REPUBLIC OF SOUTH AFRICA

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IN THE SUPREME COURT OF APPEAL OF
SOUTH AFRICA

In the matter between:

THE OWNER OF THE MT'TIGR'

FIRST

APPELLANT

ULTISOL TRANSPORT CONTRACTORS
SECOND APPELLANT
LIMITED and

TRANSNET LIMITED t/a PORTNET

RESPONDANT

BOUYGUES OFFSHORE SA (First Intervening Party)

THE HULL AND MACHINERY

UNDERWRITERS OF THE 'BOS 400' (Second Intervening Party)

CORAM:

HEFER,NIENABER,MARAIS,SCHUTZ et SCOTT JJA

HEARD: 5 May 1998

DELIVERED: 27 May 1998

SCOTT JA:

On 26 June 1996 the barge Bos 400 ran aground and was wrecked at Oude Schip on the west coast of the Cape Peninsula just south of Sandy Bay and not far from Cape Town. She was being towed at the time by the the tug Tigr. The barge was owned by a French company, Bouygues Offshore SA ('Bouygues'). Her insurers were likewise French. The owner of the Tigr was a corporate body (to which I shall refer as 'Caspian') of the Republic of Azerbaijan. She had been time-chartered by Caspian to Ultisol Transport Contractors Ltd ('Ultisol'), a Bermudan company managed from the Netherlands. At the time of the casualty the barge was under tow from the Congo to Cape Town in pursuance of a contract made between Bouygues and Ultisol in the so-called BIMCO Towcon form ('the Towcon') which is apparently recognised internationally and used world- wide.

The loss of the barge has given rise to a spate of litigation both in

South Africa and England. The sole connection with the latter lies in the terms of cl 25 of the Towcon which provides that it is to be construed and governed by English law and that any dispute or difference which may arise out of or in connection with the agreement or the services performed thereunder is to be referred to the High Court of Justice in London. Bouygues has sought to have its claim for damages arising from the loss determined in South Africa. Caspian and Ultisol wish to have the claim determined in England. The motive relates to the marked difference in the statutory provisions of the two countries relating to the limitation of liability for maritime claims. In South Africa the limit is lower than in England but is more easily broken. In England the limitation regime is such that it is seldom avoided.

The respondent in the present appeal is Transnet Limited, trading as Portnet. It is a South African company which in terms of s 3 of the Legal

Succession to the South African Transport Services Act 9 of 1989 is the owner of the harbours of the Republic of South Africa, including Table Bay Harbour at Cape Town. It is in effect the harbour authority for all ports in South Africa and as such controls the entry of all vessels into Table Bay Harbour. Portnet is the defendant in one of two actions instituted by Bouygues and the insurers of the barge as joint plaintiffs in the Cape Provincial Division. (It appears that any claim which the insurers may have is dependent upon that of Bouygues and as nothing turns on the distinction between them it is unnecessary to refer any further to the insurers.) In the action against Portnet (case AC 102/95) it is alleged in the particulars of claim that the loss of the barge was caused by the negligence of Portnet's servants at the port control office at Table Bay Harbour who were at all material times acting in the course and scope of their employment.

On 25 January 1995, and as a consequence of an ex parte application

by Portnet, the Tigr and her bunkers (the latter being the property of Ultisol) were attached to confirm the jurisdiction of the Court over Caspian and Ultisol to enable Portnet to join them as third parties in the action. A rule nisi was issued calling upon them to show cause why the attachments should not be confirmed and why, even in the absence of an attachment, they should not be joined as third parties.

The confirmation of the rule was opposed by Caspian and Ultisol. A number of postponements followed. On 31 July 1996 Bouygues sought leave to intervene in order to have the matter expedited and heard on the semi-urgent roll. On 14 November 1996 Ultisol gave notice that it intended applying at the hearing for the matter to be postponed or alternatively stayed pending the determination of an action instituted by Bouygues in England. Eventually on 23 December 1996, after reserving judgment, Comrie J declined to postpone or stay the matter and confirmed the rule. With the leave of the Court a quo the appellants, Caspian and

Ultisol, appeal to this Court.

