THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 222/07
Reportable

In the matter between:

UNITED ENTERPRISES CORPORATION **FIRST APPELLANT**
MV "WISDOM C" **SECOND APPELLANT**

and

STX PAN OCEAN COMPANY LIMITED **RESPONDENT**

CORAM: SCOTT, FARLAM, CLOETE, COMBRINCK JJA et HURT AJA

HEARD: 26 FEBRUARY 2008

DELIVERED: 27 MARCH 2008

SUMMARY: Shipping – application to set aside arrest – *exceptio rei judicatae* not available where previous arrest set aside because *prima facie* case not established – application for countersecurity – applicant must show genuine and reasonable need for security.

Neutral citation: This judgment may be referred to as *United Enterprises Corporation v STX Pan Ocean Company Ltd* (222/07) [2008] ZASCA 21 (27/03/08).

FARLAM JA

INTRODUCTION

[1] The first appellant, United Enterprises Corporation, a company incorporated in accordance with the company laws of the Marshall Islands, is the owner of the second appellant, the MV 'Wisdom C', a bulk carrier registered in the Republic of Panama. The respondent is STX Pan Ocean Company Limited, a company incorporated in accordance with the company laws of South Korea, which carries on business as a charterer of vessels.

[2] The appeal is from a judgment of Cleaver J, sitting in the Cape High Court, who dismissed an application brought by the appellants for orders (i) setting aside the arrest of the second appellant at the instance of the respondent and (ii), in the alternative, directing that the respondent furnish counter-security in respect of the first appellant's claim against the respondent in arbitration proceedings in London. The judgment of the court *a quo* has been reported: see *MV* Wisdom C: *United Enterprises Corporation v STX Pan Ocean Co Ltd* 2008 (1) SA 665 (C).

[3] On 6 July 2006 the respondent obtained an *ex parte* order for the arrest of the second appellant in terms of s 5 (3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (which I shall call in what follows 'the Act'). The arrest was for the purposes of providing security for the respondent's counterclaim in arbitration proceedings in London. In those proceedings the first appellant is claiming from the respondent payment of money allegedly due to it in terms of a charterparty and damages suffered by it (a) in consequence of the alleged repudiation of the charterparty by the respondent and (b) in consequence of damage allegedly done to the second appellant's crane by servants or agents of the respondent. The respondent has in turn instituted a counterclaim against the first appellant and it was in order to obtain security for this counterclaim that the arrest was effected. Subsequently the first appellant provided a letter of undertaking to the respondent and the second appellant was allowed to sail. In terms of s 5 (3)(b), read with s 3 (10)(a)(i) of the Act, the second appellant is deemed to be under arrest.

[4] The appellants then sought to set aside the deemed arrest of the second appellant and the discharge in terms of s 5 (2)(d) of the Act of the security provided by the appellants to the respondent. In the alternative they sought, *inter alia,* an order that countersecurity be provided by the respondent in respect of the first appellant's claims in the arbitration.

[5] The grounds on which the appellants relied in support of the contention that the deemed arrest be set aside and the security discharged were:

(a) that previous arrest proceedings in Italy gave rise to a defence based upon the *exceptio rei judicatae* which prevented the respondent from causing the second appellant to be arrested under s 5 (3) of the Act to obtain security for its counterclaim in the arbitration;

(b) that the respondent failed to adduce admissible evidence in its founding affidavit to prove that it had a *prima facie* case in respect of its cause of action in its counterclaim in the arbitration; and

(c) that the respondent had failed to comply with the obligation resting on it as a litigant seeking *ex parte* relief to make a full disclosure to the court of all material facts and circumstances which might have influenced the decision of the judge hearing the *ex parte* application.

The *Res Judicata* Point

[6] The first ground relied on was based on the fact that the respondent had previously, in March 2006, obtained *ex parte* an order for the conservatory arrest of the second appellant to provide security for its counterclaim from the court at Gorizia in Italy, which order was revoked on 8 April 2006. An appeal against the revocation of the order was dismissed on the ground that, as the second appellant had left Italian waters by the time the appeal was heard, the respondent was unable to prove the existence and duration of its interest to act. The appeal was dismissed without the merits of the matter being considered. The judge who revoked the arrest did so because, so he held, the facts on which the respondent's claim was based

appeared ‘under the present circumstances altogether vague and unsubstantiated’. (The relevant portion of the judgment of the Italian court on the point is set out at 670F-I of the reported judgment of the court *a quo.*)

[7] It is clear that the Italian court did not make a decision on the merits but gave a judgment which if it had been given in a South African court would have amounted to absolution from the instance. (In this regard I agree with what the learned judge in the court below said in para 18 of his judgment at 675B-H.)

