REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 653/2002
Reportable

In the matter between:

MT 'ARGUN' Appellant
(Defendant)

and

THE MASTER AND CREW OF THE MT 'ARGUN'
CLAIMING UNDER CASE NO. AC127/99 First Respondent
(Plaintiffs)

THE FORMER CREW OF THE MT 'ARGUN'
CLAIMING UNDER CASE NO. AC134/99 **S**econd Respondent
(Plaintiffs)

THE MASTER AND CREW OF THE MT 'ARGUN'
CLAIMING UNDER CASE NO. AC4/02 Third Respondent

(Plaintiffs)

CORAM: MARAIS, FARLAM, NAVSA, CLOETE JJA et JONES AJA

HEARD: 16 MAY 2003

DELIVERED: 19 SEPTEMBER 2003

SUMMARY: Maritime law – admiralty – whether action *in rem* lapses when arrest by which it was instituted lapses – whether judgment given in action *in rem* after lapse of arrest can be

executed against vessel under arrest in another action – date from and rate at which interest on amounts adjudged to be due to be determined – whether sheriff's preservation costs and remuneration correctly included in costs order.

JUDGMENT

FARLAM JA

INTRODUCTION

[1] This is an appeal from judgments delivered on 13 August 2002 and 12 September 2002 by Foxcroft J in the Cape Provincial Division of the High Court, sitting as a court of admiralty in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983 (to which I shall refer in what follows as 'the Act'). In the first judgment on appeal the learned judge dealt with two admiralty cases which were heard before him. The first was case no AC127/99, in which the master and crew who were serving on board the MT 'Argun' when she arrived in Cape Town on 25 May 1999 claimed various amounts in an action *in rem* against the vessel in respect of wages due as at various dates as well as interest and costs of repatriation. The master also claimed an amount in respect of work done and expenses incurred. In what follows the plaintiffs in case no AC127/99 will be referred to as 'the first respondents'.

[2] The second case was case no 134/99. This was also an action *in rem* against the vessel. In this case the plaintiffs were the master and crew of the MT 'Argun' who had served on board the vessel during the period 25 July 1995 to 31 January 1996. The main claim was in respect of unpaid wages due as at 24 July 1996. They also had an alternative claim for an amount

allegedly due to them in terms of a settlement. In what follows I shall refer to the plaintiffs in case no AC134/99 as 'the second respondents'.

[3] In the second judgment on appeal the learned judge dealt with these two cases as well as a third case, which was case no AC4/2002. The plaintiffs in this case, also an action *in rem* against the vessel, were the first twenty-one plaintiffs in case no AC127/99. Their claims were in respect of wages due and unpaid for the period 1 July to 13 October 1999, being the day before they were repatriated to Russia. In what follows I shall refer to them as 'the third respondents'.

[4] The arrest by which the first action *in rem* (case no AC127/99) was instituted took place on 14 July 1999 and the arrest by which the second action *in rem* (case no AC134/99) was instituted took place on 23 July 1999.

[5] On 30 July 1999 the Sheriff of Cape Town applied to the Cape Provincial Division for an order *inter alia* declaring (i) that various parties at whose instance the vessel had been arrested (the first and second respondents and two other companies who are not parties to the present appeal) were jointly and severally liable with such of the arresting parties to the extent that the vessel was under the arrest at their instance during the said period, for all the sheriff's expenses reasonably incurred in the preservation of the vessel as well as his reasonable remuneration in relation to such expenses; in respect of the period during which the vessel was under arrest at the instance of that party, and (ii) that the continued arrest of the vessel at the instance of each of the arresting parties be made conditional upon that party reimbursing the sheriff within 10 days of demand for his reasonable expenses for the preservation of the vessel incurred during the period the vessel was under arrest at the instance of that arresting party, as well as for his reasonable remuneration in relation to such expenses.

[6] This application was dismissed by Cleaver J in the High Court but succeeded on appeal to this Court. This Court's judgment, which was delivered on 1 June 2001, is reported as *MT* Argun; *Sheriff of Cape Town v MT* Argun, *Her Owners and All Persons Interested in Her and Another* 2001 (3) SA 1230 (SCA).

[7] The first and second respondents did not reimburse the Sheriff of Cape Town for the preservation expenses and remuneration referred to in this Court's order after he had demanded such reimbursement and on 21 June 2002 at the instance of the vessel's owner Foxcroft J declared that the arrests of the vessel at the instance of the first and second respondents had lapsed by operation of the order made by this Court on 1 June 2001.