For a better understanding of the issues and the context in which they arise it is appropriate to record as briefly as the circumstances permit the litigation which has ensued between the parties both in England and South Africa since the loss of the barge.

The first salvo appears to have been fired on 30 June 1994 when the Tigr was arrested in pursuance of an action in rem instituted by Bouygues in the Cape Provincial Division. This action was subsequently withdrawn but on 25 July 1994 Bouygues obtained ex parte an order in the same Court for the attachment of the Tigr and her bunkers to confirm the jurisdiction of the Court in an action in personam to be instituted against Caspian and Ultisol for damages arising from the loss of the barge. Despite opposition, the order was confirmed on 13 December 1994. (See Bouygues Offshore and Another v Owner of the MT Tigr and Another

1995 (4) SA 49 (C).) An appeal by Ultisol was subsequently dismissed by the Full Bench. (See [See Ultisol Transport Contractors Ltd v Bouygues Offshore and Another 1996 (1) SA 487 (C).)

On 26 January 1995 and in pursuance of the attachments just mentioned Bouygues commenced action in personam (under case no AC 10/95) against Caspian and Ultisol. The action was founded in delict, it being alleged that both defendants had falsely made misrepresentations to Bouygues as to the capacity of the Tigr and that the employees of both had been negligent in relation to the tow.

Caspian filed a special plea in which it invited the Court in terms of s 7 (1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act') to decline to exercise its jurisdiction so as to permit the matter to be determined in England in accordance with the provisions of the Towcon. This plea was

ultimately dismissed by King DJP in a judgment delivered on 16 October 1997.

On 25 May 1995 Bouygues instituted an admiralty action in personam against Caspian and Ultisol in the High Court of Justice in England. The action was for all intents and purposes identical to the action in South Africa under case no AC 10/95. It appears to be common cause that the only reason for Bouygues instituting these proceedings was to avoid Caspian or Ultisol being able to plead prescription under the Towcon in the event of the South African Court declining to exercise jurisdiction.

On 22 June 1995 Ultisol instituted proceedings in the High Court, England, in which it claimed on the basis of cl 25 of the Towcon an injunction restraining Bouygues from continuing with its proceedings against Ultisol in South Africa. In a judgment delivered on 2 February 1996 Mr Justice Clarke granted the injunction subject to an undertaking which is not relevant for present

purposes (see Ultisol Transport Contractors Ltd v Bouygweg Offshore SA and [1996] 2 Lloyd's Rep. 142 (Adm.Ct.)). On 6 October 1995 Ultisol, in addition, launched an application in the Cape Provincial Division in which it sought an order that the Court decline to exercise its jurisdiction in case AC 10/1995. In view, no doubt, of the judgment of Clarke J on 2 February 1995 this application was abandoned and not set down for hearing.

In the meantime, on 12 September 1995 Bouygues instituted action against Portnet in the Cape Provincial Division under case AC 102/95. This is the action to which reference has previously been made.

On 5 December 1995 Ultisol commenced a limitation action in the High Court, England, claiming to be entitled to limit its liability under English law to the sum of UK 2573 717,58. On 20 December 1995 Caspian started its own

limitation proceedings in England. Subsequent to the Court a quo giving

judgment and on 30 April 1997 both Ultisol and Caspian were held to be entitled to limit their liability, if any, arising out of the loss of the barge (see Caspian Basin Specialised Emergency Salvage Administration and Another v Bouygues (Offshore SA and Others (No 4) [1997] 2 Lloyd's Rep 507 (Adm.Ct)).

On 25 January 1996 Portnet, before filing its plea in case AC 102/95, obtained ex parte the attachments which were subsequently confirmed by Comrie J on 23 December 1996 and which are the subject matter of the present appeal.

