THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 972/2015

Name of Ship: **MV 'NYK ISABEL'**

In the matter between:

NORTHERN ENDEAVOUR SHIPPING PTE LTD **APPELLANT**

and

THE OWNERS OF THE 'NYK ISABEL' **FIRST RESPONDENT**

NIPPON YUSEN KABUSHIKI KAISHA

('NYK LINE') **SECOND RESPONDENT**

Neutral citation: *Northern Endeavour Shipping Pte Ltd v Owners of MV NYK Isabel* (972/2015) 2016 ZASCA 89 (1 June 2016)

Coram: LEACH, THERON, SERITI and WALLIS JJA and KATHREE-SETILOANE AJA.

Heard: 25 May 2016

Delivered: 1 June 2016

Summary: Maritime law – associated ship arrest relying on deeming provision in s 3(7)*(c)* of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act) – charterer deemed to be owner of ship concerned –

charterer includes a slot charterer – application for security in terms of s 5(2)*(c)* of the Act – requirements for – prima facie claim – reasonable and genuine need for security – factors relevant to exercise of discretion.

ORDER

On appeal from: KwaZulu-Natal Local Division, Durban (Mnguni J, sitting as court of first instance):

1 The order of the high court is amended in the following respects:

(a) The deletion of paragraph 1 and the renumbering of the remaining paragraphs accordingly.

(b) The deletion in the original paragraph 4.2.3 of the words:

'the Respondent's *in rem* action will be dismissed with costs, alternatively'

2 Subject to those amendments the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (Leach, Theron and Seriti JJA and Kathree-Setiloane AJA concurring)

[1] This appeal involves a claim for security by the second respondent, Nippon Yusen Kabushiki Kaisha trading as NYK Line (NYK), against the appellant, Northern Endeavour Shipping Pte Ltd (NES). Mnguni J sitting in the KwaZulu-Natal Local Division, Durban, exercising its admiralty jurisdiction, upheld the claim and ordered NES to provide the security demanded by NYK in an amount of nearly $10 million within ten days of the court's order. The penalty for it failing to do so was that the deemed

arrest of the *NYK Isabel*, which it had obtained in order to pursue an action *in rem* against that vessel in respect of a claim against NYK, would fall away and become of no force and effect. In addition the order provided that the action would either lapse automatically, or that NYK could approach the court for an order dismissing the action. In practical terms the effect of the order was that NES would be unable to continue with its action. The high court granted leave to appeal to this court against that order. The circumstances in which the claim for security was made were unusual and it is necessary at the outset therefore to set out the factual background in some detail.

The background facts

[2] By a time charter party dated 2 November 2000, Kien Hung Shipping Co Ltd (Kien Hung) chartered the *Andhika Loreto* from its owners, Lady Loreto Shipping Inc. On 20 November 2001, by way of an addendum, NES assumed the rights and obligations of the owners under the charter party. At some stage, although the date is unclear, the vessel was renamed *Northern Enterprise* and it is by that name that I will refer to it.

[3] In the latter stages of 2002 Kien Hung, NYK and another shipping line, referred to as CSAV, which played no part in these events, concluded a slot exchange agreement for the operation of a regular container service from the Far East to the East Coast of South America, via South Africa. The service was to be known as Supergex and would operate a weekly round-trip service using vessels provided by each of the participants. Each line would nominate vessels for the service and would in respect of those vessels be the ship operator. The lines, other than the ship operator in relation to each vessel, would charter slots on the vessels so nominated

in agreed proportions. These charters would be governed by the terms of a standard slot charter agreement. Each line would, however, issue its own bills of lading in respect of cargo booked on a vessel and would be the principal carrier in respect of such cargo.

[4] On 22 February 2003 Kien Hung nominated the *Northern Endeavour* to undertake this service for a voyage from Pusan, South Korea to Santos, Brazil via various ports including Singapore and Durban. At Singapore NYK loaded a number of containers on board the vessel in bay 22. When the vessel arrived in Durban there was a request, the nature of which was disputed, that these containers be re-stowed. It is alleged by NES that NYK refused that request, a dispute we do not have to address. The vessel then sailed for Brazil. Off the Cape of Good Hope it encountered a fierce storm with force 10 or 11 winds, heavy seas and waves of up to 9 metres in height. In that storm the container stack in bay 22 collapsed. Eleven containers were washed overboard and lost and the cargo in a number of other containers in that bay was damaged.

[5] Cargo underwriters, acting under rights of subrogation, instituted action against NYK in Brazil to recover the losses suffered as a result of these events. They relied upon the fact that NYK had issued the bills of lading under which the cargo was carried and was the carrier of the cargo under those bills of lading. NYK joined NES to the proceedings, claiming an indemnity from it in the event of it being held liable to the cargo underwriters. The Brazilian court upheld both the cargo underwriters' claim and NYK's claim against NES for an indemnity in the same amount as it had been held liable to pay to the underwriters. An appeal against that judgment failed. There is apparently a further appeal pending before

the highest court in Brazil, but the volume of cases awaiting a hearing is such that it is improbable that the appeal will be heard in the near future.

[6] NES was aggrieved by this result as it holds NYK entirely liable for the losses that were suffered on this voyage. It alleged that the reason for the collapse of the containers stacked in bay 22 was the improper manner in which NYK caused them to be stowed. It levelled three complaints against NYK. The first was that it caused 24 containers to be stowed on the port side of bay 22 and another 24 on the starboard side with only a single container in the central portion of the stow, thereby depriving the outside containers of necessary support and the stow of stability. Second, it contended that the upper containers in the stow were loaded with heavier cargo than the lower containers, and this also affected the stow's stability. Third, it claimed that, when the vessel arrived in Durban, NYK was requested to re-stow these containers in a more satisfactory manner and that it refused to do so. It alleged that the defects in the stow were caused by this improper method of stowing the containers and pointed to the fact that, notwithstanding the magnitude of the storm that the *Northern Endeavour* encountered, no other containers were lost and no other cargo was damaged.

[7] NES contended that any amount that it is obliged in due course to pay NYK pursuant to the Brazilian judgment will constitute damages suffered by it in consequence of NYK's actions in causing the improper stowage of containers in bay 22 on the *Northern Endeavour*. It alleged that it was entitled to recover these damages from NYK in an action in tort or delict, based on negligence. To that end it caused the *NYK Isabel*, a vessel owned by Mercurius Shipping Pte Ltd (Mercurius), but controlled by its parent NYK, to be arrested as an associated ship on 23 January

2013, when it called at Durban. Security was furnished on 25 January 2103 to secure the release of the vessel and there is now a deemed arrest in place in terms of s 3(10) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act).

[8] A writ of summons was served in the action and an appearance to defend delivered on behalf of both Mercurius and NYK. Particulars of claim were delivered as was a plea embodying a number of special pleas. There is a replication in response to the plea. The litigation over the claim threatens to be protracted unless it is forestalled by the present application.