[8] The vessel had in the meantime been arrested on 21 February 2002 at the instance of the third respondents in case no AC4/2002. Despite the fact that the arrests at the instance of the first and second respondents had lapsed

Foxcroft J directed that the first and second actions proceed to trial together with the third action. Special pleas to the effect that the first and second actions had lapsed when the arrests in those actions lapsed were dismissed in the first judgment on appeal and the actions then proceeded to trial.

[9] On 12 September 2002 Foxcroft J delivered the second judgment which is now on appeal. He ordered the defendant vessel, which is the appellant before us, to pay:

(a) the capital amount of the plaintiff's claims in all three actions (amended in slight respects);

(b) interest at the rate of 15.5% per annum with effect from the end of each month for which each plaintiff had claimed wages;

(c) the plaintiffs' costs of suit on a party and party scale, including:

(i) the necessary travel costs of the master;

(ii) the sheriff's reasonable and necessary costs incurred in preserving the vessel and his reasonable remuneration earned in respect thereof from the date of her arrest until:

(aa) in the first and second actions, the lapsing of each arrest; and

(bb) in the third action, the release of the vessel from arrest; and

(iii) the costs of discovery.

He further ordered that the costs in each of the three cases be paid by the defendant vessel and by her owner, the Russian Federation.

In addition he declared that the first and second respondents were entitled to execute their judgments *in rem* obtained in respect of the vessel against the vessel.

ISSUES ON APPEAL

[10] Six issues were argued on appeal, *viz:*

1. Whether the first and second actions lapsed when the arrests by which they were instituted lapsed;

2. Whether the judge in the court below was justified in ordering that the

first and second respondents were entitled to execute against the appellant their judgments *in rem* obtained against her;

3. Whether he was correct in ordering the appellant to pay interest on the amounts adjudged to be due to the respondents with effect from the end of each month for which they had claimed wages;

4. Whether he was justified in ordering the appellant to pay interest on the capital amounts adjudged to be due to the respondents at the rate of 15.5%;

5. Whether he was empowered to order that the sheriff's preservation costs and remuneration in respect of the vessel during the period of her arrest in each of the actions should constitute part of the respondent's costs of suit; and

6. Whether the respondents should, irrespective of the outcome of the appeal, be ordered to pay the costs of an additional volume of the appeal record which the respondents prepared for inclusion therein and to which the appellant objected, as well as the costs of perusal thereof.

DID THE FIRST AND SECOND ACTIONS *IN REM* LAPSE WHEN THE ARRESTS LAPSED?

[11] In regard to this issue Mr *Wragge*, who appeared on behalf of the appellant, pointed out: that the first and second respondents' claims arise from contracts entered into, not with the owner of the MT 'Argun', ie the Government of the Russian Federation, but with two companies, National Pacific G.S.C. SA in the case of the first respondents and Inaqua Co. in the case of the second respondents; that it is not alleged that the owner of the vessel at the time of her arrest was personally liable to them; and that the arrests by which the first and second actions *in rem* were instituted were

based upon the fact that the respondents had maritime liens over the vessel in respect of their claims.

[12] Counsel submitted that in order to determine the nature of the first and second respondents' claims and the maritime lien which underpins their actions *in rem* and the arrests by which they were instituted, it is necessary to have regard to the relevant provisions of the Act and the rules promulgated thereunder against the backdrop of English Admiralty law as it was on 1 November 1983 when the Act was brought into operation. He contended that this was so because the 'matter' or issue between the appellant and the first and second respondents is the effect which the lapsing of their arrests had on their actions *in rem.* This issue is a matter in respect of which a Court of Admiralty of the Republic sitting pursuant to the provisions of section 2(1) of the Colonial Courts of Admiralty Act 1890, 53 and 54 Vict, c 27, had jurisdiction before the commencement of the Act on 1 November 1983. This is because in terms of section 6 (1) of the Act the law applicable is the law 'which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter' at the commencement of the Act 'insofar as that law can be applied'. (The reference to 'the High Court of Justice of the United Kingdom' was presumably intended to be a reference to the Supreme Court of England and Wales as constituted by the Supreme Court Act, 1981: see *Brady-Hamilton Stevedore Co and Others v MV* Kalantiao 1987 (4) SA 250 (D) at 253 D and *MV* Stella Tingas : *Transnet Ltd v Owners of the MV* Stella Tingas *and Another* 2003 (2) SA 473 (SCA) at 479 G-H.)