[8] There was a dispute between the experts on Italian law whose affidavits were filed by the parties as to whether the decision of the Gorizia court which revoked the arrest order was final, or whether it would have been open to the respondent to present a further petition in an Italian court for the arrest of the second appellant based on new points of fact or law even if such points had already existed when the original order was made. (The contrasting opinions of experts are summarised at 671A to 672F of the reported judgment.)

[9] It was common cause before us that Cleaver J, following *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) 509 (D), was correct in applying the *lex fori.* It is clear that in our law a defendant who has been absolved from the instance cannot raise the *exceptio rei judicatae* if sued again on the same cause of action: see *Grimwood v Balls* (1835) 3 Menz 448; *Thwaites v Van der Westhuyzen* (1888) 6 SC 259; *Corbridge v Welch* (1892) 9 SC 277 at 279; *Van Rensburg v Reid* 1958 (2) SA 249 (E) at 252B-C; Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa,* 4 ed, 1997, 544 and 684. It was held in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563G-H that the dismissal of an application (which ordinarily would be regarded as the equivalent to granting absolution from the instance: *Municipality of Christiana v Victor* 1908 TS 1117, *Becker v Wertheim, Becker & Leveson* 1943 (1) PH F34 (A)) can give rise to the successful raising of the *exceptio rei judicatae* where, regard being had to the judgment of the court which dismissed the

application, 'the import of the order [was] clearly that on the issues raised the Court found against the appellant [which had been the applicant in the previous proceedings], and in favour of the respondent'. It is thus clear that it is not the form of the order granted but the substantive question (did it decide on the merits or merely grant absolution?) that is decisive in our law and that what is required for the defence to succeed is a decision on the merits.

[10] In view of the fact that the court *a quo* correctly found, as I have said, that the effect of the judgment in the Gorizia court was to absolve the respondent from the instance, it follows that whether or not a fresh application for a security arrest would, in the absence of new facts or points of law which arose after the dismissal of the first Italian application, be competent in Italy is irrelevant for our purposes, because the judgment of the Italian court cannot be regarded as a judgment on the merits.

THE ALLEGED FAILURE TO MAKE OUT A *PRIMA FACIE* CASE IN THE FOUNDING AFFIDAVIT

[11] The second ground relied on by the appellants in their attack on the judgment of the court *a quo* was based on the failure by Ms Reyna Soni, the respondent's attorney who deposed to the founding affidavit in the arrest application, to identify the persons who were the sources of her knowledge as to the events and circumstances surrounding the termination of the charter party. The appellants' counsel recognised that s 6(3) of the Act provides for the admission of 'statements which would otherwise be inadmissible as being in the nature of hearsay evidence' but contended that, before s 6(3) can apply, what they called 'the ultimate source of any hearsay statement' had to be identifiable. In support of this submission they referred, *inter alia,* to *Southern Pride Foods v Mohidien* 1982 (3) SA 1068 (C) at 1071D to 1072B.

[12] A similar argument based on the *Southern Pride* decision and the cases cited in it was rejected by this court in *Cargo Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 842B-D where Botha JA said:

'I do not, however, agree with the argument nor, with respect, with the remarks in the

unreported judgment [*Elsden Shipping Lines (Holdings) Ltd v Atlantic Fisheries & Shipping Co Ltd, CPD,* 21 March 1986] which tend to support it. In my opinion it is quite clear that the Legislature intended, by enacting s 6(3), to sanction a departure in admiralty cases from the general practice of the courts in other cases in regard to receiving hearsay statements in evidence. The object of the Legislature is placed beyond doubt by the use of the expression "which would otherwise be inadmissible". Counsel's attempt to cut down the effect of that expression by confining its operation to cases which are not of an interlocutory nature rests on pure speculation as to the Legislature's intention and is wholly unwarranted. Although the prerequisites in other cases to which counsel referred, such as urgency and the disclosure of the source of the information, are matters which will no doubt be taken into consideration in the exercise of the discretion conferred by s 6(3), I can perceive no justification for thinking that the Legislature contemplated compliance with such prerequisites as a condition requiring fulfilment before the exercise of the discretion can come into play.'

[13] Lower down on the same page Botha JA, at 842G-H, in a passage cited by Cleaver J (at 679C-D), said:

'Accordingly, in my view, the general approach to be adopted in the application of s 6(3) should be lenient rather than strict; the Court should, speaking generally, incline to letting hearsay statements go in and to assess the weight to be attached to them under s 6(4) when considering the case in its totality; and a decision to exclude such statements should normally be taken only when there is some cogent reason for doing so.'