In February 1996 Caspian approached the High Court in England for an anti-suit injunction against Bouygues restraining it from pursuing its action in South Africa under case AC 10/95. The application, which was based primarily on the Himalaya clause in the Towcon, was dismissed by Morrison J on 10 May 1996. (See Bouygues Offshore SA v Caspian Shipping Co and Others (No 2)

[1997]2 Lloyd's Rep 485 (Adm.Ct).)

On 2 August and 22 August 1996 Caspian and Ultisol respectively applied ex parte for and were granted leave to serve third party notices on Portnet in the English action commenced by Bouygues in May 1995. Portnet's subsequent application to have its joinder as a third party set aside was unsuccessful. (See Bouygues Offshore SA v Caspian Shipping Co and Others (No 3) [1997] 2 Lloyd's Rep 493 (Adm.Ct).)

Finally to complete the picture, an application brought by Bouygues in the High Court, England, to have the injunction granted by Clarke J discharged and for the stay of its own action against Caspian and Ultisol in England was dismissed by Walker J on 23 May 1997 (see ouygues Offshore SA v Caspian Shipping Co and Others (No 5) Utisol Transport Contractors Ltd v Bouygues

Offshore SA and Another [1997] 2 Lloyd's Rep 533 (Adm.Ct)).

Against this background I turn to the issues which arise for determination in the present appeal.

The attachments in the present case were effected not, as is usually the case, at the instance of a plaintiff in order to institute an action personam against a defendant, but at the instance of a defendant, in this case Portnet, to enable it to join in the proceedings two peregrini, Caspian and Ultisol, as third parties from whom it claims a contribution or indemnification. In their written heads of argument counsel for Caspian contended that an attachment in such circumstances is neither contemplated nor permitted under the Act and that by reason of the provisions of s 5 (1) of the Act the joinder of peregrinus as a third party required the leave of the court which it would either grant or refuse in the exercise of its discretion. At the commencement of the hearing in this Court, Mr

Wallis conceded quite frankly that upon reflection he considered the contention to be unsound. The concession was correctly made. Section 5(1) affords a court in the exercise of its admiralty jurisdiction a discretion to permit the joinder of a third party 'notwithstanding the fact that he [the third party] is not otherwise amenable to the jurisdiction of the court, whether by reason of the absence of attachment of his property or otherwise'. It is implicit in the section that an attachment would render the third party amenable to the jurisdiction of the court and that an attachment is permissible for such a purpose. Rules 9 (1) and 9 (3) of the admiralty rules in force at the time of the application (now Rules 11 (1) and 11 (3)), read with s 5 (1), make it clear that while a third party may ordinarily be joined as of right by the party seeking the joinder, in three specified instances the leave of the court (in the exercise of its discretion) is required. They are (i) where the joinder is sought after the close of pleadings, (ii) where the claim against the

third party is not a maritime claim and (iii) where the third party is not otherwise .

amenable to the jurisdiction of the court.

In the present case the attachment of the Tigr and her bunkers would

have rendered Caspian and Ultisol amenable to the jurisdiction of the Court.

Portnet's claim against Caspian and Ultisol is for a contribution or indemnification

as joint wrongdoers within the meaning of the Apportionment of Damages Act 34

of 1956 in relation to the claim of Bouygues against Portnet. Such a claim is a

maritime claim within the meaning of s 1 (1) (ff) of the Act. It is not in dispute

that Portnet purported to join Caspian and Ultisol as third parties prior to the close

of pleadings in case AC 102/95. As was pointed out by this Court in Longman

Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty)Ltd 1990 (2) SA

906 (A) at 914 E- G, once a party (in that case, an incola plaintiff) has satisfied

the requirements for an attachment it is entitled to an attachment order and the

court has no discretion to refuse it. From this it follows that should it be found that those requirements were satisfied in the present case Portnet would have been entitled as of right to an attachment order and upon effecting the attachment would have been entitled as of right to join Caspian and Ultisol as third parties in the action.

On behalf of Caspian it was argued that Portnet had failed to satisfy two of the requirements in law for the attachments. The first was the need to show a prima facie cause of action; the second was the need to show that the subject matter of the attachment had at least some value, however small. I deal with each in turn.