[13] Mr *Wragge* dealt in his argument with various theories regarding the origin of the concept of the maritime lien in English maritime law as well as the ambit and effect of the maritime lien in English Admiralty law and in particular with maritime liens for seamen's wages and for master's wages and disbursements. On this part of his argument he relied heavily on the judgment of this Court in *The MV* Andrico Unity 1989 (4) SA 325 (A). He put particular emphasis on the following *dictum* of Corbett JA (at 332 B):

'The lien is asserted by the arrest of the ship in a proceeding *in rem* and it then relates back to the time when it first attached.'

[14] Counsel relied on a *dictum* of Lord Diplock in The Halcyon Isle: *Bankers Trust International Ltd v Todd Shipyards Corporation* [1981] AC 221 (PC) at 234 F-G (which was approved in the court below in *The MV* Andrico Unity 1987 (3) SA 794 (C) at 805 H – 806 G). The *dictum* reads:

'... any charge that a maritime lien creates on a ship is initially inchoate only; unlike a mortgage it creates no immediate right of property; it is, and will continue to be,

devoid of any legal consequences unless and until it is "carried into effect by legal process, by a proceeding *in rem*".'

[15] He contended further that proceedings *in rem* are made up of two interdependent parts, the action *in rem* and the arrest of the maritime *res* and that it is the arrest of the *res* which gives the action *in rem* utility and effectiveness by affording the plaintiff pre-judgment security and a potentially executable asset.

[16] In the course of his argument Mr *Wragge* traced the development of the action *in rem* in England culminating in the decision of the House of Lords in *Republic of India and Another v Indian Steamship Co Ltd* (No 2) 1998 AC 878 (HL(E)) (reported in Lloyds Reports as *The Indian Grace* (No 2) [1998] 1 Lloyds Rep 1 (HL)). In that case, which arose under s 34 of the Civil Jurisdiction and Judgments Act 1982 (c 27), it was held that the action *in rem* brought by the Republic of India (Ministry of Defence) against the *Indian Endurance,* a sister ship of the *Indian Grace,* in respect of damage to the government's cargo which was being carried on the *Indian Grace,* was barred because the Indian Government had previously started an action in the subordinate judge's court in Cochin against the owners of the *Indian Grace* for damages in respect of part of the cargo on the *Indian Grace* which had been jettisoned and it obtained judgment on its claim some three and a half months after the Indian Government's writ *in rem* was issued.

[17] The House of Lords held, agreeing on this point with the Court of Appeal, that the English action *in rem* was 'between the same parties, or their privies', within the meaning of section 34 of the Civil Jurisdiction and Judgments Act 1982, as the action in which the government obtained judgment in Cochin; and that 'for the purposes of section 34 an action *in rem* is an action against the owners from the moment that the Admiralty Court is seized with jurisdiction'. In coming to this conclusion Lord Steyn, with whose opinion all the other law lords agreed, held that at least as far as an action *in rem* based on a statutory right *in rem* (as opposed to a maritime lien) is concerned, the procedural theory as to the origin of the action *in rem* (in terms whereof the proceeding *in rem* is to be regarded as an exceptional form of procedure employed in order to compel the defendant's appearance) is to be preferred to the personification theory (in terms of which the ship is

treated as a juridical entity endowed with a measure of personality and the action *in rem* is seen as a proceeding against the vessel). Lord Steyn, in a passage in his opinion to which Mr *Wragge* referred, made it clear that the case before the House of Lords was not concerned with maritime liens. 'That', as he said (at 908H), 'is a separate and complex subject which I put to one side.'

[18] Mr *Wragge* submitted that before the Act came into force the characteristics of the South African action *in rem* were the same as the characteristics of the English action *in rem* as at 1 November 1983. He submitted further that it was against this backdrop that the Act and the Admiralty Proceedings Rules which were made pursuant to section 4 of the Act and which came into operation on 1 December 1986 were drafted and enacted. He argued that under the Act and the Rules, for a claim to remain enforceable by an action *in rem*, there must be a co-existent arrest of the defendant maritime *res* with the result that if an arrest lapses the action instituted thereby lapses also because the utility and effectiveness provided by the arrest has been lost.