The application

[9] On 26 November 2013 NYK and Mercurius brought an application against NES claiming the following relief:

'1. NIPPON YUSEN KABUSHIKI KAISHA ("NYK Line") is granted leave to be joined to these proceedings as an intervening applicant; and

2. In terms of section 5(2)(b) of the Admiralty Jurisdiction Regulation 105 of 1983 ("the Act") the Respondent is ordered to provide security to the Intervening Applicant for its claim against the Respondent advanced in proceedings (number 1.242/04) before the Court of Santos, Brazil and which has resulted in a judgment in favour of NYK Line against the Respondent currently subject to a challenge by special appeal.

3. The Respondent is directed to provide said security:

3.1 in the sum of US$11,428,277.00;

3.2 within 10 days of the date of this order;

3.3 in a form to the satisfaction of the Applicants' attorneys or, failing that, to the satisfaction of the Registrar of this Court.

4. In terms of section 5(2)*(c)* of the Act, it is ordered that:

4.1 the deemed arrest of MV "NYK Isabel" at the instance of the Respondent (as Plaintiff) in the action under case number A7/2013 is

made subject to the Respondent providing the security as set forth in paragraphs 2 and 3 of this Order;

4.2 in the event that the Respondent does not provide the security in compliance with paragraphs 2 and 3 of this Order:

4.2.1 the aforesaid deemed arrest of the MV "NYK Isabel" will fall away and be of no force or effect;

4.2.2 the letter of undertaking provided by the First Applicant to the Respondent to secure the release of the MV "NYK Isabel" from arrest (and of which a copy is annexure "SMSD1" to the founding affidavit of Mr Dwyer in this application) shall be null and void and returned for destruction; and

4.2.3 the Respondent's *in rem* action will be dismissed with costs, alternatively, the Applicants shall have leave, on the same papers supplemented in so far as may be necessary, to make application to this Court for an order that the Respondents claim in the *in rem* action is dismissed with costs.

5. The Respondent is ordered to pay the Applicants' costs of the application.'

[10] The security sought by NYK was not security for a counter-claim in the existing *in rem* action. Instead it was security for the indemnity claim advanced by NYK against NES in Brazil, for which it had already been granted judgment. The high court held that it was incumbent on it to order security 'in order to render the court's judgment effective if it finds against' NES. Other than a reduction in the amount of the security, the relief that the high court granted was in accordance with the prayer.

[11] In the founding affidavit it was said that 'arguably' NYK was already a party to the pending litigation, but to place matters beyond doubt it sought an order that it be granted leave to 'join in the proceedings as the second intervening applicant in this application'. There was a considerable amount of ambiguity in this to which I will need to refer in

due course. Beyond that the deponent, Mr Dwyer, a senior and very experienced attorney in maritime matters, set out the history of the voyage giving rise to the dispute and the history of the litigation in Brazil.

[12] In dealing with the claim for security, Mr Dwyer said that, notwithstanding the further pending appeal, the cargo underwriters were now in a position to enforce their judgment against NYK, against the provision of security in the event of the judgment being overturned on appeal. At the time he deposed to his affidavit the amount of the judgment, after taking account of the provision in Brazilian law for a monetary adjustment, presumably related to inflation, and interest, was in excess of US$ 11 million. NYK had obtained security from NES by way of a P & I Club letter of undertaking in an amount of US$ 1,8 million. He accordingly said that his client required security for its claim in an amount of some US$ 9.6 million.

[13] In support of this claim, Mr Dwyer submitted that his clients had a prima facie case against NES as evidenced by the judgment it had obtained against it. As regards the need for security he said that NES had disposed of the *Northern Endeavour* and was now a dormant non-trading shell without assets or income. In view of the fact that, as a result of its arrest of the *NYK Isabel*, NES was fully secured for its claim against NYK he submitted that it would be just and equitable for NYK in its turn to be fully secured for its claim against NES. Lastly he submitted that in order to compel NES to comply with an order to provide security the order should provide that if it failed to do so within a specified time the deemed arrest would be set aside; the security provided by NYK would be declared null and void and returned; and either the action against the

NYK Isabel would be dismissed, or NYK should be given leave to apply for it to be dismissed.

[14] Mr Cunningham who represented NES, also a senior and experienced maritime attorney, did not seriously challenge the facts deposed to by Mr Dwyer in the opposing affidavit. He contended that NYK was not a party to the South African action and that unless it became a party it could not ask the court to order that NES provide it with security. In any event he contended that security could not be ordered for NYK's claim against NES under the Brazilian judgment, but only for a claim pending or contemplated before a South African court. If these legal arguments were not upheld he contended that no sufficient case had been made for security to be ordered. If all this failed he contended that the sanctions proposed by Mr Dwyer were inappropriate.

The arrest of the NYK Isabel

[15] The *NYK Isabel* was arrested as an associated ship. The basis for such an arrest was set out in the *Silver Star*.[1] The first element of such an arrest is the identification of the owner of the ship in respect of which the claim arose (the ship concerned) at the time that claim arose. Section 3(7) *(c)* of the Act provides that the charterer or subcharterer of the ship concerned is deemed to be the owner of the vessel for the purposes of effecting an associated ship arrest, where the charterer or subcharterer and not the owner is liable in respect of the claim. NYK was the slot charterer of a defined number of slots on board the *Northern Endeavour* on this particular voyage. NES accordingly alleged that in terms of s 3(7)*(c)* of the Act it was deemed to have been the owner of that vessel at the time

[1]*MV Silver Star: Owners of the MV Silver Star v Hilane Ltd* [2014] ZASCA 195; 2015 (2) SA 331 (SCA) paras 14 and 16. (*Silver Star*).

that the claims by the cargo underwriters arose, as these were claims for which it, and not NES, was liable. That satisfied the first requirement for an associated ship arrest. At the time of the arrest of the *NYK Isabel*, it was owned by a company (Mercurius) controlled by NYK. That satisfied the second requirement. The *NYK Isabel* was accordingly an associated ship in relation to the *Northern Endeavour*, the ship in respect of which NES's claim had arisen.

[16] The premise upon which this rested was that a slot charterer was a charterer for the purposes of s 3(7)*(c)* of the Act. If that premise was incorrect, then the arrest of the *NYK Isabel* should not have been effected and could have been set aside on application to the high court exercising its admiralty jurisdiction. That would have been a simple and direct way of NYK disposing of NES's claim and it would not have been necessary for it to invoke the complicated process of obtaining and enforcing an order for security.

[17] Were that the position, it would have affected the question whether it was appropriate for the high court to order NES to provide security. NYK would have had a remedy near to hand and, if it eschewed reliance on it without good reason, that would be a strong factor weighing against the court coming to its assistance by ordering NES to provide security. Accordingly, this court called upon the parties to file written argument on this point and the issues flowing from it. Both sides filed succinct and helpful supplementary written arguments and we were provided with copies of the relevant authorities. Counsel were at one in submitting that a slot charterer fell within the concept of a charterer in terms of s 3(7)*(c)* of the Act. For the reasons that follow I think they were correct.