[14] Another complaint raised by the appellants on this part of the case was based on the fact that Ms Soni said that she had been given her information by Mr Nick Graydon, an English solicitor dealing with the arbitration on behalf of the respondent, who had in turn been instructed by the manager of the insurance and legal department of the respondent, who had in turn been given information by unnamed and unidentified officers and servants of the respondent. In my view this complaint is answered on the facts of this case by what was said by Scott JA in *The MT* Tigr*: Owner of the MT* Tigr *v Transnet Limited* 1998 (3) SA 861 (SCA) at 868H-I, a passage cited by the court *a quo* (at 678A-C), namely:

'In admiralty cases the evidence tendered and accepted by the Courts for the purpose of establishing a *prima facie* cause of action is almost invariably of a hearsay nature. Even "double hearsay" evidence from an undisclosed source has been accepted for this purpose (see the *MV Thalassini Avgi* case *supra* at 841C-843D). It follows that the level of the test applied is, generally speaking, a low one even in the type of applications for attachment or arrest to which reference has just been made.'

[15] The appellants contended that Ms Soni's founding affidavit also fell short of establishing a *prima facie* case because she had contented herself with the bald statement that the charterparty had been repudiated by the first appellant without proving the facts from which the court could assess whether there had in fact been a repudiation. It was conceded that the requisite facts which were missing from the founding affidavit were contained in Ms Soni's replying affidavit filed in reply to the first appellant's affidavit stating why the arrest should be set aside but it was argued that on this part of the case the respondent had to stand or fall by what was said in its founding affidavit.

[16] In my opinion the authorities are decisively against this submission. In *Transol Bunker BV* v MV Andrico Unity; *Grecian MAR SRL v* MV Andrico Unity 1987 (3) SA 794 (C) at 799H-I, in a passage specifically approved by Botha JA in the *Thalassini Avgi* decision, at 834F-G (and incidentally cited by the court *a quo* at 678, fn 14) Marais J said:

'It would serve no good purpose to set aside an arrest, knowing full well that a sound basis for the arrest does indeed exist, merely because the party who obtained the order failed to rely upon it initially. It would ordinarily simply result in a new application for arrest being launched in which precisely the same issue would have to be considered. That is manifestly wasteful of both time and money.'

Similar considerations clearly apply here.

THE ALLEGED MATERIAL NON-DISCLOSURES AND MISSTATEMENTS

[17] The third ground of complaint related to what were alleged to be material non-disclosures and misstatements contained in the founding affidavit in the arrest application. In this regard the appellants relied on the rules set forth in *Schlesinger v Schlesinger* 1979 (4) SA 342(W) at 348E-349B, which have been approved on several occasions by this court (see, eg, *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) at 428I-429B), namely that all material facts must be disclosed which might influence a court in coming to its decision and the withholding or suppression of material facts by itself entitles a court to set aside an order even if the non-disclosure or suppression was not wilful or *mala fide.*

[18] The non-disclosures and misstatements of which the appellants complained were the following:

(1) The respondent failed to set out the basis upon which the first appellant's claims were being prosecuted in the arbitration, in that

(i) it did not mention that the first appellant alleged in the arbitration that the respondent was not entitled to make the deductions from the hire payable under the charterparty because it had not provided proper supporting statements in respect of the deduction it claimed (as was required under clause 29 of the charterparty); and

(ii) it did not mention that the first appellant alleged in the arbitration that the second appellant could have taken on bunkers at the port of Mina Saqr in the Persian Gulf and indeed did so (a fact which was relevant in the context of the first appellant's termination of the charterparty).

(2) The respondent did not properly describe the nature and effect of the Italian proceedings.

(3) The respondent failed to describe accurately what had taken place during the negotiations between the parties with regard to the provision of security once the dispute between the parties had manifested itself.

[19] As was pointed out by the respondent's counsel, it is important to note that the appellants did not contend that if any of the alleged non-disclosures had not occurred there was a reasonable prospect that the judge would not have ordered the arrest of the second appellant nor was an explanation given as to how the alleged non-disclosures and misstatements *might* have influenced the judge's decision to order the arrest.

[20] As far as the first complaint is concerned I am satisfied that the respondent's submissions in the arbitration, which were annexed to the founding affidavit, contained sufficient information to convey to the judge what she required to know for the purpose of deciding that the respondent had

made out a *prima facie* case in respect of its claim.

[21] The appellant's second complaint, regarding what was said about the Italian proceedings, is dealt with by Cleaver J at 681D-682C of his judgment. The passage in the founding affidavit which the appellants criticised is set out at 681D-F. As Cleaver J said, the description of the proceedings was terse but, save in one respect, accurate. The inaccuracy to which he referred, and on which the appellants' counsel placed great emphasis, was the statement that:

'(t)he court of final instance in Italy declined to determine an appeal against the order of the court of first instance, on the basis that the vessel had left its jurisdiction by the time the appeal was to be determined and that Applicant [ie, the present respondent] as appellant therefore had no material interest enforceable by the appeal court.'