[19] As far as the Act is concerned counsel referred to s 1(2)(b)(iv) which made it clear that an action which commenced *inter alia* by the giving of security, or an undertaking as contemplated in s 3(10)(a) (ie where there was a deemed arrest), would lapse if the property were deemed to have been released and discharged (because no further step was taken in the proceedings within a year after the security or undertaking was given). In other words, the Act makes it clear that an action commenced by a deemed arrest will lapse if there is a deemed release. He contended that it cannot have been contemplated by the legislature that there would be a different result where there is an actual release following on the lapsing of an actual arrest.

[20] As far as the rules are concerned *Mr Wragge* relied strongly on rule 6 (3) read with rule 6 (2), in terms of which a person who has an interest in the property concerned and who has given notice of intention to defend an action *in rem:*

'shall not merely by reason thereof incur any liability and shall, in particular, not become liable *in personam*, save as to costs, merely by reason of having given such notice and having defended the action *in rem.'*

(Rule 6 of the Admiralty Rules which came into operation on 1 December 1986 has been replaced by Rule 8 of the Admiralty Rules which came into operation on 19 May 1997 but the wording is the same. In what follows I

shall refer to this rule by its new number.)

[21] This subrule is important, so counsel submitted, because it reverses for our practice the rule in the English case of *The Dictator* [1892] P 304 in which Sir Francis Jeune P held that when in an action *in rem* the owners enter appearance, judgment can be given against them for the full amount of the claim (even if such amount exceeds the value of the *res*). This judgment represented what Lord Steyn (at 908B) called 'the breakthrough' and provided the particular characterisation of the action *in rem* which came to be known as the procedural theory. Indeed Mr *Wragge* contended that it is evident from the provisions of the Act and the Rules to which he referred that there has been a departure in South African Admiralty law from a general application of the procedural theory and an adoption of certain material attributes of the personification theory.

[22] Mr *Burger,* who appeared on behalf of the respondents, submitted that English law does not require a continuing arrest for an action *in rem* to be able to proceed. He relied, *inter alia*, on the decision of the Probate, Divorce and Admiralty Division in *The City of Mecca* (1879) 5 P 28. In this case it was held by Sir Robert Phillimore that the admiralty division had jurisdiction to entertain an action *in rem* to enforce what was regarded as substantially a judgment *in rem* given by a Portuguese court in proceedings instituted against *The City of Mecca* while she was in Lisbon, despite the fact that she subsequently left Lisbon without giving security.

[23] Mr *Burger* submitted that this case indicates that the court did not consider a continuing arrest of the vessel to be essential for the Portuguese court to be able to give a judgment *in rem* enforceable in England and it accordingly demonstrates, so he submitted, that a continued arrest of a vessel (or substitute security) at all times was not necessary to pursue an action *in rem* which had been commenced when the vessel was arrested.

[24] Mr *Wragge's* answer to this argument was that *The City of Mecca* indicated no more than that the English court was prepared to recognise and enforce a *foreign* judgment *in rem* given after the vessel concerned was no longer under arrest but that it did not follow from this that it would have held that an *English* judgment *in rem* would have been given if the original action *in rem* had been instituted in England and the vessel had then left the jurisdiction without giving security. In my view Mr *Wragge's* contention in this regard is correct and *The City of Mecca* cannot be regarded as authority for the proposition that in English law an action *in rem* will continue even if the arrest by which it was instituted has lapsed.

[25] In regard to the present position in England it is clear that, as Lord Brandon of Oakbrook put it in *The August 8* [1983] 2 AC 450 (PC) at 456:

'[b]y the law of England, once a defendant in an Admiralty action *in rem* has entered an appearance in such action, he has submitted himself personally to the jurisdiction of the English Admiralty Court, and the result of that is that, from then on, the action continues against him *not only as an action in rem but also as* an action *in personam* ....' (My emphasis.)

[26] If the present case had been heard in England, therefore, on the lapsing of the arrest of the vessel the actions would at the very least have continued as actions *in personam* against the vessel's owner. That that is not our law is clear from rule 8(3), the material provisions of which are quoted in para [20] of this judgment. In fact neither counsel was able to refer us to authority directly in point on the issue to be decided.

