be prepared to establish the matters referred to on a balance of probabilities.

In support of his argument that the applicant need only prove a prima facie case (in the above-defined sense) with reference to his need for security, appellant's counsel referred us to three English cases: The "Moschanthy" [1971] 1 Lloyd's Rep. 37; The "Polo II" [1977] 2 Lloyd's Rep. 115; Greenmar Navigation Ltd v Owners of Ship "Bazias 3" and "Bazias 4" and Sally Line Ltd [1993] 1 Lloyd's Rep. 101. These cases establish the principle in English law that where a vessel has been arrested in an action in rem or to provide security for an arbitration claim, the vessel will be released on provision of sufficient security to cover the amount of the claim, interest and costs on the basis of the plaintiff's "reasonably arguable best case". This test was accepted and applied by Friedman J in Zygos

Corporation v Salen Rederierna AB 1984 (4) SA 444 (C), at

457 C - E. In my opinion, counsel's reliance on these cases is misplaced. The principle which they establish postulates that a valid arrest has taken place and it deals with the quantum of security to be furnished to secure the release of the vessel. In the case under consideration one is dealing with one of the requirements to be established in order to found a valid arrest. In any event, I am not persuaded that the "reasonably arguable best case" test excludes or is incompatible with proof upon a balance of probabilities. And here I would point out that in applying this test and assessing the quantum of the claims in the Zygos case (1984) Friedman J seems to have made the probabilities his criterion (see particularly 1984 (4) SA 444 (C), at 458 E and 459 F).

Appellant's counsel also drew attention to the provisions of sec 5(4), which, he argued, constituted a safeguard indicating that the Legislature contemplated

that the requirements of sec 5(3) (a) would be satisfied

on a prima facie basis only. Sec 5(4) reads:

> "Any person who makes an excessive claim or requires excessive security or without reasonable and probable cause obtains the arrest of property or an order of court, shall be liable to any person suffering loss or damage as a result thereof for that loss or damage."

This is not the occasion for a consideration of the meaning and scope of sec 5(4). Whatever that may be, it is, in my view, a non sequitur to say that because of this safeguard the lesser onus of a prima facie case was intended as far as the need for security under sec 5(3) is concerned. Sec 5(4) would seem to apply where the standard of proof is admittedly merely a prima facie case, e g the applicant's claim or the quantum thereof, and also where the standard of proof is unquestionably on a balance of probabilities, e g ownership of the property

arrested or the fact that the vessel arrested is an associated ship. The fact that on the papers an applicant may establish a balance of probabilities in his favour would not necessarily preclude the respondent from showing subsequently that he did not have reasonable and probable cause, e g where his allegations were unfounded or based on false evidence. Moreover, it would seem that sec 5(4) would apply to, inter alia, orders of arrest obtained ex parte where the probabilities are assessed on the applicant's evidence alone.

For these reasons I hold that the Court a quo correctly found that Bocimar had to establish on a balance of probabilities that its need for additional security was genuine and reasonable. And I turn now to whether, applying that test, Bocimar proved its case on the papers before the Court.

In order to show a genuine and reasonable need for security provided by the arrest of the KORDUN Bocimar

had to establish that the arrest of the CRNA GORA provided no or inadequate security for its claim.

Bocimar's first argument (in logical order) was that the CRNA GORA provided no security in that in terms of United Nations resolution 820 of 1993 the Netherlands Government was obliged to impound the CRNA GORA; that the probabilities were that the Dutch Government would carry out this obligation; and that once impoundment was effected the vessel could not be sold in order to satisfy claims against it.

Resolution 820 was adopted by the Security Council on 17 April 1993. In terms of paras 24 and 25 of that resolution the Council decided (I quote only the relevant portions) -

> "24 ....that all States shall impound all
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> vessels.................in their territories in which
>
> a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia

(Serbia and Montenegro) and that these vessels................may be forfeit to the seizing State upon a determination that they have been in violation of resolutions 713 (1991), 757 (1992), 787 (1992) or the present resolution.

25 ....that all States shall detain pending investigation all vessels....found in their territories and suspected of having violated or being in violation of [the same resolutions as listed in par 24] and that, upon a determination that they have been in violation, such vessels.......................................shall be impounded and, where appropriate, they and their cargoes may be forfeit to the detaining State."

Mr Hooykaas, Docimar's expert witness on the law of the Netherlands, stated in his first affidavit that in terms of par 24 of resolution 820 the Dutch Government was obliged to impound the CRNA GORA; that such impoundment would take the form of an arrest under the Dutch Code of Criminal Procedure, which would mean

that neither the owners of the vessel nor third parties would be entitled to exercise their rights pending decision on forfeiture of the vessel; and that once impoundment of the vessel had been effected it would not be able to be sold in order to satisfy claims against it.

