REPORTABLE
Case number: 159/2000

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

GOLDEN SEABIRD MARITIME INC **FIRST APPELLANT**

GOLDEN SEAGULL MARITIME INC **SECOND APPELLANT**

and

ALAM TENGGIRI SDN BHD **FIRST RESPONDENT**

MOUSAKA INCORPORATED **SECOND RESPONDENT**

CORAM: **HEFER ACJ, SCOTT, MPATI, MTHIYANE JJA and CONRADIE AJA**

DATE OF HEARING: **3 SEPTEMBER 2001**

DELIVERY DATE: **25 SEPTEMBER 2001**

Summary: The provisions regarding a 'deemed arrest' in s 3(10)(1)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983 apply to a security arrest in terms of s 5(3)(a) of the Act. Such an arrest accordingly does not lapse upon the release of arrested property against the provision of an extra-curial guarantee.

JUDGMENT

CONRADIE AJA:

[1] On 28 August 1997 the first and second appellant each bought from the second respondent a vessel then in the course of construction at the Onomichi dockyard in Japan. The one was hull 425. It later became known as the MT *Theano*. The other was hull 426. It became the MT *Ludovica.*

[2] According to the appellants, the parties intended it to be a term of each agreement that the vessel would be suitable for carrying methyl tert-butyl ether ('MTBE') in all their cargo tanks. In the alternative, the appellants alleged that it had been represented by the second respondent that the vessels would be so suitable. MTBE is a corrosive chemical, which can only be transported in specially coated tanks fitted with specially constructed valves. The second respondent's attitude was that the contract specification provided, and was intended to provide, for MTBE carrying capacity in only approximately 25% of the tanks. It denied the alleged misrepresentation.

[3] The disputes were to be arbitrated in London. In order to obtain security for their claims in the arbitration the appellants on 3 November 1998 arrested a ship belonging to the first respondent, the MV *Alam Tenggiri* under s 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act'). Two letters of undertaking from a P & I Club, the Assuranceforeningen Skuld ('the Skuld letters'), were tendered in order to secure the release of the ship. No authorized official of the appellants could be reached in time to grant their attorneys authority to accept the Skuld letters. The respondents thereupon applied for and were granted an order by Nicholson J -

1. That the Respondents accept the two letters of undertaking issued by

Skuld…as security for the Respondents' claims against the Second Applicant, which claims are to be enforced by the Respondents against the First Applicant in London in arbitration proceedings;

2. That the aforesaid letters of undertaking are to be substituted with bank guarantees from a first class South African or London Bank in precisely the same format and for the same amounts within a period of thirty (30) days calculated from the date of this order…

Once the Skuld letters had been accepted the *Alam Tenggiri* was released from arrest.

[4] Soon thereafter the respondents sought before Hurt J an order setting aside the arrest of the *Alam Tenggiri* and directing that the security given to free the vessel from the arrest be set aside. The learned judge decided that the appellants had failed to establish that the vessel was an associated vessel, liable to be arrested in the place of the *Theano* or the *Ludovica.* He accordingly set aside the arrest and ordered the appellants to pay the costs. He nevertheless declined to order the return of the banker's guarantees which had by this time been furnished by the Bank of Nova Scotia ('the Scotia Bank guarantees'). The Scotia Bank guarantees were, despite what Nicholson J had ordered, not in the same terms as the Skuld letters. For one thing, the parties conferred jurisdiction on the High Court of Justice in London. The judge *a quo* accordingly held that he had no jurisdiction to order the return of the Scotia Bank guarantees. This part of the order is not challenged on appeal.

[5] The respondents next sought an order in the High Court of Justice in London, declaring that the setting aside of the arrest order had resulted in the Scotia Bank guarantees falling away.

[6] The appellants' attempt to secure a reversal of the order setting aside the arrest was aimed at protecting the integrity of the Scotia Bank guarantees. One way of doing this would be to question the correctness of the decision of Hurt J that the appellants had failed to prove that the *Alam Tenggiri* was an associated ship of the *Theano* and the *Ludovica*. This is indeed one of the appellants' arguments. There is, however, another that requires attention first.

[7] Mr Wallis for the appellants argued that the circumstances in this case are such that the order for the arrest of the *Alam Tenggiri* under s 5(3)(a) of the Act lapsed when the ship was released from arrest; at the time the respondents brought their application before the court *a quo* there was no extant arrest order which could have been set aside; accordingly, the court's order purporting to set aside the arrest was a futility.