[27] Mr *Burger* relied, by way of analogy, on the decision of this Court in *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A), a case involving an attachment to found jurisdiction at common law where it was said that a valid attachment at the commencement of the action is sufficient to establish jurisdiction and that, even if the property attached is destroyed during the course of the proceedings, the court retains jurisdiction. The applicable rule, which is based on civilian authority cited in Voet, was formulated as follows (at 310 D-E):

'Jurisdiction having once been established at such time [ie, the commencement of the proceedings] it continues to exist to the end of the action even though the ground upon which the jurisdiction was established ceases to exist. (see Voet, 5.1.64; *R v de Jager,* 1903 TS 36 at p38).'

[28] Mr *Burger* contended that the legislature clearly intended attachments (to which the rule set out in *Thermo Radiant* applied) and arrests to be treated in the same way and that if an additional jurisdictional requirement (a continuing arrest) had been intended to apply in the case of an action *in rem* instituted by an arrest, the legislature would have said so.

[29] The difficulty I have with the arguments of both Mr *Wragge* and Mr *Burger,* which are based on what the legislature presumably intended, is that

there is no clear provision in the Act dealing with the point at issue. The contentions advanced by Mr *Wragge* (in paragraph [18] above) and Mr *Burger* (in paragraph [27] above) are both explicable on the basis, at best for the side advancing them, that the legislature appears to have assumed that the law was as counsel submitted it to be. But there is clear authority for the proposition that the fact that Parliament appears to have enacted a provision on a certain assumption as to what the law was does not make that assumption correct: see, eg, *Trivett & Co (Pty) Ltd v Wm Brandt's Sons and Co Ltd* 1975 (3) SA 423 (A) at 435 B-C.

[30] I have a further problem with Mr *Wragge's* submission in this regard. If anything, Parliament appears to have thought that it is not enough that an arrest has fallen away for the action to lapse. A specific provision to that effect (s 1(2)(b)(iv)) appears to have been thought necessary, which undermines the contention that the lapsing of an arrest automatically and without more leads to the lapsing of the action.

[31] I think, however, that the answer to the problem is to be found in the rule of the civil law to which reference was made in the *Thermo Radiant* decision. That the rule in question was a general one appears from the decision of the Transvaal Supreme Court in *R v De Jager* 1903 TS 36. In that case a Transvaal court which had commenced hearing a criminal trial in respect of an offence committed in the district of Vryheid, which was then in the Transvaal, was held on the basis of the rule to have retained jurisdiction in the case despite the fact that the district of Vryheid was excised from the Transvaal after the commencement of the trial and added to Natal.

[32] Browne, in his classic treatise on the law of admiralty, *A Compendious View of the Civil Law and the Law of Admiralty,* published in 1802, says at page 34 of volume 2 that the law 'by which the proceedings of the court of admiralty [were] governed [was] composed of those parts of the civil law which treat of maritime affairs (as far as the decisions of the Roman code upon those subjects have with us been deemed equitable), blended with other maritime laws; the whole corrected, altered and amended, by acts of parliament and common usage'.

[33] It must also be remembered that until the High Court of Admiralty Act 1859, 22 & 23 Vict, cap 6, extended the right to practise in the High Court of Admiralty, the civilian practitioners of Doctors' Commons had the monopoly of admiralty practice. I am satisfied that the rule of the civil law applied in *R v De Jager, supra,* and referred to in the *Thermo Radiant* case would have formed part of the law that would have been applied in the admiralty court before 1859 if the point presently under consideration had come up for decision and that nothing that happened thereafter, when common lawyers gained the right of appearance in the court and the court became part of the

Supreme Court of the Judicature on the enactment of the Judicature Acts 1873 – 1875, would have altered the position.

[34] It follows in my view that the court did not lose jurisdiction in the first and second actions *in rem* when the arrests lapsed and those actions continued. This conclusion renders it unnecessary to express an opinion on the interesting questions raised by Mr *Wragge* regarding the procedural and the personality theories in relation to the development of the action *in rem*, particularly in a case such as this, which, unlike *The Indian Grace* (No 2), *supra*, concerns a maritime lien. (For a useful discussion see Jonsson, 'The Nature of the Action in Rem', (2001) 75 *ALJ* 105.) In the circumstances the contentions raised by Mr *Wragge* in regard to the first issue must be rejected.

ARE THE JUDGMENTS IN THE FIRST AND SECOND ACTIONS *IN REM* EXECUTABLE AGAINST THE APPELLANT?

[35] I turn to deal with the issue as to whether Foxcroft J erred in ordering that the first and second respondents were entitled to execute their judgments *in rem* obtained in respect of the vessel against the vessel notwithstanding that the arrests had lapsed.

