REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 178/2000

Reportable

In the matter between:

NAME OF SHIP: "MERAK S"
SEA MELODY ENTERPRISES SA Appellant

and

BULKTRANS (EUROPE) CORPORATION Respondent

CORAM: HEFER AP, NIENABER, FARLAM, MPATI JJA ET LEWIS AJA

HEARD: 15 FEBRUARY 2002

DELIVERED: 27 MARCH 2002

Maritime Law – Admiralty Jurisdiction Regulation Act 105 of 1983, section 5(2) – 'security', meaning of.

JUDGMENT

FARLAM JA

[1] This is an appeal from a judgment of Niles-Dunér J, sitting in the

Durban and Coast Local Division of the High Court, who dismissed the appellant's application for a reduction in the amount of a bank guarantee given by the appellant to secure the release of the vessel 'Merak S' from arrest and for an order calling upon the respondent, at whose instance the vessel had been arrested, to furnish the appellant with security for the claims it proposed bringing against the respondent. The judgment of the court *a quo* has been reported: see [2000] 1 Lloyd's Rep 619 [S.A. Ct.].

[2] The appellant's vessel had been arrested in terms of an order granted under section 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 in order to provide security for claims which the respondent, which had chartered the vessel from the appellant under a time charter, intended pursuing against the appellant in arbitration proceedings in London. The security which the appellant sought from the respondent related to the claims which the appellant averred it had against the respondent arising from the same charter.

[3] After Niles-Dunér J had granted the appellant leave to appeal to this Court against her judgment dismissing its application it appeared that the respondent was not proceeding with its claims in the arbitration. Subsequently the appellant obtained an order for the return of the guarantee which had been given on its behalf. It is thus clear that an order allowing the appeal would have no practical effect. The appellant contended, however, that this Court should exercise the discretion it has in terms of section 21A of the Supreme Court Act 59 of 1959 to hear and dispose of the appeal. The Maritime Law Association of South Africa arranged for *Mr Wallis SC,* who had appeared for the respondent in the court *a quo*, to be available to present argument in support of the judgment of Niles-Dunér J as an *amicus curiae*, if that course were to be approved by this Court. *Mr Wallis* was thereafter appointed as *amicus curiae*. We are grateful to him for appearing and arguing in support of the judgment given in the court below.

[4] In view of the importance of the questions of law which arise in this matter, the frequency with which they arise and the fact that at the time of the decision in the court *a quo* and of the granting of leave to appeal those questions were, as *Mr Shaw* for the appellant put it, 'live issues', I am satisfied that this is an appropriate matter for the exercise of this Court's discretion to allow the appeal to proceed: *cf Coin Security Group (Pty) Ltd v*

SA National Union for Security Officers and Others 2001(2) SA 872 (SCA) at 875 (para [8]) and *Natal Rugby Union v Gould* 1999(1) SA 432 (SCA).

[5] In view of the fact that the respondent is not proceeding with its claims and the appellant has obtained an order for the return of the guarantee given on its behalf it is unnecessary for the facts giving rise to the application to be summarised. Indeed the appellant asked this Court, if it was minded to allow the appeal, to grant declaratory relief instead of the orders asked for in the court below. It is sufficient to state that if the appellant's contentions are correct it would have been entitled to the orders sought.

[6] It will be convenient to set out the statutory provisions which have a bearing on the issues to be considered.

Section 3(10)(a) of the 1983 Act before it was amended by section 1 of Act 87 of 1992 read as follows:

> 'Property shall be deemed to have been arrested or attached and to be under arrest or attachment if at any time, whether before or after the arrest or attachment, security or an undertaking has been given to prevent the arrest or attachment of the property or to obtain the release thereof from arrest or attachment.'

Since the amendment it has read as follows:

> 'Property shall be deemed to have been arrested or attached and to be under arrest or attachment at the instance of a person if at any time, whether before or after the arrest or attachment, security or an undertaking has been given to him to prevent the arrest or attachment of the property or to obtain the release thereof from arrest or attachment.'

Section 11(9) of the 1983 Act read as follows:

> 'Notwithstanding the provisions of this section any undertaking or security given with respect to a particular claim shall be applied in the first instance in satisfaction of that claim.'

The subsection, now renumbered 11(12), has read, since it was amended by section 9 of the 1992 Act, as follows:

> 'Notwithstanding the provisions of this section, any undertaking or security given with respect to a particular claim shall be applied in satisfaction of that claim only.'

Section 1(2)(a)(iv) of the Act, as amended by section 1(e)of the 1992 Act, is in the following terms:

> '(2)(a) An admiralty action shall for any relevant purpose commence –
>
> ...
> (iv) by the giving of security or an undertaking as contemplated in section 3(10)(a).'