Mr Cath, Kotor's legal expert, disputed much of this. In his first affidavit he contended that the formal legal basis for the implementation of the United Nations resolution had to be found in the national law of the Netherlands, in this case the Sanctions Act of 1980, read in conjunction with certain other statutes. The Sanctions Act empowers certain ministers of Government, by either general decree or ministerial decree, to take measures to implement decisions or recommendations of organs or organizations established by public international law in relation, inter alia, to shipping. Various decrees had, according to Mr Cath, been issued implement-

ing the Security Council resolutions referred to above, including a decree of 28 April 1993 with reference to resolution 820, but none of these decrees contained any empowerment of Netherlands authorities to impound a vessel or to apply for its forfeiture.

In response to this Mr Hooykaas asserted that it was unnecessary for any Dutch legislation in order to empower the Dutch authorities to impound the CRNA GORA. Scott J found this "bald assertion" in the face of Mr Cath's detailed explanation of the position unconvincing and held that inasmuch as Bocimar bore the onus it could not be accepted. I agree.

Further points made in Mr Cath's affidavit were summed up by Scott J as follows:

> "Reverting again to Mr Cath's affidavit, after referring to the Ministerial Decree of 28 April 1993, he proceeds to deal with the existing Netherlands legislation, in terms of which

> vessels may be impounded or declared forfeited. What is of significance is that he points out that in the event of the competent authorities deciding to impound a vessel or to apply to court for a forfeiture order, any interested party is entitled in terms of article 552 of the Code of Penal Procedure to apply to court for an order protecting his interests. In this regard, Mr Cath referred to a decision of the Netherlands Supreme Court, a copy and translation of which was provided, in which the rights of a mortgagee and the holder of a right of retention in respect of a vessel were preserved by the Court upon forfeiture of the vessel, and he expressed the view that the same would apply in the case of an impoundment under the Civil law at the instance of a creditor. On this issue, too, Mr Hooykaas disagrees with Mr Cath, but with little in the way of elaboration."

Mr Cath further amplified his views in a second affidavit.

On the probabilities it would seem that:

(1) In order for the provisions of resolution 820 to become enforceable law in the Netherlands it was necessary that they be incorporated by decree issued in terms of the Sanctions Act.

(2) A decree of 28 April 1993 was issued in order to implement, inter alia, resolution 820, but neither this nor any prior decree implementing sanctions resolutions empowered the relevant Netherlands authorities to impound a vessel and to obtain its forfeiture.

(3) As at the time of the hearing before Scott J there was no indication that a decree would be issued providing for impoundment and forfeiture.

(4) Even if such a decree were to be issued and impoundment and forfeiture took place the likelihood was that the rights of creditors

would be preserved.

I accordingly agree with the finding of the Court a quo that the United Nations resolutions would not prevent the arrested CRNA GORA providing security for the enforcement of Bocimar's claim.

Accepting, therefore, that the CRNA GORA would provide security for Bocimar's claim, the next question is whether it would constitute adequate security. This depends in turn on (a) what the CRNA GORA would be likely to fetch on a judicial sale; (b) the quantum of the prior claims of the mortgagees, which would determine the amount of free residue available to meet Bocimar's claim; and (c) the quantum of Bocimar's claim. If, taking into account these factors, it appears that the CRNA GORA would provide adequate security, then this would defeat Bocimar's right to arrest the KORDUN; and vice versa. As I have already indicated, the onus was on Bocimar to establish (a) and (b) above on a balance of

probabilities; while, in regard to (c), it was sufficient for Bocimar to place before the Court evidence which, if accepted, would establish what it contended to be the quantum of its claim.

As to (a) above, divergent views were expressed as to the amount which the CRNA GORA would be likely to fetch on a judicial sale. Bocimar's experts valued the vessel at US$7,5m, provided that she was "in class" and in good condition, but contended that this figure would have to be adjusted downwards by reason of the following factors: (i) because the CRNA GORA had gone out of class during her arrest, the cost of bringing her into class would have to be taken into account; (ii) judicial sales generally do not produce prices reflective of true market value; and (iii) the vessel's former Yugoslavian ownership would adversely affect the amount realised at a judicial sale. Motor's experts, on the other hand, valued the vessel at between US$Bm and US$8,7m, disputed

 the

validity of factors (ii) and (iii) above and minimized the cost of putting the vessel back in class.

After carefully reviewing the evidence Scott J stated:

> "It follows, from what I have said, that the contention advanced by Bocimar that the 'Crna Gora' if sold at a judicial sale in Rotterdam would realise substantially less than US$7.5m, is not only disputed but, on the contrary, a cogent case has been made out by Kotor that when sold in execution the vessel is likely to realise a price in the region of US$8m or wore."

Later in his judgment the learned Judge worked on the basis of a realisable value of the CRNA GORA "in the region of US$8m". I have no quarrel with this finding. I am satisfied that Bocimar has certainly not shown that on the probabilities the realisable value of the vessel is substantially less than US$8m. It is not necessary

review the evidence, as I understood appellant's counsel to concede this.