[36] In arguing this part of the case Mr *Wragge* submitted that the judgments in the first and second actions did not give rise to any personal liability on the part of the owner and were therefore not enforceable against the owner's assets, such as the vessel.

[37] I do not agree with this contention. Once it is accepted that the appellant must fail in respect of the first issue it follows that the judgments given in the first and second actions *in rem* must stand. Indeed Mr *Wragge* conceded that, if he failed on the first point, the judgments given in the first and second actions could be sued on in an action *in rem* in a foreign admiralty court if the vessel were found within such court's area of jurisdiction. He contended, however, that they could only be executed upon against the vessel in the jurisdiction of the Cape admiralty court if further actions *in rem* were instituted and judgments given thereon. The contention cannot be upheld. It is of course necessary, in order to enforce a judgment *in rem* given against a vessel in a foreign admiralty court, to ask a domestic admiralty court in an action *in rem* to order that it be enforced because such a judgment would not be executable without more in that domestic jurisdiction. But it would be absurd if a litigant armed with a judgment of a South African admiralty court against a particular vessel had to approach that same court for a further order allowing its own earlier order to be enforced against that very vessel while she is within its own area of jurisdiction. I am accordingly satisfied that Mr *Wragge's* contentions on the point must also be rejected.

THE INTEREST ISSUES

[38] In my opinion the two issues relating to interest can be taken together. Section 5 (2) (f) of the Act, which deals with the court's powers in the exercise of its admiralty jurisdiction, provides as follows:

'(2) A court may in the exercise of its admiralty jurisdiction ─

. . .

(f) make such order as to interest, the rate of interest in respect of any sum awarded by it and the date from which interest is to accrue, whether before or after the date of the commencement of the action, as to it appears just'.

The section confers a wide and unfettered jurisdiction.

[39] No evidence was placed before the court *a quo* to enable it to decide what rate would be just or what date should be fixed upon as the date from which interest at that rate would be calculated.

[40] The approach to be adopted by this Court in deciding whether it would be appropriate to interfere with the exercise by the court *a quo* of its discretion in a comparable situation was set out in *Adel Builders (Pty) Ltd v Thompson* 2000 (4) SA 1027 (SCA), a decision on section 2A of the Prescribed Rate of Interest Act 55 of 1975. Section 2A (5) of that Act provides as follows:

'(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law ... may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.'

[41] At 1032 H – J of the *Adel* case Howie JA said:

'Acting in terms of ss (5), it was open to the Court, in fixing the date from which interest was to run, to give effect to its own view of what was just in all the circumstances. No question of *onus* was raised then or in the notice of appeal. Nor could it have been. The discretion afforded by s 2A(5) was of the nature referred to in a long line of cases in this Court from *Ex parte Neethling and Others* 1951 (4) SA 331 (A) onwards. Plainly, if

parties wish certain facts and circumstances to be weighed in the exercise of such a discretion they must establish them. But there are no *facta probanda.* No enquiry arises as to whether a necessary fact has been successfully proved. Similarly, absence of proof does not result in failure on any issue. Indeed, there are no evidential issues to attract any onus.

[42] In terms of the decision in *Ex parte Neethling and Others, supra,* to which reference was made in the *Adel* case, the Court is only entitled to interfere with the exercise of a discretion of the kind here under discussion if it comes to the conclusion that the court below did not exercise a judicial discretion. The reason for this given in the *Neethling* case at 335 H is that: 'in cases of this kind the Appeal Court, because of the nature of the case, has only a limited power of correction'.

[43] In the present matter no basis was put before us for concluding that Foxcroft J did not exercise his discretion judicially. It follows that the appeal on these two issues must fail.

PRESERVATION COSTS AND EXPENSES

[44] The next issue to be considered is whether the judge erred in holding that the costs incurred by the Sheriff of Cape Town in preserving the vessel and his reasonable remuneration earned in connection therewith during the period that the vessel remained under arrest should properly constitute part of the respondents' costs of suit in enforcing their claims.

[45] It will be remembered that the court *a quo* ordered that the respondents' costs of suit in all three actions were to be paid by the appellant vessel and the Russian Federation. The effect of ordering that the sheriff's preservation costs and his reasonable remuneration in respect thereof are to be included in the costs of suit therefore means that the burden of paying such costs rests not only on the appellant but also on the vessel's owner, the Russian Federation.

