REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 513/2001

Reportable

In the matter between:

Mv 'IVORY TIRUPATI' First Appellant
CASTERBRIDGE NAVIGATION COMPANY LIMITED Second Appellant

and

BADAN URUSAN LOGISTIK Respondent

CORAM: HEFER AP, SCOTT, FARLAM, CONRADIE JJA et JONES AJA

HEARD: 19 NOVEMBER 2002

DELIVERED: 29 NOVEMBER 2002

JUDGMENT

Shipping – Admiralty Jurisdiction Regulation Act 105 of 1983, ss 3(6) and 3(8) – whether maritime claim based on damage to cargo the same as claim based on judgment given in respect of that damage – letter of undertaking, construction of.

FARLAM JA

[1] This is an appeal from a judgment of Davis J, sitting in the Cape of

Good Hope Provincial Division of the High Court, in which an application brought by the appellants to set aside the arrest of the first appellant was dismissed with costs. The judgment of the court *a quo* has been reported: see 2002(2) SA 407(C).

[2] The first appellant, the 'Ivory Tirupati', was arrested on 11 January 2000 in Cape Town at the instance of the respondent. The action *in rem* instituted by the arrest was for the enforcement, *inter alia*, of a maritime claim arising out of a judgment given in the High Court of the Hong Kong Special Administrative Region, Court of First Instance, on 31 May 1999 in favour of the respondent against the owner of the ship 'Amer Prabha' for payment of US$ 331 322.30. It was alleged by the respondent that the 'Ivory Tirupati' was an associated ship of the 'Amer Prabha' as contemplated by section 3(6) and 3(7)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983, as amended (to which I shall refer in what follows as 'the Act').

[3] Before the judgment on which the respondent's claim against the first appellant vessel was based was given by the Hong Kong Court, the 'Amer Prabha' had been arrested in Singapore at the instance of the respondent in connection with the claim in respect of which the respondent eventually obtained judgment and she was released after a letter of undertaking had been issued to the respondent on 30 October 1997 by Ocean Marine Mutual Insurance Association Ltd (to which I shall refer in what follows as 'Ocean Marine').

[4] The letter of undertaking furnished to the respondent read, as far as is material, as follows:

'SHIP "AMER PRABHA"

VOYAGE KANDLA, INDIA TO JAKARTA, INDONESIA
CARGO 15,254.444 TONNES OF INDIAN RICE
B/L NOS 1/NY AND 2/NY BOTH DATED NEW YORK, N.Y.26 DECEMBER, 1995

CLAIM US $ 331,332,30'

In consideration of the owners of and other persons interested in the cargo referred to above (hereinafter together referred to as the 'Cargo Owners')

consenting to the release from arrest and/or refraining from taking action resulting in the arrest of the above-named ship or any other ship in the same or associated ownership, management or control for the purpose of founding jurisdiction of any claims of the said Cargo Owners concerning the cargo mentioned above, against the above-named ship and/or Casterbridge Navigation Company Limited [the second appellant], the owners thereof and of Cargo Owners refraining from commencing and/or prosecuting legal or arbitration proceedings in respect of the above claims (otherwise than before the Court referred to below) against the said owners, we Ocean Marine Mutual Insurance Association Limited hereby undertake to pay to you on demand such sums as may be adjudged by the Supreme Court of Hong Kong or any appeal thereof or as may be agreed to be recoverable from the above-named ship and/or the owners therefore in respect of the said claims, interests and costs of the Cargo Owners provided that the total of our liability shall not exceed the sum of United States Dollar Three Hundred and Thirty One Thousand Three Hundred and Thirty Two and Thirty Cents (US $ 331, 332.30) plus interest and costs.

And for the consideration aforesaid:-

...

2. We further undertake that we will, within 14 days of the receipt from you of a request so to do, instruct solicitors to accept on behalf of the owners of the above-named ship service of proceedings brought by the Cargo Owners in the Supreme Court of Hong Kong and to file acknowledgement of service thereto.

3. We confirm that the Owners of the above-mentioned claims shall be subject to Hong Kong law and to the exclusive jurisdiction of the Supreme Court of Hong Kong.