[18] When the Act was first passed s 3(7)*(c)* read as follows:

'If a charterer or subcharterer by demise, and not the owner thereof, is alleged to be liable in respect of a maritime claim, the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner.'

This wording was drawn from Article 3.4 of the Arrest Convention,[2] providing for sister ship arrests, the relevant portion of which reads:

'When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship the claimant may arrest such ship or any other ship in the ownership of the charterer by demise …'

[19] The underlying purpose of s 3(7)*(c)* was to enable a claimant having a claim against a demise charterer to pursue that claim by way of an action commenced by an associated ship arrest. Absent the deeming provision, it was debatable whether a debt incurred by a demise charterer could be pursued in that way.[3] The effect of the presumption was to make it clear that it could, so that where the claim lay against the demise charterer and not the owner, as would probably be the case in regard to claims under bills of lading issued by the demise charterer as carrier, or claims for the price of goods supplied to the vessel at the instance of the demise charterer,[4] the claim could be pursued by way of an action commenced by an associated ship arrest.

[20] The existence of the deeming provision reinforced the purpose of the associated ship arrest provisions, which was to impose liability for maritime claims where it belonged by virtue of common ownership or

[2] International Convention for the Arrest of Sea-Going Ships concluded in Brussels on 10 May 1952. See D J Shaw *Admiralty Jurisdiction and Practice in South Africa* at 40.

[3]There was some authority in England to the effect that a demise charterer was to be equated with the owner of the vessel. See Shaw supra at 32-33

[4]See for example the facts in *Transol Bunker BV v MV Andrico Unity and Others; Grecian-Mar SRL v MV Andrico Unity and Others* [1989] ZASCA 30; 1989 (4) SA 325 (A)

common control of vessels.[5] But its reach was restricted to the case of the demise charterer, which is a less common form of charter party than time or voyage charter parties. It also meant that, in the case of claims arising in respect of time or voyage chartered vessels, where the claim arose against the charterer and not the owner, the associated ship arrest provisions were not available to assist the claimant. Where a time or voyage charterer issued its own bills of lading as carrier or was responsible for the supply of bunkers or provisions to the vessel, creditors would not be able to arrest an associated ship to pursue their claims. Nor could the owner of the vessel subject to the charter make use of the associated ship provisions to enforce a claim against the charterer arising under the charter party.

[21] These problems were addressed by way of the 1992 amendment to s 3(7)*(c)*. The reference to demise charterer was deleted and the section now reads:

> 'If at any time a ship was the subject of a charter-party the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or subcharterer, and not the owner, is alleged to be liable.'

This was a substantial extension of the scope of the associated ship arrest provisions in the Act. There can be no doubt that it extended to both time and voyage charters notwithstanding the limited power of a voyage charterer to give directions to the owner in regard to the operation of the ship. The question is whether it extended to other forms of charter party.

[5] *Silver Star* para 5.

[22] The origin of slot charter parties lies in the expansion of containerisation in international shipping. According to a special circular issued by the Baltic and International Maritime Council (BIMCO):[6]

'Slot charter parties, or space charter agreements, as they are also called, were first introduced in the very late 1960's by major container operators in consortia on the basis of exchanging slots on each other's vessels. Usually, each operator's entitlement to space on other operators' vessels would be in relation to the tonnage entered into the consortia by that particular vessel operator. Even though financial adjustments were made to match the number of slots being exchanged, the essence of the arrangement was exchange rather than sale. Therefore, terms and conditions reflecting this form of slot chartering were often provided in what could be referred to as a Cross Charter Party.

…

The main characteristic of a Cross Charter party, in particular, when used in consortia operation, is that it is rarely used as a free standing document. On the contrary it is usually attached to an operating agreement which contains the essential details of the slot charter arrangement, such as number of slots to be exchanged, financial arrangements, the specified voyages, and other operating details, leaving the Cross Charter Party primarily as the liability document.'

[23] A slot charter party has been defined[7] as:

'A time or voyage charter under which the slot charterer has the right to use only a specified amount of the ship's container carrying capacity. In container liner trades, such charters may be reciprocal ("cross slot charters") between operators/carriers, in order to share capacity.'

By contrast with this, the BIMCO circular says that:

'The feature of a slot charter party as a contract of carriage is unique in the sense that, whereas the slot charter party is not a time charter party nor a voyage charter party, it bears some similarity to both types of contract. As such, a slot charter party can be said to be a 'hybrid' type of contract. It may be mentioned that, as distinct from a time

[6]Circular No 7, 10 November 1993. The circular explains the thinking underlying BIMCO's drafting of the SLOTHIRE charter party.

[7]In Annex 2 (Glossary of Legal Definitions) to the *Legal and Economic Analysis of Tramp Maritime Services* February 2007 (EU Report COMP/2006/D2/002).

charter party when the entire vessel is being chartered, the slot charterers are only hiring space on a vessel and they are therefore not acting as operators as under a time charter party and usually have no control over the operation of the vessel.'

To similar effect, Christopher Hancock QC expresses the view that a slot charter is a unique form of charter with some elements analogous to a time charter and some analogous to a voyage charter.[8]

[24] When courts have considered the status of slot charters they appear to have concluded that they are a novel form of charter party, that has evolved in response to changes in the manner in which sea transport operates and is designed to meet the commercial contingencies of new and changing circumstances. Thus in *The "Tychy"*[9] the court was concerned with the question whether a slot charterer was a charterer for the purposes of s 21(4) of the Supreme Court Act, 1981. After a careful consideration of the authorities on the question whether this term in the Act was confined to a demise charterer, Clarke LJ held that it included both a time and a voyage charterer. He went on to consider the position of a slot charterer and held that there was in principle no difference between that and a voyage charter of part of a ship. He said:

They are both in a sense charterers of space in a ship. A slot charter is simply an example of a voyage charter of part of a ship.'

[25] Other courts seem to be similarly inclined to accept that a slot charterer is a charterer, although they have not necessarily endorsed the idea that a slot charter is a form of voyage charter. When the High Court of Australia was dealing with the meaning of the word 'charterer' in s 19(a) of the Admiralty Act 1988 (Cth), Toohey J expressly included slot

[8]Christopher Hancock QC *Containerisation, slot charters, and the law*. Chapter 14 in D Rhiddian Thomas (ed) *Legal Issues Relating to Time Charters* (2008) 247-256.
[9]*The "Tychy"* [1999] 2 Lloyd's Rep 11 (CA) at 18-22.

charterers in the category of charterer.[10] In the United States the US District Court for the Southern District of New York said that a slot charter is a 'more specific type of sub-charter'.[11] In Canada a slot charter has been described as a type of time charter,[12] thereby emphasising its hybrid character.