[8] The ship, as we have seen, had been released against two undertakings. An undertaking, Mr Wallis argued, is not the same as 'security' and, in particular, is not 'security' within the meaning of the word in s 5(3)(a) of the Act: it is only where money is paid in, or securities are given, to the registrar of the court, or where a party binds itself to the registrar to perform, that it is correct to speak of 'security' for property arrested under s 5(3)(a).

[9] This part of counsel's argument is not challenged by Mr Gordon for the respondents. If security of the kind just mentioned notionally replaces the arrested ship such security may be dealt with in the same way as the ship might have been had it been kept under arrest. (*The Christiansborg [1885]* 10 PD 141 (CA); *MV Jute Express v Owners of the Cargo Lately Laden on Board the MV Jute Express*, 1992 (3) SA 9 (A) at 18 E – F).

[10] Where security is lodged with the registrar, the operation of the arrest order is transferred to the security under the control of the court. That philosophical underpinning of the notion of a continuing arrest, is absent in the case of an extra-curial agreement. By the device of the 'deemed arrest', s 3(10)(a) of the Act ensures that, so far as the continued operation of the arrest order is concerned, private agreements are equated with security under the control of the court. Section 3(10)(a) undoubtedly applies to arrests *in rem* instituting an action in terms of s 3(5) of the Act. The full text of s 3(10)(a) reads as follows:

> '(i) Property shall be deemed to have been arrested or attached and to be

under arrest or attachment at the instance of a person if at any time, whether before or after the arrest or attachment, security or an undertaking has been given to him to prevent the arrest or attachment of the property or to obtain the release thereof from arrest or attachment.

(ii) Any property deemed in terms of subparagraph (i) to have been arrested or attached, shall be deemed to be released and discharged therefrom if no further step in the proceedings, with regard to a claim by the person concerned, is taken within one year of the giving of any such security or undertaking.'

[11] It is clear that the deeming provision serves, upon the release of the arrested property, to preserve an arrest *in rem* intact. It does this not only in the case of security lodged with the registrar, but also in the case of an undertaking given by an arrestee to an arrestor. Where an undertaking is given and accepted, the ship is by a legal pretence considered to remain under arrest. If the ship remains notionally under arrest, the original arrest cannot be said to lapse when the ship is released.

[12] In the present security arrest under s 5(3)(a) of the Act, the parties concluded an agreement not involving the registrar. Nothing remained under the control of the court for the arrest order to operate on. Moreover, under the Scotia Bank guarantees which replaced the Skuld letters, the parties subjected themselves to the jurisdiction of the High Court of Justice in London. The South African court, said Mr Wallis, had by these facts been so totally deprived of jurisdiction that it did not retain the power even to adjust the arrest order previously granted by itself.

[13] If the provisions of s 3(10)(1)(a)(i) were to apply also to a security arrest under s 5(3)(a), that would be the end of this argument. Mr Wallis contended, however, that the respondents faced the difficulty that s 5(3) of the Act does not accommodate a deemed arrest under s 3(10)(a)(i).

Section 5(3) reads as follows:

' (a) A court may in the exercise of its admiralty jurisdiction order the arrest

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

(aA) Any property so arrested or any security for, or the proceeds of, any such property shall be held as security for any such claim or pending the outcome of any such arbitration or proceedings.

(b) Unless the court orders otherwise any property so arrested shall be deemed to be property arrested in an action in terms of this Act.'

[14] It seems to me that the legislature by para (b) intended property arrested as security by virtue of s 5(3)(a) to be treated (unless the court orders otherwise), in the same way as property arrested under s 3(5) of the Act in order to institute an action *in rem.* Any anomaly or injustice arising from this state of affairs can be remedied by the court making an appropriate order in terms of s 5(3)(b).

[15] I do not agree with Mr Wallis that the only purpose of para (b) of s 5(3) is to ensure that property arrested under s 5(3)(a) is brought within the provisions of s 3(8), 9 and 10 of the Act. I find nothing in the Act to support so narrow a construction. On the contrary, the expression 'property arrested in an action in terms of this Act' in s 5(3)(b) plainly refers to property arrested under s 3(5). The *Alam Tenggiri*, despite her release upon the provision of the Skuld letters and later the Scotia Bank guarantees, was accordingly deemed to be under arrest. This meant that the arrest order did not perish with the release of the ship.