Section 5(2)(b), (c) and (d) of the Act read as follows:

> 'A court may in the exercise of its admiralty jurisdiction-
>
> ...
> (b) order any person to give security for costs or for any claim;
> (c) order that any arrest or attachment made or to be made or that anything done or to be done in terms of this Act or any order of the court be subject to such conditions as to the court appears just, whether as to the furnishing of security or the liability for costs, expenses, loss or damage caused, or likely to be caused or otherwise;
> (d) notwithstanding the provisions of section 3(8), order that, in addition to property already arrested or attached, further property be arrested or attached in order to provide additional security for any claim, and order that any security given be increased, reduced or discharged, subject to such conditions as to the court appears just.'

Section 5(3) of the Act reads as follows:

> '(3)(a) A Court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property or which would be so enforceable but for any such arbitration or proceedings.'

[7] As appears from her reported judgment Niles-Dunér was of the view that, for various reasons, the guarantee furnished to the respondent did not constitute security in respect of which the court has the power in terms of section 5(2)(d) to grant the relief sought by the appellant. In my judgment this

is not correct. There can be no doubt that as a matter of ordinary language a guarantee can be regarded as constituting security, at least personal security as *Mr Shaw* for the appellant argued. It is of course undeniable that it also constituted an 'undertaking' in the ordinary sense of that word. It is clear from the provisions of the Act quoted above that a distinction has to be drawn between the two expressions, and whichever of the rival distinctions contended for is adopted, the ordinary meaning of one or other of the two words will have to be restricted or cut down.

It is unfortunate that the legislation is so worded that no distinction is drawn between 'security', personal security in the form of a third party's undertaking and an undertaking made by the debtor. Understandably therefore, Niles-Dunér J did not deal with these distinctions in construing section 5(2) (d) in particular.

In para 377 of the title on Admiralty in Vol 1 of the 4th edition of *Halsbury's Laws of England*, which was published in 1973, the following appears:

> 'The usual step following an appearance in an action in rem is for the owner of the property arrested to procure its release **by giving security** for the plaintiff's claim. This may be done either by paying the amount of the plaintiff's claim into court, or by providing bail in a sufficient amount, or **by furnishing a guarantee acceptable to the plaintiff.** The third method is nowadays the most common in practice.'

(The emphasis is mine.) (See now paragraph 389 in the 2001 reissue of Volume 1(1) of *Halsbury*.)

Thus it is clear that in England ten years before our Act was passed a guarantee that was acceptable to the plaintiff was regarded in maritime legal circles as 'security'.

It is equally clear that, before the 1983 Act came into operation, the court had the power to reduce the amount of bail provided (see *The Duchesse de Brabant* (1857) Sw 264 and Meeson, *Admiralty Jurisdiction and Practice,* 2nd edition at para 4 – 079) and that this included the power to reduce the amount of a guarantee provided instead of bail. According to para 396 of the 2001 reissue of Vol 1(1) of Halsbury:

> '[s]ince the guarantor gives no undertaking to the court, enforcement of his liability could only be by way of a substantive claim upon the contract of guarantee. **In other respects, the effect of acceptance of a guarantee appears to be the same as the effect of giving bail.'** (My emphasis.)

That this was indeed the case appears from some of the remarks by Baggallay LJ and Fry LJ in *The Christiansborg* [1885] 10 P.D. 141(CA). These remarks are to the effect that the giving of 'contractual security' (a term used by Clarke J in *The 'Tjaskemolen'* [1997] 1 Lloyd's Rep 476 (Q.B. (Adm. Ct.)), at 479 col 2) is the equivalent of bail and have often been approved in English Admiralty cases (see, *eg, The Tjaskemolen*) subject to the rider added by Clarke J that this is subject to the terms of the particular contract. And, if 'contractual security' is, subject to this qualification, the equivalent of bail, it follows that the Court's power to reduce excessive bail was also exercisable in

respect of contractual security.

Counsel were agreed that arrested vessels were almost invariably released in South African maritime practice in 1983 on the furnishing of P & I Club letters or bank guarantees. Bail bonds and undertakings to give bail bonds were never encountered in practice although provided for in the rules in operation until the end of November 1986. Similarly, cash deposits and the giving of guarantees to the court were also seldom, if ever, encountered. From a practical point of view, guarantees of the kind in question constituted security as effectual as cash deposits and bail bonds, and there was no compelling reason which could have induced Parliament to restrict the ordinary meaning of the word security so as to exclude them. Section 3(8) provides, for example, that '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'. Bearing in mind the prevailing practice at the time of the passing of the 1983 Act it can hardly be suggested that the intention was to authorize the arrest or re-arrest of a property after a club letter of undertaking or a guarantee had been provided. Nor can it be suggested that the lawgiver would have intended in 1983 to take away the power of the court to reduce the amount of a guarantee provided instead of bail, especially where with us, as in England, the giving of contractual security was 'the almost universal practice'.