[26] In the field of limitation the right to limit under the Limitation Convention 1976[13] is given to a charterer of the vessel. In the *MSC Napoli*[14] the court had to consider whether that right extended to slot charterers. The court concluded that it did. In para 17 of the judgment Teare J said:

'Indeed the ordinary meaning of the word charterer is apt to include any type of charterer, whether demise, time or voyage charterer. There is no reason why it should not also include a slot charterer. Standard textbooks refer to slot charters when discussing types of charters … There is a good reason for a slot charterer to be within the definition. Were slot charterers not within the definition, slot chartering, which is an established and, to judge by its growth, an efficient way of organising the carriage of goods would or might fall into disuse. A slot charterer's inability to limit liability would not encourage international trade by way of sea carriage, which was the object and purpose of the convention.'

This conclusion has been accepted in textbooks on the subject of limitation.[15]

[10]*Laemthong International Lines Co Ltd v BPS Shipping* [1997] HCA 55; (1997) 190 CLR 181; 149 ALR 675 at 681.
[11]*International Marine Underwriters v M V Patricia S* 06 Civ 6273 (19 January 2007); (2007) 713 LMLN 1.
[12]*Canada Moon Shipping Co Ltd and Another v Companhia Siderurgica Paulista-Cosipa and Another* 2012 FCA 284 para 53.
[13]Convention on Limitation of Liability for Maritime Claims 1976. See also s 263(2) of the Merchant Shipping Act 57 of 1951.
[14]*Metvale Ltd and Others v Monsanto International SARL and Others (the "MSC Napoli")* [2009] 1 Lloyds' Rep 246 [QBD (Admlty Ct)].
[15]Griggs, Williams and Farr *Limitation of Liability for Maritime Claims* (4 ed) at 11; Norman A Martínez Gutiérrez *Limitation of Liability in International Maritime Conventions* (IMLI Studies in International Maritime Law, 2011) at 25-27.

[27] I do not think it desirable to approach a statute such as the Act, which is concerned with events in the dynamic field of international trade and shipping, on the basis that the meaning of expressions used in the statute are fixed in stone at a point in time, and are incapable of being adapted to accommodate new developments.[16] When the Act speaks of charter parties it is concerned to refer to contracts of a type developed by and familiar to those engaged in maritime trade. It is not concerned to restrict the category of such contracts. In other words it requires a court to give a construction to the expression that is, so far as possible, consistent with the commercial understanding of its meaning.

[28] Slot charters have evolved as the container revolution in maritime transport has evolved. They meet a perceived commercial need and their terms are largely adapted from the established time and voyage charters that are in daily use in maritime trade. The objection to treating them as charters appears to be based principally on the fact that the slot charterer does not charter the entire vessel, but only a part thereof. But I can perceive nothing in that fact that should operate to preclude slot charterers from being characterised as charterers.

[29] A final point that seems to me relevant is the purpose of s 3(7)*(c)*. It is to enable claims to be pursued by way of proceedings against an associated ship in circumstances where no claim lies against the ship concerned and its owner. The deeming provision simply enables the first requirement for an associated ship arrest to be satisfied without affecting the commercial relationships underpinning the slot charter. If the owner of the ship concerned is liable on the claim the deeming provision cannot

[16]*Malcolm v Premier, Western Cape Government* [2014] ZASCA 9; 2014 (3) SA 177 (SCA) paras 10 and 11.

be invoked. A construction of the word ‘charterer’ that includes a slot charterer will serve the purpose of promoting the ability of creditors to recover maritime claims. That is the underlying purpose of permitting proceedings to be instituted by the arrest of an associated ship. So that construction is consistent with the statutory purpose.

[30] For all these reasons I am satisfied that NYK was a charterer of the *Northern Endeavour* for the purposes of the deeming provision in s 3(7) *(c)* of the Act. It follows that it was not open to NYK on this ground to set aside the arrest of the *NYK Isabel* as defective. I turn then to deal with the other issues raised by the application for security.

Was NYK a party to the action?

[31] The primary issue argued on behalf of NES was that NYK was not a party to the action instituted by NES against the *NYK Isabel*. The mere fact that it had entered an appearance to defend that action did not, so it was submitted, make it a party as such. It was submitted that in order for it to become a party it had to take a further procedural step and seek its joinder.

[32] The crisp answer to this argument is that it is contrary to the provisions of rule 8(2) of the Admiralty Court Rules, which provides that:

‘Where summons has been issued in an action *in rem*, any person having an interest in the property concerned may, at any time before the expiry of 10 days from the service of the summons, give notice of intention to defend and may defend the action *as a party*.’ (Emphasis added.)

The rule states expressly that the person giving notice of intention to defend thereafter defends the proceedings as a party. It imposes no further obligation that must be discharged in order to become a party. And if confirmation is needed that they are a party, one need only look at rules 9

and 10. In terms of rule 9(2)*(c)* a party is entitled to deliver pleadings. There is no suggestion that NYK would have had to do any more from a procedural perspective to invoke this rule. In fact an examination of the plea delivered in the case shows that it was pleading specifically in relation to the claim against it. For example, it raised a defence of *res judicata*. But that defence is ordinarily only available to a party that was a party to the judgment relied on as constituting *res judicata*.[17]

[33] The provisions of rule 10 dispose of any residual doubt. That reads: 'A defendant and any person giving notice of intention to defend in an action *in rem* may claim in reconvention against the plaintiff, either alone or with any other person.' Acceptance of the proposition that a person does not become a party to an action *in rem* merely as a result of giving a notice of intention to defend the action, would have the remarkable result that, albeit that they were not a party, they would be entitled to bring a claim in reconvention. Counsel sought to escape this absurdity by contending that the effect of bringing a claim in reconvention would necessarily be that the person bringing that claim would have to make themselves a party to the action. But there is nothing in the rules to suggest that any additional procedural step needs to be taken before delivering the claim in reconvention. The only sensible construction of rule 8(2) is that such a person is already a party to the action.

[34] Mr Mullins SC, for NYK, drew our attention to the background to rules 8(2) and 10. When they were originally promulgated these two rules were rules 6(2) and 8 respectively. There were, however, two significant differences. In rule 6(2) (now rule 8(2)) the words 'as a party' did not

[17] *Caesarstone Sdot-Yam Ltd v World of Marble and Granite CC & others* [2013] ZASCA 129; 2013 (6) SA 499 (SCA); [2013] 4 All SA 509 (SCA) paras 3 and 4.

appear. In rule 8 (now rule 10) the words 'and any person giving notice of intention to defend in an action *in rem'* were not included.