As to (b) above, viz the quantum of the mortgagee's claims, there is virtually no dispute. Kotor's attorney annexed to one of his affidavits a statement emanating from the agent for the mortgagees dated 13 May 1993 in which the amount then owing to the mortgagees was stated to be:

" (a) Principal amount outstanding $4 583 333,31

(b) Interest due $ 60 091,59."

These amounts total US$4 643 425,90. The free residue would thus be likely to be of the order of US$3,35m.

Turning to (c) above, the quantum of Bocimar's claim, the Judge a quo, after a full consideration of the evidence, assessed Bocimar's claim at "no more than" US$2 615 957. On this basis there was clearly sufficient free residue to meet the claim in full.

Respondent's counsel criticized this assessment, more particularly a finding that Bocimar had established prima facie that it was entitled to interest in the sum of R385 000. I am inclined to think that this criticism is well-founded, but in view of the substantial free residue which even this assessment produces, it is not necessary to rule thereon.

For these reasons I agree that Bocimar failed to establish (i) that the security provided by the arrest of the CRNA GORA was inadequate and, therefore, (ii) that there was a genuine and reasonable need for the KORDUN to be arrested to provide additional security.

Finally, there was appellant's application that in the event of the Court coming to this conclusion, it should not set the arrest aside but should direct that oral evidence be heard. The Judge a quo refused to exercise his discretion to order that oral evidence be heard. On appeal it was argued that he erred in so

doing.

In giving his reasons for this decision Scott J stated:

> "The present proceedings are clearly interlocutory. The outcome will have no final and definitive effect on the main action (cf South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 549 G). That main action is to be heard in a foreign jurisdiction. The parties are peregrines and the dispute between them has nothing to do with this country. Applications for security in terms of section 5(3) (a) of the Act are by their very nature inherently urgent. Unless security is put up pending the outcome of the application, the ship must remain under arrest. As was observed by Didcott J in Katagum Wholesale Commodities v The M V Paz, supra, at 269 H:
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> > [The judgment then quoted portion of the passage from the judgment of Didcott J already cited above and continued.]

> In the present case he 'Kordun' has been tied up in Saldanha Bay since 24 December 1992 at a cost, according to the evidence, of something like US$5 000 per day. If I were to direct the hearing of oral evidence, witnesses would have to come from as far afield as the Netherlands. What would follow would be inevitably something in the nature of a mini-trial on an issue which, as I have said, will have no final and definitive effect on the main action. The delay occasioned by such a hearing could be inordinate.
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> No doubt, in appropriate cases, the Court might exercise its discretion to direct the hearing of oral evidence, but I do not consider this to be such a case. I should also add that I am unpersuaded that the balance of probabilities would be materially disturbed by oral evidence."

I readily endorse these views. Moreover, there are, in my opinion, further considerations which persuade me that the learned Judge correctly exercised the discretion vested in him.

42 It would seem that in the Court a quo Bocimar's counsel simply applied informally and non-specifically for the hearing of oral evidence, at the end of his argument on the merits, in the event of the Court holding that Bocimar had failed on the papers to establish a genuine and reasonable need for security. No indication was apparently given of who would be required to give evidence or submit themselves to cross-examination nor was any indication given of what evidence new witnesses would be able to give. In Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A), at 981 D - G, reference was made to "the salutary general rule" that an application to refer a matter to evidence should be made at the outset and not after argument on the merits. It was pointed out that the rule was not an inflexible one and that: in exceptional cases the Court may depart from it. It is, however, a factor to be considered in the present case.

43 In Kalil's case, supra, this Court said, with reference to the discretion to allow oral evidence in the case of an application for a provisional order of winding-up (at 979 H - I):

> "Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of viva voce evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent."

These observations are, in my view, pertinent to applica-

tions generally. In the present case, the probabilities on the affidavits (on those issues where the balance of probabilities is the standard of proof) tend to favour Kotor rather than Bocimar. Moreover, the lack of any specific indication as to what oral evidence Bocimar had in mind increases the difficulty of making a favourable assessment of the prospects of viva voce evidence tipping the balance in favour of Bocimar.

A peculiar feature of arrests granted ex parte under the Act is that pending the final determination of whether an arrest should have been granted the applicant enjoys the relief sought, viz the arrest, in this case, of the vessel in question. This is in contrast to the usual position in applications where the relief is granted only after hearing both parties. As appellant's counsel conceded, this is also a factor to be considered in making an order for the hearing of oral evidence, which will inevitably prolong to a considerable extent

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status quo, viz the arrest of the vessel. Appellant's counsel argued that Kotor could have mitigated the prolonged arrest of the KORDUN by providing security and thus obtaining its release from arrest. But the fact of the matter is that for reasons unknown this has not been done. And, in any event, it costs money to provide security.

It was for these reasons that the order recorded at the beginning of this judgment was made.

M M CORBETT

JOUBERT JA) GOLDSTONE JA) CONCUR NIENABER JA) KRIEGLER AJA)