[16] There was some muted debate before us on the form of the order issued by Hurt J. He was asked by way of an amendment to the respondents' papers to grant an order setting aside the 'deemed arrest' of the *Alam Tengirri*. Instead, he simply

set aside portions of the original arrest order made on 3 November 1998. I do not think that this was wrong. A 'deemed arrest' is nothing but the notional continuation of the original arrest. The Act, in certain circumstances, even supposes there to be an arrest although no arrest order has been issued. A deemed arrest is a fiction. If the original arrest order is set aside the fiction, of course, perishes with it. The correct way, then, to put an end to the deemed existence of an arrest order is to set aside that order.

[17] One other question remains. It is not disputed that the *Alam Tenggiri* was owned by the first respondent at the time that the action was commenced, or that the first and second respondents were, at the time that the second respondent owned the *Theano* and the *Ludovica*, controlled by the same parent company. They would, however, not qualify as associated ships in terms of s 3(7)(a)(iii) of the Act unless the second respondent owned the *Theano* and the *Ludovica* when the maritime claims arose. This was the point on which Hurt J was unable to come to a decision on the affidavits before him.

[18] It was common cause that, although the appellants were the respondents before Hurt J, the *onus* was on them to demonstrate that at the time their claims arose, the second respondent was the owner of these vessels (*Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 834 C – I) It was also common cause that the appellants were not able to show this in regard to their causes of action based on rectification or misrepresentation. At the time that these causes of action would have arisen, the second respondent had not yet acquired ownership of the *Theano* or the *Ludovica* .

[19] It is clear from clause 22 of each Memorandum of Agreement that the parties intended payment, delivery and the passing of ownership to occur simultaneously. From the evidence of the respondents' witnesses, it certainly seems that the parties tried to make these things happen together. If, in point of fact, they did not succeed, they failed to synchronize the transactions by no more than a few minutes. The appellants, taking advantage of the uncertainty, presented detailed evidence on exactly what steps were taken at precisely what time in order to take delivery of the vessels, and to demonstrate how physical delivery had preceded by a few minutes the final protocols which were signed nearly simultaneously in three different time zones.

[20] There is a good deal of controversy between the experts in foreign law whose evidence was placed before the court *a quo.* The experts for both sides agree that the appellants' cause of action on contract (for damages for the defective *merx*) would have arisen at the moment of delivery. If delivery could be said to have preceded the passing of ownership from the second respondent to the appellants, there would have been a brief interlude during which the appellants would have had a cause of action against the second respondent while the latter was still the

owner of the vessels. The respondents' experts consider, however, that delivery was also the moment at which ownership was transferred to the appellants. This would mean that there was no window period, however short, when the second respondent was both owner of the vessels and liable in contract to the appellants. The dispute on when ownership was transferred to the appellants is complicated by the disagreement of the experts on which system of law – whether Japanese or English law or even the law of Singapore – can be said to have governed the passing of ownership.

[21] All these contested questions of foreign law are, in a South African court, questions of fact. (*Schlesinger v Commissioner for Inland Revenue* 1964 (3) SA 389 (A) at 396G). Although a South African court may under s 1(1) of the Law of Evidence Amendment Act 45 of 1988 take judicial notice of the law of a foreign state, this may only be done '…in so far as such law can be ascertained readily and with sufficient certainty…' There is *in casu*, on cardinal aspects, insufficient certainty. Hurt J was called upon to decide, on paper, issues on which experts in foreign law who, on paper, appeared to be equally eminent, did not agree. It is small wonder that he found himself unable to come to a conclusion without a prolonged investigation, involving oral evidence, into the intentions of the parties, the complexities surrounding the delivery of the vessels and the questions of private international law involved in the transfer of ownership in the vessels. He decided that this was not a matter in which oral evidence should be heard in order to resolve disputes of fact. The ruling was not attacked on appeal. It was obviously correct. (*Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 586F – 587I). It meant, however, that too many obscurities remained for it to be said that the appellants had discharged the burden of proving that the *Alam Tenggiri*, the *Theano* and the *Ludovica* had, for one brief moment, been associated ships.

The appeal is dismissed with costs which are to include the costs consequent upon the employment of two counsel as well as the costs of the application for leave to appeal.

J H CONRADIE
ACTING JUDGE OF APPEAL

HEFER ACJ)CONCUR
SCOTT JA)
MPATI JA)
MTHIYANE JA)