[35] Those words were inserted in consequence of the judgment of Scott J in *The Lady Rose*.[18] In that case, after delivering a notice of intention to defend an action *in rem*, the owner of the boat filed a plea and a claim in reconvention. An exception was taken to the claim in reconvention on the grounds that such a procedure was impermissible. The exception was dismissed and Scott J said:[19]

'For the present purpose, however, it is unnecessary to have to decide upon the true nature of the action *in rem*. Whatever that may be, it is at least clear that the action cannot be regarded as simply an action against a *res* without reference to the owner or person having an interest therein. This is particularly so where, as in the present case, the action is dependent upon the existence of a claim *in personam* against the owner (s 3(4)(b) of the Act). Even where the claim is founded upon a maritime lien, the owner, of course, remains involved to the extent that he is compelled, in the absence of payment, to defend the action or lose his ship or other maritime *res*. In these circumstances, to regard him, for the purpose of Admiralty Rule 8, as being someone entirely different from the defendant, viz the maritime *res*, and therefore unable to counterclaim, would be to adopt an approach which, in my view, is unnecessarily technical and could not have been what was intended. Indeed, to require the owner to formally apply to be joined as a co-defendant with the *res* before being able to counterclaim, or to bring a separate action, it seems to me, would serve no purpose other than to increase the costs of litigation. In my judgment, therefore, the word "defendant" in Admiralty Rule 8 is to be construed as including the owner of a maritime *res* who appears to defend an action *in rem* against the *res*.'

[36] There can be no doubt that the amendments effected to rules 8(2) and 10 in 1997, were directed at incorporating the conclusion by Scott J

[18] *SA Boatyards CC (t/a Hout Bay Boatyard) v The Lady Rose* (formerly known as the *Shiza*) 1991 (3) SA 711 (C).
[19] At 716B-E.

in *The Lady Rose.* They involved an express acceptance that the effect of entering an appearance to defend an action *in rem* is to make the person so doing a party to that action.

[37] Counsel for NES sought to call in aid a passage from my judgment in the *Alina II,*[20] where I dealt with the fact that in English admiralty proceedings the mode of citation is such that, if the person entering appearance to defend is personally liable under the claim, that person has been properly cited and any judgment thereafter will be enforceable as a judgment *in personam* against them. I went on to say:

'Under the present admiralty rules in South Africa the second of these consequences would not flow from the entry of appearance to defend and the defence of the *in rem* action. The reason is that in terms of admiralty rule 2(4), read with form 1 to the admiralty rules, the summons *in rem* is not addressed to and does not cite the owner or other persons having an interest in the vessel or other *res* arrested in order to commence the action. In this our rules have departed from the forms that applied in England, as referred to by Lord Wright in *The Cristina* supra, and the forms previously applicable in South Africa, both when our courts sat as Colonial Courts of Admiralty and in the first three years of operation of the Act. One may therefore have a submission to the court's jurisdiction by a person not cited as a party. However, the problem, if it be one, is readily overcome by amending the summons to join that person and to reflect, as rule 22(5) contemplates, that the action will proceed as an action both *in rem* against the vessel and *in personam* against that person, with such consequential amendments as the circumstances may require. Alternatively a separate action *in personam* can be commenced on the basis of the submission to the court's jurisdiction. Some such procedural step seems to be necessary in this country in order that the action (and ultimately any judgment) reflects the party entering appearance as a party to the judgment.'

[20] *MV Alina II (No 2): Transnet Ltd v Owner of MV Alina II* [2011] ZASCA 129; 2011 (6) SA 206 (SCA) para 30.

[38] It was not my intention in that passage to suggest that a person entering an appearance to defend an action *in rem* did not thereby become a party to the action. I was concerned to deal with a different proposition. It was that, until such person was expressly cited, a judgment *in rem* against the vessel would not be executable against them *in personam* without some procedural step being taken to make it clear that the judgment lay against them personally. I postulated that the procedural step might be to cite them as a defendant by way of amendment as contemplated by rule 22(5). Alternatively a separate action *in personam* could be instituted and the proceedings consolidated. The sole purpose of these suggestions was to indicate how a judgment granted *in rem* could be pursued and executed upon *in personam*. These procedural mechanisms may not be exclusive. In the case of a judgment against a partnership it has been held that it is permissible, after judgment, to approach the court for an order naming the individual partners so that the judgment may be enforced against them.[21] Perhaps it would be permissible for the claimant to seek an order declaring that the *in rem* judgment should also operate *in personam*. That process would bear some similarity to the procedure adopted in England in *The Dictator.*[22] Be that as it may, that procedural problem is not germane to the present issue, which is simply whether NYK became a party to the action *in rem* against the *NYK Isabel* when it entered an appearance to defend that action. The answer to that question must be in the affirmative.

[39] It follows from that conclusion that paragraph 1 of the order granted by the high court was unnecessary. It should be set aside. The

[21]*M Rauff (Pty) Ltd v Petersburg Cole Agency* 1974 (1) SA 811 (T) at 812E.
[22]*The Dictator* [1892] P 304; [1891-4] All ER Rep 360.

next issue is whether NYK was entitled to invoke the provisions of ss 5(2)(b) and (c) of the Act in order to obtain the security it sought.

Applications for security in terms of s 5(2)*(b)*

[40] The application for security was brought in terms of ss 5(2)*(b)* and *(c)* of the Act. Those sections provide that:

'A court may in the exercise of its admiralty jurisdiction –

(a) …

(b) order any person to give security for costs or 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 the 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.'

[41] It is not easy to comprehend precisely what is meant by the words 'in the exercise of its admiralty jurisdiction' in the preamble to this section. The admiralty jurisdiction of the high court is defined in s 2 of the Act as being a jurisdiction to hear and determine any maritime claim and s 1(1) of the Act contains a list of maritime claims, which includes in para *(ff)* 'the giving or release of any security'. But the mere fact that a claim is made for the provision of security against 'any person' in terms of s 5(2)*(b)* cannot on its own vest the court with jurisdiction to deal with that claim. If the demand for security is unrelated to any maritime claim and unrelated to any matter having a connection to proceedings before the court, s 5(2)*(b)* could surely not be construed as empowering the court to make such an order.[23]

[23]*MV Zlatni Piasatzi: Frozen Foods International Ltd v Kudu Holdings (Pty) Ltd and Others* 1997 (2) SA 569 (C) at 574A-B, although the problem does not so much lie with the wide wording of the sub-section, but with the interpretation of the preamble to it.

[42] Section 5 of the Act deals generally with the powers of the court in admiralty matters. It is true that some of these are powers that may be exercised without any pre-existing need for the court to be seised with a matter falling within its admiralty jurisdiction. In those instances, it is the application for the exercise of the power that gives rise to the court's jurisdiction. The powers in ss 5(3)*(a)* and, in some instances s 5(5)*(a)*(i), read with s 5(5)*(a)*(iv), fall in that category. This is not, however, the case with the powers in s 5(2), save for sub-section *(dA)*, which was inserted in 1992 and does not fit comfortably with the remaining matters dealt with in the sub-section. Leaving aside the special instances mentioned above, it seems to me in general that s 5 is directed at conferring on courts powers to be exercised in matters where their admiralty jurisdiction has already been established by arrest, attachment, submission or otherwise. That is undoubtedly so in regard to the powers in sub-sections *(a)*, *(c)*, *(d)*, *(e)*, *(f)* and *(g)* of s 5(2). In my view the sensible construction of the words 'in the exercise of its admiralty jurisdiction' in the context of an application under s 5(2)*(b)* is that they limit the application of the sub-section to circumstances in which the court is already vested with admiralty jurisdiction in relation to the person against whom such an order is sought.[24] This should not hamper a litigant wishing to obtain an order that security be provided in the light of the extensive powers of the court to order joinder in terms of s 5(1).