The requirement of a prima facie cause of action in relation to an attachment fundandam vel conformandam jurisdictionem at common law has been consistently held to be that an applicant need show no more than that there

is evidence which, if accepted, will establish a cause of action (Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd 1953 (3) SA 529 (W) at 533 C - D). This test has been applied not only in relation to attachments to found or confirm jurisdiction (as extended by s 4 (4) (a)) at the instance of prospective plaintiffs in terms of s 3 (2) (b) of the Act but also to arrests at the instance of prospective plaintiffs in terms of s 3 (5) of the Act and to so-called 'security arrests' in terms of s 5 (3) (a). (See eg Weissglass NO v Savonnerie Establishment 1992 (3) SA 928 (A) at 936 E - H); Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris 1989 (3) SA 820 (A) at 831 G - 832 B; Bocimar NV v Kotor Overseas Shipping Ltd 1994 (2) SA 563 (A) at 579 E.)

Although recognizing the exceptional nature of the remedy and the need for caution (see eg Ex Parte Acrow Engineers (Pty) Ltd 1953 (2) 319 (T) at 321 G - H) as well as the far-reaching consequences of arresting or attaching

property such as a ship (see the remarks of Didcott J in Katagum Wholesale Commodities Co Ltd v The MV Paz 1984 (3) SA 261 (N) at 2169 H and cited with approval by Corbett CJ in the Bocimar NV case (supra) at 581 G) the courts have continued to give effect to what was said by Steyn J in the Bradbury Greforax Co case supra at 533 D - E:

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> 'The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where 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, that an attachment should be refused or discharged on the ground here in question.'

In terms of s 6(3) of the Act a court in the exercise of its admiralty jurisdiction has a discretion to admit hearsay evidence. In admiralty cases the evidence tendered and accepted by the courts for the purpose of establishing a prima facie cause of action is almost invariably of a hearsay nature. Even 'double hearsay' evidence from an undisclosed source has been accepted for this purpose (see the MF

Thalassini Avgi case supra at 841 C - 843 D). It follows that the level of the test applied is generally speaking a low one even in the type of applications for attachment or arrest to which reference has just been made.

In the present case, of course, we are concerned with an attachment at the instance of a defendant so as to enable it to join third parties to the action. The position of such a defendant is different from that of an applicant who is a prospective plaintiff seeking an attachment order or arrest. In the case of the latter, success in the main action is dependent solely on the establishment of a cause of action against the defendant. In the case of the former, success in the main action against the third parties is dependent on it being established that they are joint wrongdoers together with the defendant. This involves two elements; first, that the third parties are liable to the plaintiff and second, that the defendant is also liable to the plaintiff. Counsel for Caspian submitted that a defendant

19 seeking an attachment order against a prospective third party was obliged to, establish a prima facie case in the sense referred to above in relation to both elements. He conceded that in the present case Portnet had established a prima facie case in relation to the first but contended that it had failed to do so in relation to the second. He argued that far from adducing evidence which, if accepted, would show that Portnet was liable to Bouygues, the attorney representing Portnet, Mr Steyn, had on more than one occasion in his founding affidavit in support of the application denied that Portnet was liable to Bouygues. He submitted further that the allegations contained in the particulars of claim filed by Bouygues and annexed to Mr Steyn's affidavit were of no assistance to Portnet as these were not made under oath.

In the Court a quo Comrie J considered it 'somewhat illogical and unfair that Portnet should be required to adduce sworn evidence against itself on

the issue of its liability to Bouygues' and pointed out that such evidence might in

practice not be available to it. Nonetheless the learned judge found it unnecessary to decide the point and instead placed reliance on an affidavit handed in by Portnet's attorney on the morning of the hearing to which, for another purpose, a portion of an affidavit of Mr Dyason who is the attorney acting for Bouygues was annexed and in which certain allegations were made suggesting that Portnet was liable to Bouygues. In this Court counsel for Caspian referred to certain equivocal passages in the extract from Mr Dyason's affidavit and submitted that having regard to Mr Steyn's denial of liability, particularly with regard to the question of causation, a prima facie cause of action against Portnet had not been made out. He submitted further that no allegation was made in the founding papers to the effect that Portnet was liable to Bouygues so as to afford Caspian and Ultisol the opportunity of dealing with it. I shall assume for the purpose of this

judgment that these submissions are correct. The question to be decided therefore is whether a defendant in the position of Portnet is obliged to adduce evidence to establish prima facie that it is liable to the plaintiff before becoming entitled to an attachment order with the object of joining a third party.