[22] As appears from what was said earlier about the Italian proceedings the correct position was that the court of final instance in fact dismissed the appeal without considering the merits because, so it was held, the respondent had no material interest in the appeal. I am satisfied in the circumstances that Cleaver J correctly held that the misstatement was not material.

[23] Cleaver J's reasons for rejecting the appellant's third complaint against the founding affidavit are set out at 682C-683B. I agree with them and have nothing to add.

THE CLAIM FOR COUNTERSECURITY

[24] I turn now to consider the appellant's alternative claim for countersecurity. The appellants' case as far as this claim is concerned is set out in para 42 of the judgment of the court *a quo* (at 686H-687G). In summary they rely on the following facts:

(1) The first appellant has no security for its claim;

(2) If the first appellant is successful in the arbitration, it will have to launch proceedings in South Korea to enforce an award in its favour, which proceedings may take up to three years;

(3) Although the respondent is one of the world's largest carriers, owning 43 vessels, although its financial results for the second quarter of 2006 reflected assets valued at US$1,3 billion and although its vessels call at South African ports on a regular basis, there is no guarantee as to what its financial position will be in the future, the shipping industry being notoriously volatile.

[25] In my view Cleaver J was correct in holding (at 687D-E) that the first appellant's claim for security 'is in fact based on a consideration of convenience'. This means that the first appellant does not have what has been described in many of the cases under s 5(2)(b) and (c) and (3) of the Act as a genuine and reasonable need for security. Counsel for the appellants submitted, however, that, though it is clear on the authorities that an applicant for security under s 5(3) of the Act has to establish that security is needed and that such need is 'genuine and reasonable' (see, eg, the *Thalassini Avgi* decision at 832I-833A), the need for countersecurity in an application under s 5(2)(b) and (c) should not be set so high. In this regard it was submitted that the discretion conferred by s 5(2)(b) is broader than that conferred by s 5(3). This is because, so it was argued, unless countersecurity is ordered 'one party, if successful, will have security instantly available upon the conclusion of the arbitration', while the other party, if it is successful, will not have that advantage. Counsel relied in this regard on the recent judgment of MD Southwood AJ in the *MV Gladiator: Samsun Corporation t/a Samsun Line Corporation v Silver Cape Shipping Ltd, Malta* 2007 (2) SA 401 (D), where the learned judge, after a full analysis of the authorities, came to the conclusion that though an applicant for countersecurity under s 5(2)(b) and (c) had to show a need for such countersecurity, a requirement that such need be shown to be 'both genuine and reasonable' would 'lead to the loss of flexibility which the Legislature intended . . . and thus hamstring the Court in the exercise of its power' (at 424F-G). He stated that there were, as he put it, obvious differences between the approach adopted by Hurt J in The Yu Long Shan: *Guangzhou Maritime Group v Dry Bulk SA* 1987 (2) SA 454 (D) at 463E-F and that laid down in cases decided by the Cape High Court, *viz Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 374B-C; *The Catamaran* TNT: *Dean Catamarans CC v*

Slupinski (No 1) 1997 (2) SA 383 (C) at 394C-E; *MV* Heavy Metal: *Belfry Marine Ltd v Palm Base Maritime Sdn Bhd* 2000 (1) SA 286 (C) at 298D-I; *The MV* Rizcun Trader *(4):* MV Rizcun Trader *v Manley Appledore Shipping Ltd* 2000 (3) SA 776 (C) at 804I-J; and *MV* Akkerman: *Fullwood Shipping SA v Magna Hellas Shipping* SA 2000 (4) SA 584 (C) at 592B-F.

[26] It is noteworthy that MD Southwood AJ recognized (at 410G-H) that 's 5(2)(b) requires for its application that there is a need for security. The Legislature', he continued, 'could never have meant the Court to order security if there is no need for it.' (Hurt J, in the passage to which MD Southwood AJ referred, also proceeded from the premise that the need for counter-security had to be established.) It is difficult to see how a need which is not 'genuine' can be regarded as a need at all. It is also not clear to me why a need which is not reasonable should be taken into account in the exercise of a discretion to order countersecurity. I agree in this regard with Cleaver J's statement (at 686E-F) that '(t)he difference in approach may well be nothing more than one of semantics for it seems that it will be difficult to identify the difference in practice' but if there is a difference, I prefer the approach followed in the Cape.

[27] In the circumstances I am satisfied that Cleaver J correctly decided not to exercise his discretion in regard to countersecurity in favour of the first appellant and that the attack on this part of his judgment also must fail.

The following order is made:
The appeal is dismissed with costs.

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IG FARLAM
JUDGE OF APPEAL

CONCURRING
SCOTT JA
CLOETE JA
COMBRINCK JA
HURT AJA