...

This undertaking shall be governed by and construed in accordance with English law and we agree to submit to the exclusive jurisdiction of the English Courts for the purpose of any process for the enforcement thereof.

...'

[5] After the Hong Kong Court had given judgment against the owners of

the 'Amer Prabha' on 31 May 1999 the respondent's solicitors sent a formal demand to Ocean Marine's solicitors asking that Ocean Marine effect payment of the judgment amount within fourteen days and stating that should this not be done the respondent would take steps to enforce the judgment.

Ocean Marine did not comply with this demand. It is common cause on the papers that it is in provisional liquidation.

[6] Before the contentions of the appellants are considered it is appropriate to set out the relevant sections of the Act.

Section 1(1) contains a definition of the expression 'maritime claim'. As far as is material it reads as follows:

> '"maritime claim" means any claim for, arising out of or relating to –
>
> ...
>
> (g) loss of or damage to goods ... carried or which ought to have been carried in a ship, whether such claim arises out of any agreement or otherwise;
>
> ...
>
> (aa) any judgment or arbitration award relating to a maritime claim, whether given or made in the Republic or elsewhere;
>
> ...'

As far as is material section 3(6) reads as follows:

> '... [A]n action *in rem*, ... may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.'

Section 3(8) is in the following terms:

> 'Property shall not be arrested and security therefor shall not be given more than once in respect of the same maritime claim by the same claimant.'

[7] The appellants sought the setting aside of the arrest of the first appellant on five main grounds, viz.:

(a) the first appellant was not an associated ship of the 'Amer Prabha', within the meaning of section 3(6) and (7) of the Act;

(b) as the respondent had arrested the 'Amer Prabha' herself in Singapore in connection with its claim and had been given security therefor in order to procure the release of the 'Amer Prabha' from arrest, the respondent was by reason of the provisions of section 3(6) and (8) of the Act not entitled to arrest the first appellant;

(c) the arrest of the first appellant was precluded by the terms of the letter of undertaking given to the respondent to secure the release of the 'Amer Prabha';

(d) the respondent had no right to institute its action *in rem* in this country because it had agreed, in return for receiving the letter of undertaking, to submit its claims to the exclusive jurisdiction of the Supreme Court of Hong Kong.

(e) there could be no arrest of an associated ship where judgment had already been obtained against the ship in respect of which the maritime claim arose, pursuant to an arrest of that ship.

[8] The Court below rejected all the grounds on which the arrest of the first appellant was attacked and, as has been said, dismissed the appellants' application with costs.

[9] The first and fourth grounds of attack, viz that the first appellant is not an associated ship of the 'Amer Prabha' and that the respondent's claim had

been submitted to the exclusive jurisdiction of the Hong Kong Court, were not persisted in on appeal and it is accordingly not necessary to say anything more about them.

[10] The basis for the court *a quo's* decision that the appellants could not rely on section 3 (6) of the Act was that the arrest of the first appellant was not effected in respect of the same maritime claim as the earlier arrest of the 'Amer Prabha'. Pointing to the fact that a claim for 'loss of or damage to goods ... carried or which ought to have been carried in a ship, whether such claim arises out of any agreement or otherwise' is covered by paragraph (g) of the definition of 'maritime claim', while a claim in respect of a judgment relating to a maritime claim falls under paragraph (aa) of the definition, Davis J said that the Act presupposed two separate claims and that the respondent's claim for the enforcement of the Hong Kong judgment was a maritime claim in its own right. He held further that 'although entirely a derivative cause of action [it had] a separate and distinct existence which is recognised expressly by the Act.' (See the reported judgment at 419 A-C.)

[11] Davis J also said (at 418 G) that if he had not been sitting, as he put it, 'in terms of admiralty jurisdiction' the conclusion might well have been different. This was because it had been held in *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) and *Swadif (Pty) Ltd v Dyke NO* 1978(1) SA 928(A) that 'it is artificial to regard a judgment as having, in all circumstances, the effect of a novation'.