[43] Differing views have been expressed in regard to the scope of the power given to the court in terms of s 5(2)*(b)*.[25] In the context of

[24]In view of the point discussed earlier in this judgment that a person that has entered an appearance to defend in an action *in rem* thereby becomes a party to the action, the conclusion in *MV Rizcun Trader (3): Manley Appledore Shipping Ltd v MV Rizcun Trader* 1999 (3) SA 966 (C) at 973 B-C that an order for security could not be made against such a person because the only party to the proceedings was the ship was incorrect.

[25]Gys Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* (2 ed, 2012) para IV.8, p 225.

applications for security for counterclaims brought by the owners of vessels arrested in actions *in rem* in South Africa or arrested under s 5(3) *(a)*, there are judgments that suggest that it should be sparingly exercised.[26] These cases have also tended to view the proper approach to its exercise through the prism of the common law in regard to compelling *peregrini* to provide security. Others have disagreed.[27] In my view the language of the section does not restrict the manner in which the power to order security is to be exercised. It is undesirable in that situation for the discretion to be unduly circumscribed.[28] A better approach is that adopted by Friedman J in *The Paz*.[29] In dealing with the similarly unqualified discretion in s 5(3) of the Act, he said:

'(T)he discretion is an unfettered judicial discretion which falls to be exercised upon a consideration of all relevant facts and circumstances. To endeavour to categorise or catalogue those facts or circumstances, as has on occasions been done in the past when questions of discretion were involved, is not only undesirable but is fraught with obvious dangers. This does not mean, however, that general guidelines as to the Court's approach to the powers conferred upon it by s 5(3) should not, if possible, be sought and stated.'

[44] It is unhelpful to have regard to common law rules on the furnishing of security for costs in determining the scope of the power to order security under this section. These are not only restrictive, but are

[26]*Sunnyface Marine Ltd v Hitoroy Ltd (Trans Orient Steel Ltd and Another Intervening); Sunnyface Marine Ltd v Great River Shipping Inc* 1992 (2) SA 653 (C) at 657; *The Catamaran TNT: Deans Catamarans CC v Slupinski (No 1)* 1997 (2) SA 383 (C) and *The MV Leresti: Afris Shipping International Corporation v MV Leresti (DMD Maritime Intervening)* 1997 (2) SA 681 (D) at 689E-H.
[27]*The Yu Long Shan: Guangzhou Maritime Group v Dry Bulk SA* 1997 (2) SA 454 (D); *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* 2000 (1) SA 286 (C) (*Heavy Metal*) at 298 D-H; *MV Akkerman: Fullwood Shipping SA and Another v Magna Hella Shipping SA* 2000 (4) SA 584 (C) at 592B-F; *The Millenium Amanda* SCOSA B141 at B151G-H and *MV Gladiator: Samsun Corp t/a Samsun Line Corp v Silver Cape Shipping Ltd Malta* 2007 (2) SA 401 (D) at 411 I-J and 413D-E.
[28]*Heavy Metal* at 298 F-H; *MV Pasquale Della Gatta; MV Filippo Lembo; Imperial Marine Co v Deiulemar Compagnia Di Navigazione Spa* [2011] ZASCA 131; 2012 (1) SA 58 (SCA) (*Pasquale Della Gatta*) para 57.
[29]*Katagum Wholesale Commodities Co Ltd v The MV Paz* 1984 (3) SA 261 (N) at 264 A-C.

directed at different situations to those that arise under the Act.[30] The Act is a special statute dealing with maritime matters and it is directed at meeting the needs of the shipping industry in enforcing maritime claims. It provides the court with very extensive powers to deal with maritime cases. In regard to the breadth of these powers I draw attention to s 5(1), which empowers the court, to join a person as a party 'notwithstanding the fact that he is not otherwise amenable to the jurisdiction of the court', and to s 5(2)*(a)*, which provides that a court may decide any matter arising in connection with a maritime claim 'notwithstanding that any such matter may not be one which would give rise to a maritime claim'. These powers take account of the reality that maritime defendants are mobile and transitory in their presence in any particular jurisdiction. Perforce they compel maritime claimants to become 'wandering litigants of the world', in the colourful expression of Didcott J recorded in *The Paz*,[31] but without the pejorative overtones with which he used it. In order to address this problem the Act provides wide-ranging powers of arrest, both for the purpose of instituting actions in South Africa[32] and to enable claimants to obtain security for proceedings in other jurisdictions.[33]

[45] It follows in my view that the provisions of the Act should be given a generous interpretation consistent with its manifest purpose of assisting maritime claimants to enforce maritime claims. That construction is also consistent with the right of access to courts afforded to everyone in terms of s 34 of the Constitution. There is, however, a need for balance when the courts exercise the expansive powers of arrest and attachment of vessels embodied in the Act. Sections 5(2)*(b)* and *(c)* give courts the

[30]*Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C) at 371 E-F. Hofmeyr, supra para IV.14, p 227.
[31]At 263G-H.
[32]These are commonly and compendiously referred to as associated ship arrests in terms of s 3(7) of the Act.
[33]Commonly referred to as security arrests in terms of s 5(3) of the Act.

means to balance the interests of claimant and defendant by ordering counter-security in appropriate cases and attaching conditions to orders of arrest or attachment. Thus it is commonplace for an arrest to be subject to the provision of security for the costs of an application to set the arrest aside, or for any loss suffered in consequence of that arrest if it is subsequently set aside.[34]

[46] Turning then to general matters applicable to the exercise of a court's discretion under s 5(2)*(b)* two requirements are well established. The first flows from the language of the section, namely that security is to be given for costs or a claim. An applicant for security under this section must establish that they may be entitled in due course to an order for costs, or that they have a claim against the party from whom security is sought. The existence of a claim need only be established prima facie, that is by producing evidence that, if accepted, shows the existence of a cause of action.[35] As the claim must be one that is enforceable it is for the applicant also to show on a prima facie basis that it will be enforceable in the forum in respect of which security is sought. The second is that the applicant must show a genuine and reasonable need for security. After some debate at the level of the high court, this court held that to be a requirement in the *Wisdom C*.[36]

[47] NES contended that the security sought by NYK was unrelated to the subject matter of the litigation in South Africa. It is not clear to me whether it was intended by this submission to contend that it was

[34]*Yu Long Shan* at 462I-J.
[35]*Pasquale Della Gatta* paras 19 and 20.
[36]*MV Wisdom C: United Enterprises Corp v STX Pan Ocean Co Ltd* [2008] ZASCA 21; 2008 (3) SA 585 (SCA) para 26.

impermissible for the court to grant the application for security.[37] To the extent that this was its purpose, I disagree. The section refers to 'any claim' and NYK has a claim for an indemnity against NES that is reinforced by the judgment in its favour granted by the Brazilian court. It would be entitled to pursue a counterclaim in the present action based on that judgment. Such a claim is a maritime claim in terms of paragraph *(aa)* of the definition of maritime claim. I understood counsel to accept that, if NYK had brought a counterclaim on that basis, NES could not have objected to the application for security on this ground. That concession was in my view destructive of the argument. There can be no practical difference between security for a counterclaim in South Africa based on the Brazilian judgment and security for payment of that judgment in its country of origin, if it is not set aside on appeal.