[46] It is clear from rule 8 (3), the wording of which has been quoted in paragraph [20] above (which enacts the rule laid down by Dr Lushington in *The Volant* (1842) 1 W Rob 383, 166 ER 616, that although the liability of an appearing owner in an action *in rem* is not *in personam* and is limited to the value of the *res,* he can also be held liable *in personam* for costs) that Foxcroft J's decision to order the owner of the vessel, which had appeared to defend the actions *in rem,* to pay the respondents' costs of suit therefore cannot be faulted. The question for consideration, however, as has been

stated is whether he correctly included the sheriff's preservation costs and remuneration in the costs of suit.

[47] Mr *Wragge* submitted that a clear distinction is drawn in the Act between preservation costs and costs of suit. He referred in this regard to ss (4)(a) and (10) of s 11, which deals with the ranking of claims. Subs 4(a) provides that a claim 'in respect of costs and expenses incurred to preserve the property in question or to procure its sale and in respect of the distribution of the proceeds of the sale' ranks for payment as a first charge against the proceeds of the sale of the vessel. Subs (10) deals, *inter alia,* with the costs of enforcing a claim and provides that such costs 'shall for the purposes of this section [*ie*, s 10, the ranking section] be deemed to form part of the claim'.

[48] While it is true that preservation costs and expenses are differentiated, for ranking purposes, from the costs of enforcing the claim, this cannot detract from the fact that a costs order covers not only the costs of instituting a claim and prosecuting it to judgment but also the expense of (a) executing against property belonging to a judgment debtor, (b) preserving it until the execution sale and (c) the sale itself. I do not think that the fact that such expenses were incurred in this case before judgment and not, as is usually the case in non-maritime cases, thereafter can operate so as to deprive them of their character as costs. It is true that where they are incurred *before* judgment it is not clear at that stage that they will be subject to a subsequent order that the defendant is to pay them; but where a costs order is given in due course against the defendant there is no reason why they should not be covered thereby. The fact that portion of such costs enjoys a higher ranking than other portions cannot affect the position. It follows that Mr *Wragge's* contentions on this part of the case cannot be upheld.

COSTS OF THE ADDITIONAL VOLUME

[49] The last issue to be considered is the question whether the respondents should bear the costs of an extra volume of the record which they caused to be prepared. This volume included documents which were before the court at an earlier stage in the proceedings as well as the judgment given by Foxcroft J declaring that the arrest of the vessel at the instance of the first and second respondents had lapsed by operation of the order made by this

Court in the Sheriff's appeal.

[50] Mr *Wragge* conceded that on the authority of the judgment of the Full Bench of the Transvaal Provincial Division in *Anastassiades v Argus Printing and Publishing Co Ltd* 1955 (2) SA 349 (T) at 353 A – B the record should contain all the documents which were before the court below and that it is not for an appellant to decide unilaterally to omit what he or she thinks is immaterial. (It is, of course, another matter if both or all parties agree that certain documents are immaterial. If one party insists on unnecessary documents being included or both do not agree on their exclusion an appropriate costs order can be made.)

[51] In the present case the only argument advanced on behalf of the appellant is that the documents in the additional volume were not before the court below. The short answer to that contention is: they were. They related not to different proceedings, as Mr *Wragge* argued, but to an earlier chapter in the same proceedings. Moreover, included in the volume was the judgment declaring the arrests to have lapsed to which Mr *Wragge* himself referred in his argument. In the circumstances it is clear that the appellant's contentions on this point must fail.

COSTS ON APPEAL

[52] It remains to consider what costs order should be made on appeal.

[53] As has been pointed out earlier in this judgment, in terms of rule 8(3) of the Admiralty Rules a costs order may be made against an owner who has defended an action *in rem* brought against his ship. The bringing of an appeal against an order made in such an action against a ship must be regarded as an extension of the defending of the action. It follows that it is competent for a costs order to be made against the Russian Federation in the appeal.

[54] Marais JA, who was a member of the Court which heard the appeal, was as a result of indisposition unable to participate in the finalisation of the judgment. This judgment is accordingly the judgment of the court in terms of s 12(3) of the Supreme Court Act 59 of 1959.

[55] The following order is made:

1. The appeal is dismissed.

2. The appellant and the Russian Federation are ordered, jointly and severally, to pay the costs of the appeal.

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IG FARLAM

JUDGE OF APPEAL
CONCURRING:
NAVSA JA
CLOETE JA
JONES AJA