[12] Davis J rejected the appellants' arguments based on the provisions of section 3(8) of the Act on two bases: firstly, for the reasons he had given in regard to their section 3(6) argument, because he was satisfied that the first appellant was not arrested in respect of the same maritime claim as the claim which formed the subject matter of the arrest of the 'Amer Prabha', and secondly because, so he held, section 3(8) could not operate because the letter of undertaking given by Ocean Marine to procure the release of the 'Amer Prabha' did not constitute 'security' within the meaning of the subsection. In respect of this second ground the learned judge relied on the decision of Niles-Dunér J sitting in the Durban and Coast Local Division in *The Merak S* [2000] 1 Lloyd's Rep 619(SA Ct). In view of the fact that this decision has since been overruled by this Court (see *The Merak S* 2002(4) SA 273 (SCA)) it was conceded by counsel for the respondent that the second ground relied on by Davis J on this part of the case could not be sustained on appeal.

[13] In respect of the contentions raised by the appellants in regard to the letter of undertaking Davis J held that as the effect of the undertaking

was to preclude the respondent from arresting the 'Amer Prabha' or any other ship in the same or associated ownership, management or control 'for the purpose of founding jurisdiction and/or obtaining security in respect of any claim of the said cargo owners concerning the cargo' the dispute raised by the respondent's claim to enforce its judgment took the dispute outside the scope of the undertaking.

[14] He also held that the respondent could resile from its undertaking not to arrest an associated ship because reciprocity existed between that undertaking and Ocean Marine's obligation to honour the guarantee given by it with the result that on Ocean Marine's failure to pay the judgment on demand the respondent became entitled to arrest the first appellant.

[15] Mr *Hofmeyr,* who appeared together with Mr *MacWilliam* on behalf of the appellants, contended that the respondent's claim on the Hong Kong judgment was the same as the cargo claim on which the Amer Prabha had been arrested in Singapore with the result that the arrest of the first appellant was precluded by both section 3(6) and 3(8) of the Act.

[16] He contended that the reasoning of the court *a quo*, which has been summarised in para [10] above, was erroneous. In developing this argument, he submitted that the prohibition inherent in section 3(6) is a prohibition against the institution of the same action *in rem* twice, once

against the guilty ship (ie the ship in respect of which the maritime claim arose) and also against the associated ship. In deciding whether it is the same action *in rem* which is being instituted more than once one has to have regard to the underlying cause of action and not to the particular maritime claims listed in the definition of maritime claim in section 1(1) which arise from the applicable cause of action. He pointed out that the construction adopted by the court *a quo* leads to a striking anomaly which could never have been intended by the legislature. To demonstrate this he gave a number of examples of which it is only necessary to mention one. A collision at sea usually gives rise to both a maritime claim in terms of paragraph (e) of the definition (damage caused in the collision) and a maritime claim in terms of paragraph (y) thereof (a maritime lien). If the construction adopted by the court *a quo* were correct a party could arrest a ship which has caused damage on the ground that it had a maritime claim as defined in paragraph (e) and then when the ship had been released on the giving of security proceed on the same facts but this time allege that its claim was as defined in paragraph (y).

[17] He conceded that where as in this case a ship is arrested for loss of or damage to cargo (ie in respect of a maritime claim covered by paragraph (g) of the definition) and judgment is thereafter given against the ship on the

claim for which she was arrested, a claim brought on the judgment does not merely result from what amounts to a change of labels as in the hypothetical case mentioned in the previous paragraph because the giving of judgment by a competent court constitutes a new fact which would not have been present when the cargo arrest took place. He contended, however, that in order to decide whether the cause of action is the same one has to look at the effect of this new fact. Relying on *Trust Bank of Africa Ltd v Dhooma*, *supra,* and *Swadif (Pty) Ltd v Dyke NO, supra* he contended that the cause of action relied on was still the same. In particular he relied on the following passage in the *Swadif* judgment (at 944 F-G):

> 'In a case like the present, where the only purpose of taking judgment was to enable the judgment creditor to enforce his right to payment of the debt under the mortgage bond, by means of execution, if need be, it seems realistic, and in accordance with the views of the Roman Dutch writers, to regard the judgment not as novating the obligation under the bond, but rather as strengthening or reinforcing it. The right of action, as Fannin, J, puts it [in *Trust Bank of Africa Ltd v Dhooma*, *supra*], is replaced by the right to execute, *but the enforceable right remains the same.'* (The words I have italicised were those on which Mr *Hofmeyr* particularly relied.)