Counsel were unable to refer to any case in which an application similar to the one presently in issue was considered, nor have I been able to find one. As I have indicated, the circumstances in which the attachment order was sought are very different from those in which attachment orders and arrests are normally sought and in the context of which the requirements of a prima facie case have been considered. It is a common occurrence for a defendant who denies liability to join as a third party a potential joint wrongdoer from whom it will seek a contribution or indemnification in the event of it being found liable despite its denial. The illogicality and unfairness referred to by Comrie J of requiring a

defendant in such circumstances to establish prima facie case against itself would seem obvious, so does the practical difficulty of procuring the evidence required. In response, counsel for Caspian submitted that the difficulty could be obviated by the simple expedient of a defendant seeking the leave of the court to join the peregrinus as a third party in terms of s 5 (1) of the Act, in which case an attachment would be rendered unnecessary. But the purpose of an attachment is not only to found or confirm jurisdiction, it is also to provide an asset in respect of which execution can be levied in the event of judgment being granted in favour of the party seeking the attachment. (See Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd 1977 (4) SA 682 (C) at 697 E - F; Thermo Radiant Oven Was (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A) at 306 B - 307 A; 309 E - F.) What the argument implies therefore is that a defendant in the position of Portnet who wishes to defend the plaintiff's claim against him but also

to join a third party must either obtain and adduce prima facie evidence against

himself or forego the security provided by an attachment. To place a defendant in such a dilemma seems to me to adopt an approach which is both over-technical and unrealistic.

It is true of course that the allegations contained in the particulars of a plaintiff's claim are not made under oath. This is Caspian's objection to reliance being placed upon them for the purpose of Portnet establishing that Bouygues has a prima facie cause of action against it. But, as pointed out above, the level of evidence required to satisfy the test is generally speaking a low one. Once it is accepted that a prima facie cause of action of a plaintiff can be established even on the basis of hearsay evidence it is difficult to appreciate why in the particular circumstances of a defendant who denies liability but who seeks to attach the property of peregrinus in order to join him as a third party, the allegations

contained in the particulars of claim should not suffice to satisfy what I have called the second element of the defendant's cause of action against the third party. If it were to be shown that the claim is excipiable or clearly without substance, the position would be otherwise. But in the absence of such a state of , affairs the distinction between evidence under oath, particularly when founded on hearsay, and allegations contained in pleadings does not, when weighed against the practicalities of the situation, justify in my view a defendant being obliged to produce evidence under oath which, if accepted, would render itself liable to the plaintiff. To hold the contrary would, I think, for all practical purposes preclude a defendant in the position of Portnet from seeking an order for the attachment of the property of a peregrine.

To sum up, in my judgment a defendant who denies liability but who seeks to attach the property of a peregrinus with a view to joining him as a third

party so that in the event of the defendant being held liable a contribution or

indemnification can be claimed from the peregrinus, need not produce evidence under oath which if accepted would establish the defendant's liability to the plaintiff. To the extent that such liability is an element of the defendant's claim against the third party it is sufficient for the defendant to rely on the allegations contained in the plaintiff's particulars of claim. To rebut this element of the defendant's claim the peregrinus would have to show that the plaintiff's particulars of claim are either excipiable or otherwise clearly without substance. As far as the other element of the defendant's claim against the peregrine third party is concerned, viz that the third party is liable to the plaintiff, the defendant would remain obliged in the ordinary way to produce evidence which, if accepted, would establish such liability.