[8] I am accordingly satisfied that the word 'security' as used in the Act also applies to guarantees such as that furnished in this case. By contrast the word 'undertaking' must be taken to refer to undertakings which do not constitute personal security. By way of example *Mr Shaw* mentioned an undertaking to give security in the future or to satisfy the judgment of the court (which might be a valuable undertaking to obtain from a wealthy shipowner if the vessel is heavily mortgaged) and to this may be added the example given in the following passage from Meeson, *op. cit*, at para 4-066:

> 'The court may release arrested property without such security being provided, but this is only done in exceptional circumstances, and only where some satisfactory alternative to ordinary security is provided For example, the court could order the release on terms of a fishing vessel whose continued detention deprives the defendant of his livelihood and ability to pay the claim, where no injustice would be done to the claimant. This would normally require strict terms such as an undertaking not to remove the vessel from the jurisdiction or to return to the jurisdiction at specified intervals, to keep the vessel maintained and insured and to pay receipts into a nominated bank account over which a *Mareva* injunction is granted. The vessel could either remain technically under arrest or be subject to re-arrest. Such a course would be very exceptional, but is not unknown.'

[9] I now turn to deal with the claim for counter-security.

The first ground on which Niles-Dunér J relied for rejecting the appellant's claim for counter-security was her decision that the bank guarantee given to the respondent did not constitute security for the purposes of the Act and that there no longer existed (as envisaged in s 5(2)(c)) 'anything done' or 'to be done' in terms of the Act which the court might make conditional upon

the provision of security to the appellant for its counterclaim. I have already given my reasons for being of the opinion that the guarantee given did constitute security for the purposes of the Act.

Furthermore on the basis of this Court's decision in *mv the Alam Tenggiri,* 2001(4) SA 1329 (SCA) the arrest of the appellant's vessel was deemed to be continuing. I do not think that Mr *Wallis's* contention that the *Tenggiri* decision should be overruled as clearly wrong can be accepted. The submissions he advanced in this regard were the same as those advanced in the *Tenggiri* case and for the reasons given in the judgment in that matter I think that they were correctly rejected.

[10] It follows that Niles-Dunér J's first ground for rejecting the claim for counter-security cannot be upheld.

[11] A further reason given for rejecting the appellant's claim for counter security was that section 5(3) (or indeed the Act) did not contemplate that it should be a condition of an arrest under section 5(3) or security in respect of an arrest thereunder that the other party's counterclaim should be secured where it was not related to the arrest. *Mr Wallis* conceded that there was nothing in the language of the section to indicate that a party whose property had been arrested under section 5(3) had to comply with the same subsection to obtain counter-security. By applying for a security arrest the respondent rendered itself amenable to the court's power to require it to lodge counter-security: see *Devonia Shipping Ltd v mv Luis (Yeoman Shipping Co Ltd Intervening),* 1994(2) SA 363(C) at 372 I – 373 H and *mv Rizcun Trader* (4) 2000(3) SA 776(C) at 803 C-E.

[12] I can see no basis for holding that security arrests under section 5(3) are, unlike arrests under other provisions of the Act, immune from the imposition of conditions under section 5(2)(c), which, after all, speaks of '**any** arrest or attachment made or to be made ... in terms of this Act'. 'Any', as was said in *S v Wood* 1976(1) SA 703(A) at 706, is 'a word of very wide import, "and *prima facie* the use of it excludes limitation" ...' I do not think that it is restricted either by the subject matter or the context. On the contrary both the subject matter and the context indicate an intention to give a court exercising

admiralty jurisdiction wide powers so as to achieve 'a high degree of commercial convenience': see *The 'Yu Long Shan',* 1997(2) SA 454(D) at 461 F-H.

[13] In the circumstances I am satisfied that Niles-Dunér J's second basis for rejecting the appellant's claim for counter-security can also not be upheld.

ORDER

[14] In view of the fact that the original guarantee given to the respondent has been returned and the respondent is not proceeding with its claims in the arbitration I agree with Mr *Shaw* that it would be appropriate to give the declaratory orders for which he asked in this court rather than an ineffectual order against the respondent.

[15] The following order is made:

1. The appeal is allowed with costs.

2. The order of the court *a quo* is set aside and replaced with the following order:

'It is declared:

(a) that the guarantee furnished on behalf of the applicant by virtue of which the vessel mv "Merak S" was released from arrest is security for the purposes of section 5(2)(d) of the Admiralty Jurisdiction Regulation Act 1983, as amended, and that the court accordingly has jurisdiction to order that the security be reduced; and

(b) that it is within the powers of the court to order that the respondent give security for the claim of the applicant against the respondent which is to be submitted to arbitration in London and to impose appropriate conditions for the enforcement of its order.'

……..
IG FARLAM
JUDGE OF APPEAL

Concur:
Hefer AP
Nienaber JA
Mpati JA
Lewis AJA