[18] The same reasoning led, so he contended, to the conclusion that the respondent had breached the prohibition on bringing an action *in rem* against more than one ship in respect of the same claim (which is contained in

section 3(8) of the Act).

[19] As far as the letter of undertaking was concerned it was contended by counsel for the appellants that the respondent was precluded by the terms of the letter of undertaking from arresting the first appellant 'for the purpose of founding jurisdiction and/or obtaining security in respect of any [of its] claims ... concerning the cargo mentioned' in the letter, that the arrest itself had conferred jurisdiction on the court and provided security [*cf The Argun* 2001(3) SA 1230 (SCA) at 1244 E-F] and that the claim, even if a claim based on the Hong Kong judgment was not the same as the cargo claim in respect of which the 'Amer Prabha' had been arrested, was certainly a claim concerning the cargo and therefore covered by the letter.

[20] Relying on the judgment of the English Court of Appeal in *Gore v Van der Lann* [1967] 2 QB 31 (CA), they contended that the second appellant was entitled to an order setting aside the arrest of the first appellant. It was further contended that the fact that Ocean Marine had not honoured its undertaking to pay the Hong Kong judgment did not deprive the appellants of the right to rely on the respondent's obligation under the letter of undertaking not to arrest the first appellant. This was because it was common cause on the papers that the contract contained in the letter of undertaking had not been terminated and the security was accordingly still in place, and furthermore because the appellants were not to blame for Ocean Marine's failure to honour its undertaking: they were not in breach of any obligations under the letter and could accordingly enforce it.

[21] Counsel for the appellants submitted further that the release of the 'Amer Prabha' was to be regarded as having been purchased, that the security given took the place of the ship (see *The Silvergate* 1999(4) SA 405 (SCA) at 422 J – 423 D and the authority there cited) and that the respondent was limited to proceeding against the security – good or bad – and had no further recourse against the ship or an associated ship.

[22] Mr *MacWilliam* developed this submission in the reply. He pointed out that where a ship is arrested and the owners do not enter appearance to defend, judgment is given against the ship and the owners are not liable further than the value of the ship. If it is sold for less than the judgment amount or what is produced from any security given is less than that amount, that is the end of the matter and once again the owners have no further liability.

[23] A further consequence of this, so he contended, was that if, as Davis J found (at 422 D-E), the undertaking was 'a worthless piece of paper' the claim came to an end as effectively as if the 'Amer Prabha' had sunk, because there was no longer a 'guilty ship' in respect of which the first appellant could be said to be an 'associated ship'. All prospect of there being an associated ship or ships for the respondent to arrest ended, so he submitted, when the undertaking which took the place of the Amer Prabha became worthless.

[24] Were the 'Amer Prabha' and the first appellant arrested in respect of the same claim? If this question is answered in the negative then the objections to the arrest based on sections 3(6) and 3(8) will fail.

[25] In my opinion Mr *Hofmeyr*'s criticism of the basis on which this part of the case was decided in the court *a quo* is correct. There is in my view no answer to the point raised by Mr *Hofmeyr* that the court *a quo*'s construction leads to an anomaly which indicates that that construction cannot possibly be correct. I do not agree, however, with Mr *Hofmeyr*'s further submission that the fact that a judgment was given on the cargo claim does not alter the position. The passage in *Swadif, supra*, on which this submission was based (viz, the statement at 944 G that 'the enforceable right remains the same') was, as I shall endeavour to show, obiter and was in conflict with the view of at least one of the Roman Dutch writers to which the Court had referred with approval earlier in the judgment.