[48] An alternative submission was that while NES had submitted to the jurisdiction of the South African court for the purposes of its action and matters relating thereto or arising therefrom, it had not submitted to the jurisdiction in relation to a claim for security to be provided in Brazil. That appeared to be based upon a passage in the judgment in the *Rizcun Trader (4)*,[38] where it was said that while jurisdiction to make such an order was inevitably present when the claim was to be pursued in reconvention in the South African proceedings, that was not necessarily so in relation to a claim to be pursued in a foreign tribunal. In that case the initial arrest of the vessel as an associated ship by an entity referred to as MAS, had been for the purpose of obtaining security for arbitration proceedings in London. The owner of the arrested vessel brought an

[37]If it was, it was inconsistent with judgments such as *MV Leresti: Afris Shipping International Corporation v MV Leresti (DMD Maritime intervening)* 1997 (2) SA 681 (D) at 686B-H and the *Pasquale Della Gatta* supra.
[38]*MV Rizcun Trader (4): MV Rizcun Trader v Manley Appledore Shipping Ltd* 2000 (3) SA 776 (C) at 803G-804E.

application against MAS for security for a claim for damages for wrongful arrest that it wished to pursue in South Africa. Van Reenen J dismissed the application *inter alia* on the footing that in bringing the initial application MAS had only submitted to the jurisdiction of the South African court in respect of matters relevant to its original claim for security and not in respect of the proposed claim for damages.

[49] That conclusion was incorrect. In *Mediterranean Shipping Co v Speedwell Shipping Co Ltd*[39] Van Heerden J said:

'It was the defendants who had initially sought the assistance of this Court against the plaintiff for relief under the Act. The present claim is for loss flowing from that relief. … The plaintiff's present cause of action arose under and by virtue of the Act and within the jurisdiction of this Court. Anyone who invokes the jurisdiction of this Court for relief under the Act must be taken - and can hardly be heard to contend otherwise - to have submitted to that jurisdiction for the recovery, in terms of a remedy under the Act, of any loss or damage flowing from his very action in coming to this Court.'

[50] In this case NES has invoked the jurisdiction of the South African court with a view to nullifying the effect of the judgment granted against it and in favour of NYK in Brazil. NYK, for its part, is defending that action and, by inference, defending the Brazilian judgment insofar as it holds NES liable to indemnify it for any amount it may have to pay to underwriters under the same judgment. In invoking the jurisdiction of the South African court NES subjected itself to the exercise of the powers of that court to grant relief under the provisions of the Act. Those powers include those set out in ss 5(2)*(b)* and *(c)* of the Act. I can see no basis for the view that the scope of those powers is in some way circumscribed by the nature of the claim brought by NES. It makes no sense to say that

[39]*Mediterranean Shipping Co v Speedwell Shipping Co Ltd* 1986 (4) SA 329 (D) at 333J-334B.

NYK could ask for security for its claim, provided it brought a counterclaim in South Africa based on the Brazilian judgment, but not if it wanted that security for payment of the judgment in Brazil.

[51] Beyond the two requirements referred to above, I do not find it helpful to try and establish further guidelines for the exercise of the court's discretion under ss 5(2)*(b)* and *(c)*. Each situation will be different. The court should not be constrained by a formulaic approach to the exercise of its discretion.[40] All relevant factors must be weighed and a conclusion reached that is in accordance with the interests of justice. How should that exercise be undertaken in this case?

The exercise of the court's discretion.

[52] It is unclear on what grounds the high court exercised its discretion in favour of NYK. Having set out the facts it summarised the issues and concluded that there were five questions that needed to be addressed. The third of these was whether the court had jurisdiction in respect of NES to order it to furnish security for a claim advanced in Brazil and the fourth was whether the court should exercise its discretion to make such an order. It then said that the fifth issue was whether NYK had established a genuine and reasonable need for such security. That inverted the enquiry because proof of a genuine and reasonable need for security is a prerequisite for the exercise of the discretion. Proof of that need is essential.[41]

[53] This may explain why in the latter part of the judgment the fourth and fifth issues were dealt with together. But having set out the arguments

[40] *Pasquale Della Gatta* para 57.
[41] Ibid.

by NYK in favour of security being ordered, the judgment digressed to deal with the quantum of security. It concluded simply:

'I agree with counsel for applicants that fairness would, in the circumstances, dictate that the respondent actually pay (and secure) its liability to the intervening applicant and in that way, if the respondent is correct, it will have met its obligation in terms of the binding judgment and will have recovered that which it claims to be entitled to recover in the South African action *in rem*. Conversely, if the intervening applicant is correct, and the respondent's claim *in rem* is bad, the respondent will have met its obligations. Obviously in those circumstances the South African court will ultimately decide where the losses will lie.'

The following paragraph added the conclusion that the application for 'additional' security was genuine and reasonable.

[54] It seems to me that this approach conflated the question whether NYK's need for security was reasonable and genuine with the exercise of the court's discretion and led in the end result to the court not dealing with the latter question. It falls to be emphasised that these are separate issues. Whether there is a reasonable and genuine need for security is a prior question concerned with the likelihood that the applicant for security will be paid if it is successful in obtaining an order for costs or in pursuing its claim.[42] In *The Paz*[43]it was said that an applicant for a security arrest should say why it needed security; that it had not already obtained security; and that it could not obtain security in the other actual or contemplated proceedings. I would add the following glosses. If some security has been obtained there should be an explanation of the need for further security, for example, by explaining that it is insufficient or of no real value. If it would be feasible to obtain security elsewhere, or in the other or contemplated proceedings, there needs to be an explanation for

[42]*MV Orient Stride: Asiatic Shipping Services Inc v Elgina Marine Co Ltd* [2008] ZASCA 111; 2009 (1) SA 246 (SCA) para 7.
[43]At 268B-C.

invoking the jurisdiction of a South African court for that purpose. In other words, as Didcott J said in *The Paz*[44] the applicant must explain:

'no alternative and less disruptive opportunity for obtaining such has been or is likely to become available to him and, if one has already been lost, that this was not his fault or, I should rather say, not his fault to such a degree as to be fairly held against him.'