Returning to the present case, evidence was adduced which, if

accepted, would establish that Bouygues has claims in delict against Caspian and Ultisol. As far as Portnet's potential liability to Bouygues is concerned, the particulars of claim filed on behalf of the latter contain detailed allegations of negligence as well as averments of fact in support of those allegations. It was not suggested that the claim was in any way excipiable or without substance. The first ground of attack on the granting of the attachment order must therefore fail.

The second is that the value of the Tigr was such that her attachment provided no security at all for Portnet's claim and accordingly the attachment could not serve to confirm the Court's jurisdiction over Caspian.

The basis for this contention is the following. Because the value of the Tigr is substantially less than the quantum of Bouygues' claim, the security provided by the Tigr would be exhausted by the execution of a judgment in Bouygues' favour in the event of it being successful in its action against Caspian

 in case AC 10/95, and because Portnet's claim against Bouygues in case AC .

102/95 is predicated upon Caspian's liability to Bouygues, it followed that there would be no security left against which Portnet would be able to execute. There is no substance in the point. Reliance was placed by counsel for Caspian on Thermo Radiant Oven Sales (Pty)Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A). The case is no authority for the proposition for which it was cited. There the plaintiff sought to attach a monetary claim which the defendant allegedly had against the plaintiff arising out of the same transaction as that on which the plaintiff based its claim. The success of the plaintiff's claim necessarily involved the negation of the defendant's claim so that in the event of the plaintiff succeeding no debt to the defendant would have been in existence at the time the attachment was sought. It was accordingly held that the attachment order ought not to have been granted. In the present case the value of the Tigr was in the

region of US $1,5 million when the attachment order was granted and served. It is at that stage that the property must have some value. The fact that it may thereafter become valueless will not affect the court's jurisdiction once founded or confirmed by the attachment. (See the Thermo Radiant case supra at 301 E - F; 310 D - F.) In any event, the circumstances in which and the party at whose instance the security will be exhausted is dependent on a number of factors which are unknown at this stage. It follows that on this ground too the appeal must fail.

I turn to Ultisol's appeal. The argument advanced on its behalf is shortly the following. As a consequence of the decision of Clarke J on 2 February 1996 interdicting Bouygues from proceeding against Ultisol in South Africa the latter's liability to the former was to be determined in England. Accordingly, so the argument went, whether Ultisol was a joint wrongdoer with Portnet in relation to the damage suffered by Bouygues or not was not an issue which could be

decided by a South African court because, although Ultisol was sought to be joined by Portnet and not Bouygues, the issue necessarily involved determining whether Ultisol was jointly and severally liable to Bouygues and, by reason of Clarke J's judgment, that was something which a South African court could not do. There is, I think, a short answer. The proposition advanced by counsel is founded on the premise that an injunction by an English court prohibiting Bouygues from proceeding against Ultisol in South Africa has the effect of depriving a South African court of its undoubted jurisdiction to determine at the instance of Portnet whether Ultisol is a joint wrongdoer in relation to the damage suffered by Bouygues. That premise in my view is clearly unsound and the argument must fail.

It follows from the aforegoing that Portnet was entitled as of right to an attachment order and that following the attachment of the Tigr and her bunkers

30 it became entitled to join Caspian and Ultisol as third parties in the action (AC 102/95). In this context therefore the Court a quo correctly held that the question of the exercise of a discretion did not arise. As to that Court's decision to refuse to postpone or stay the application, which did involve the exercise of a discretion, counsel for Ultisol conceded that the decision was not appealable. The concession was correctly made (cf Zweni v Minister of Law and Order 1993 (1) SA 523 (A)).

It follows that considerations relating to the procedural dislocation flowing from the parallel proceedings in England and South Africa are irrelevant to the determination of this appeal.

The appeals of both first appellant (Caspian) and second appellant (Ultisol) are dismissed with costs including the costs of two counsel.

It is recorded that the intervening parties (Bouygues and the underwriters of the Bos 400) have abandoned the costs order made in their favour

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