[26] In the *Swadif* case a liquidator of a company in liquidation had sought orders (1) rescinding a judgment which had been granted against the company before the liquidation, based on a second bond the company had caused to be registered over its immovable property, for which it had received no value, and (2) cancelling the bond. This Court held that no legal basis had been made out for an order rescinding the judgment and an exception to the particulars of claim in this respect was upheld. As far as the claim for an order cancelling the bond was concerned it was argued on behalf of the excipient that the registration of the bond could not be set aside because the judgment on the bond novated the debt thereon. This argument was rejected and it was held that the effect of the judgment had not been to

novate the obligation under the bond but to strengthen or reinforce it (at 944 F-G).

[27] It was not necessary for the Court to pronounce on the question as to whether the judgment which provided the strengthening or reinforcement (to use the two metaphors employed by the Court) in itself constituted an additional obligation or was somehow absorbed into the original obligation which had been strengthened by such absorption. It follows that the passage relied on by Mr *Hofmeyr* was obiter and not necessary for the decision.

[28] One of the Roman Dutch writers whose views were cited with approval by the Court was Van der Keessel. In commenting in his *Praelectiones Juris Hodierni* on Grotius's *Inleiding,* 3.43.3, he discussed whether Grotius, who had said in 3.43.1 that 'novation takes place when an obligation is released upon the terms that simultaneously another obligation takes its place' (Lee's translation), had been correct in saying in 3.43.3 that a novation may be concluded 'door rechtspleging' (which Lee translates as 'by taking legal proceedings'). Having stated that it was clear that a *novatio necessaria* takes place on *litis contestatio,* Van der Keessel said that it was equally clear that it does not terminate the antecedent obligation or those things that were accessory to it, such as pledges, sureties or interest. He proceeded:

> 'Daarom kan daar twyfel oor die vraag ontstaan of die omskrywing wat in para 1 gegee is by hierdie noodwendige soort [ie *novatio necessaria*] aangepas kan word aangesien daar hier geen kwytskelding van die skuld geskied nie, *hoewel daar boonop 'n nuwe verbintenis aangegaan word.'* (Gonin's translation, my italics.)

[29] There is nothing unusual about an obligation being confirmed or reinforced by the incurrence of another obligation which is in effect an alternative to an antecedent one, such as where a cheque is given in payment of an existing debt without any intention to novate the existing debt.

[30] It is furthermore correct, as Mr *Wallis,* who appeared with Mr *Wragge* for the respondent, contended, that although an original cause of action may continue to exist in a reinforced and strengthened form a judgment (or an arbitration award) may also give rise to a new and independent cause of

action enforceable between the same parties in another court: see *Bulsara v Jordan and Co Ltd (Conshu Ltd)* 1996(1) SA 805(A) at 808I-809B and 811A-B, *EA Gani (Pty) Ltd v Francis* 1984(1) SA 462 (T) at 466B-467A and *Wright v Westelike Provinsie Kelders Bpk,* 2001 (4) SA 1165 (C) at 1175 D-G.

[31] As appears from the decision of Cilliers AJ in *Metequity Ltd NO and Another v Heel* 1997(3) SA 432(W), at 440G to 441I, it is a controversial question as to whether a judgment 'in all circumstances' creates a new and independent debt. What is not controversial, however, is the proposition that a judgment furnishes the judgment creditor with a new cause of action on which he may sue in another court (which is the aspect of the matter with which we are here concerned: see the *Metequity* case, *supra,* at 442B and F; whether the interpretation of the *ratio decidendi* of the *Bulsara* decision, *supra,* contained in the *Metequity* case is correct need not be decided in this matter.)

[32] That a new and independent cause of action enforceable between the same parties in another court came into existence in this case is illustrated by a consideration of the facts which the respondent would have had to prove to obtain judgment in its favour in the action *in rem* against the first appellant, viz:

(a) that the Hong Kong Court had international competence to decide the action against the Amer Prabha;

(b) that the Court's judgment was final and conclusive;

(c) that the judgment was not against public policy; and (possibly)

(d) that the judgment did not contravene the Protection of Businesses Act 99 of 1978.