Whether security should be ordered when a reasonable and genuine need therefor has been established will depend upon the circumstances of the particular case.

[55] It will usually be convenient in considering an application for security to address these questions sequentially. Starting then with the question whether NYK demonstrated that it had a claim against NES, it is clear that it did. The claim arose under the slot exchange agreement, read with the particular slot charterparty applicable to the voyage. A court of competent jurisdiction in Brazil adjudicated upon it and it is in that court that NYK seeks to enforce it. It was therefore prima facie established and the first requirement was satisfied.

[56] Some argument was addressed to us on the basis that if NYK sought to enforce the judgment in South Africa it would need to make further allegations and establish them on a prima facie basis.[45] Stress was laid on the need for a South African court to be satisfied that the foreign court had international jurisdiction or competence. The short answer to this is that NYK was not seeking to enforce its Brazilian judgment in South Africa, but in Brazil. It would only be if it were contrary to South African public policy for our court to lend its aid to the enforcement of that judgment by compelling NES to provide security, that the issue of the Brazilian court's exercise of its jurisdiction might arise. In this case there

[44] At 270A-B.
[45] *Jones v Krok* [1994] ZASCA 177; 1995 (1) SA 677 (A) at 685A-C.

is no suggestion that it exercised jurisdiction on an exorbitant basis. Given the breadth of the admiralty jurisdiction vested in our courts under the Act, it would only be in extreme circumstances that our courts would refuse to recognise the admiralty jurisdiction of a foreign court on public policy grounds.

[57] On the question of NYK's genuine and reasonable need for security its case was simple. NES has disposed of the *Northern Endeavour* and the company is dormant, with neither assets nor income. In the absence of security there seems little prospect of NYK obtaining payment of its claim if the judgment it has is not disturbed on appeal. It has obtained some security in Brazil in the form of a P & I Club letter of undertaking, in an amount equivalent to the package limitation applicable to the lost and damaged cargo, and it reduced its claim for security by the amount of that guarantee. It also caused a claim made by NES against ships' agents in South Africa to be arrested. But, if NYK succeeds in its claim against NES, it is difficult to see that any value can attach to that claim. Accordingly in my view NYK clearly established a genuine and reasonable need for security for its claim against NES.

[58] The final issue is the exercise of the discretion vested in the court under s 5(2)*(b)*. There was very little argument directed at suggesting that this should not be exercised in favour of NYK. It seems to have been accepted that once the pre-requisites for the exercise of the discretion had been established an order for security should follow. Accordingly I confine myself to the following observations that point in favour of an order for security. First, in doing so we are assisting a court in one of our close trading partners and a fellow member of the BRICS group of trading nations to enforce its judgment. So we are dealing with the

judgment of a court in a friendly nation. Judicial comity points in favour of assisting in its enforcement. Second, NES invoked the jurisdiction of the South African court in order to obtain security for its claim against NYK and it cannot complain if NYK makes use of the same jurisdiction for the same purpose. Third, where the merits of a claim and counterclaim are on the face of it reasonably balanced, considerations of fairness suggest that either both parties should have security or neither. Fourth, NES did not point to any policy or equity reasons to suggest that it would be unjust for it to be required to provide such security. The present litigation is being supported by its P & I Club. Its decision to provide or withhold security will be a business decision in the light of its underwriting experience and its assessment of the value of pursuing the claim.

[59] While a court will ordinarily not explore the merits of the claim for which security is sought, it would in my view be a relevant consideration in the exercise of the discretion if it appeared that it was largely speculative or had limited prospects of success. In this case the position appears to be that NYK has a strong claim and conversely NES a weak claim. I have read both the first instance and the appellate judgments of the Brazilian courts. Contrary to the allegation in papers in this court that its finding that NES should indemnify NYK flowed from a special provision of the Brazilian Commercial Code that imposed strict liability on NES, there is no mention in either judgment of reliance on such a provision. Instead it appears that NES largely ran the same defences against NYK as NYK ran against the underwriters, namely, defences of heavy weather and Act of God, as well as package limitation. In the appellate judgment it is recorded that NES argued that NYK was

exclusively liable ‘due to the improper cargo stowage’, but this defence was rejected.

[60] The provisions of the slot exchange agreement and the slot charter party also favour NYK’s case. Clause 5.5(a) of the former provides that:

‘The Ship Operator [NES] takes responsibility of the container from the time the spreader is disconnected at the port of loading until the spreader is reconnected at the port of discharge’.

While clause 8.1 makes each line responsible for the proper and careful stowing of containers, that is in turn subject to the provisions of clause 8.2 of the slot charter, which provides that:

‘The Charterer shall comply with the directions of the Master or other persons responsible for the stowage on behalf of the owners as to when and where containers are to be stowed.’

It is no doubt in the light of that provision that the ship operator – in this case NES – undertook in clause 10.2 of the slot charter to be:

‘responsible for the proper and careful carriage, custody and care of the containers and goods whilst on board the Vessel …’

In clause 10.4 the possibility of the slot charterer pursuing a claim for an indemnity against the owner (NES) arising out of claims made against it by cargo interests, was expressly recognised.

[61] I do not say that these provisions were necessarily decisive of NES’s liability to NYK. They do, however, furnish powerful support for the proposition that the Brazilian court’s decision was supported by the terms of the relevant contracts. Furthermore NES does not seek in the South African proceedings to rely upon the contracts for its claim against NYK. Instead it pursues the claim in delict or tort, always a problematic

course of action when the parties' relationship is governed by detailed contracts.[46]

[62] Weighing all these factors it seems to me that this is a clear case in which the overall interests of justice pointed in favour of the grant of an order that NES provide security to NYK for its claim in Brazil. It was but faintly argued that if security was not provided the penalty should be that the amount of security NES held should be reduced to correspond with the security NYK holds in Brazil under the P & I Club letter of undertaking. I can see no justification for that. Subject only to two minor amendments to the order of the high court the appeal must be dismissed with costs. The first of these is the deletion of the unnecessary order for NYK's admission as an applicant. The second is the inadvertent grant of relief in para 4.2.3 of the court's order of relief in the alternative. The parties were at one that the costs of two counsel were warranted.

[63] I make the following order:

1 The order of the high court is amended in the following respects:

(a) The deletion of paragraph 1 and the renumbering of the remaining paragraphs.

(b) The deletion in the original paragraph 4.2.3 of the words:

'the Respondent's *in rem* action will be dismissed with costs, alternatively'

2 Subject to those amendments the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

[46] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2005] ZASCA 109; 2006 (3) SA 138 (SCA); [2007] 1 All SA 240 para 25; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) para 64.

M J D Wallis
JUDGE OF APPEAL

Appearances

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