None of these facts would have had to be proved or could have been proved in the cargo claim case brought against the 'Amer Prabha' in Hong Kong.

[33] For these reasons I am satisfied that the Hong Kong judgment not only strengthened the cargo claim but also gave rise to a new cause of action

enforceable by the respondent in another court against, *inter alios,* the first appellant.

[34] It follows that the claim upon which the arrest of the first appellant was founded was not the same claim as that which formed the subject matter of the arrest of the Amer Prabha and that Mr *Hofmeyr*'s arguments based on section 3(6) and section 3(8) must be rejected.

[35] This conclusion renders it unnecessary to consider the further argument advanced before this Court by Mr *Wallis* to the effect that the decision of Thring J in *M v Fortune 22* 1999(1) SA 162(C), the correctness of which had been accepted in the court *a quo,* was wrong.

[36] I turn now to consider the argument advanced on behalf of the appellants in respect of the letter of undertaking.

[37] Although the relevant words used in the letter of undertaking, viz 'for the purpose of founding jurisdiction and/or obtaining security in respect of any claim of the said cargo owners concerning the cargo', are perhaps wide enough to cover a claim or a judgment upholding a claim for compensation for loss of or damage to the cargo there is, in my view, an element of vagueness in the phrase used. When one considers the context in which the letter of undertaking was given it seems to me that the possibility that Ocean Marine would not satisfy on demand a judgment in favour of respondent on the cargo claim would have been very far from the minds of the parties when the contract embodied in the letter of undertaking was concluded. One can readily see what the response of the respondent would have been if during the negotiations leading up to the giving of the letter of undertaking the more imaginative bystander known to every student of the law relating to tacit terms (see eg *Rapp and Maister v Aronovsky* 1943 WLD 68 at 74-5) had asked the respondent, 'Does this mean that even if you have obtained judgment on your cargo claim and Ocean Marine then fail to satisfy the judgment on demand you will still be precluded from executing on your judgment by arresting the Amer Prabha or an associated ship?'

[38] In the circumstances the words used in the letter of undertaking must be construed as extending to the cargo claim only.

[39] This conclusion renders it unnecessary for me to consider whether Davis J was correct in holding that the respondent could resile from its undertaking not to re-arrest the 'Amer Prabha' and not to arrest an associated ship because reciprocity existed between that undertaking and Ocean Marine's undertaking to pay on demand any judgment given on the cargo claim.

[40] I now proceed to consider the argument advanced for the appellants in reply by Mr *MacWilliam.* The first problem with this submission is that it

is contrary to the decision of this Court in the *Heavy Metal* 1999(3) SA 1083 SCA at 1098 F-J that an association can arise for the purposes of section 3(7) of the Act between two ships which have a common owner (or controller) (1) who was the owner (or controller) of the guilty ship when the claim arose and (2) who is the owner (or controller) of the associated ship when she is arrested. The fact that the guilty ship has sunk or been disposed of since does not alter the position.

[41] The second problem with the submission arises from the facts that in this case the owners did enter appearance and the judgment which forms the basis of the arrest in this case was given against the vessel and the owners. It is clearly established that where an action *in rem* results (as here) in a judgment against a vessel and her owners, the judgment creditor is permitted to levy execution against the vessel to satisfy the judgment against the owners even if the vessel had been released at an early stage of the action and security given in her place: see *The Gemma* [1899] P 285.

[42] In the present case, as I have said, judgment was given in Hong Kong not only against the 'Amer Prabha' but also against her owners. It would accordingly have been competent for the respondent to have sought to execute its judgment against the 'Amer Prabha'(if she had still belonged to the second appellant), despite her earlier release when the letter of undertaking was given and because of section 3(6) and section 3(7) this procedure was also available to the respondent against the first appellant.

[43] In the circumstances the appeal must, in my view, be dismissed.

[44] The following order is made:

The appeal is dismissed with costs, including those occasioned by the employment of two counsel.

CONCURRING:

HEFER AP
SCOTT JA
CONRADIE JA
JONES AJA

.....

IG FARLAM

JUDGE OF APPEAL