

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: 21734/2009

In the ex parte application of:

SALVATORE LAMONICA

Applicant

IN RE: EASTWIND DEVELOPMENT SA

BALTIC REEFERS MANAGEMENT LIMITED Intervening party

JUDGMENT DELIVERED ON 5 NOVEMBER 2009

BLIGNAULT J:

[1] This is an opposed application for the recognition by this court of a foreign representative to enable him to pursue certain claims in this country.

[2] Applicant is Mr Salvatore LaMonica. He was appointed by the United States Bankruptcy Court of the Southern District of New York as bankruptcy trustee of Eastwind Development SA ("Eastwind"), a company duly incorporated in accordance with the company laws of Panama.

[3] The intervening party is Baltic Reefers Management Limited (“Baltic Reefers”) a company with limited liability duly incorporated in accordance with the company laws of the British Virgin Islands, carrying on business at Akara Building 24, de Castro Street, Wickhams Cay 1, Rhode Town, British Virgin Islands.

[4] Eastwind is the registered owner of the “E W Cook” (“the vessel”). The vessel is registered in Panama.

[5] On 10 September 2009 this court granted an order in terms of section 9 of the Admiralty Jurisdiction Regulation Act No 105 of 1983 as amended (“the Act”) that the vessel including its equipment, furniture, stores, bunkers and lubricating oils as are on board at the time of its sale, be sold by public auction.

[6] Pursuant to the order the vessel was sold and the proceeds of the sale form a Fund to be dealt with in terms of paragraph 12 of the court order. Paragraph 12 provides, *inter alia*, for the appointment of a referee “to receive, examine and report to this Court of the validity of ranking of claims in respect of the Fund”. It provides further for the filing of claims and the delivery of objections to the claims of others parties.

[7] Applicant brought the present application for an order in the following terms:

“Recognising applicant as the duly appointed bankruptcy trustee of Eastwind Development SA, a company duly incorporated in accordance with the company laws of Panama for the purpose of exercising the rights and fulfilling the relevant obligations contained in the Order of this Honourable Court granted on 25 August 2009 under case no. AC 76/2009 (and which was made final on 10 September 2009) in particular paragraph 12 thereof relating to the filing of claims and any objections to the claims asserted by other claimants.”

[8] In the founding affidavit filed on behalf of applicant it is alleged that Eastwind has a claim against the Fund created by the sale of the vessel:

“27. With regard to the claim to be asserted on behalf of the Company against the Fund created by the sale of the vessel, I annex marked “JJ5” a copy of a document entitled “Assignment of First Priority Naval Mortgage and Second Priority Naval Mortgage” concluded by applicant on the one part as trustee of the Company and by Gerald E Chelius and Martin Lunder on the other part acting in the name of and on behalf of Nordea Bank Finland plc, a corporation duly organised and existing under the laws of Finland in terms of which, inter alia, the latter bank transferred and

assigned all of its interest in and to the mortgages therein referred to applicant.

... ..

29. *Accordingly, and in his aforesaid capacity, applicant as the assignee of the First and Second Priority Naval Mortgage Bonds referred to in annexure JJ5 hereto will seek payment from the Fund of the amount of USD\$8 397 664,00 which is alleged to be the damages suffered by the latter “for the purchase price of the balance of the bunkers supplied” by Baltic Reefers Management Limited that remained on the vessel.”*

[9] It is also alleged that applicant intends to object to the claim to be asserted by Baltic Reefers in the amount of US\$439 538,70.

[10] In a supplementary affidavit filed on behalf of applicant the following is said:

- “3. *The Applicant is, I am advised, by virtue of his appointment as the Chapter 7 Bankruptcy trustee of Eastwind Development SA, obliged and entitled to represent the company in legal proceedings and is obliged and entitled to collect all assets including claims belonging to the company, convert same to cash and distribute such cash in accordance with the ranking provided for in the Bankruptcy Code.*

... ..

5. *I have perused the provisions of Chapter 7 of the US Bankruptcy Code and confirm that in broad terms the provisions of the Chapter 7 Bankruptcy Code are similar in effect to the provisions of the Companies Act and the Insolvency Act insofar as compulsory liquidations and sequestrations are concerned and in particular with regard to the rights of the trustee to represent the Company or Insolvent in proceedings relating to property belonging to the estate of the debtor.*

6. *I am advised that the reason why the US Court exercised jurisdiction in the Bankruptcy proceedings is by virtue of the place of business of the company (from which the affairs of the company were conducted) being within its jurisdiction. This gave the Court jurisdiction despite the company being incorporated in Panama.”*

[11] The intervening party, Baltic Reefers, opposes the relief sought by applicant. Its grounds of opposition are summarised in para 17 of its answering affidavit:

“17. Baltic Reefers submits that the application falls to be dismissed with costs for the following reasons:

17.1 Eastwind Developments is a company registered and incorporated in Panama and is therefore regarded as being domiciled in Panama. Whatever the effect of the bankruptcy order issued by the New York court

might have been, its effect was not to divest Eastwind Development of its moveable property in the Republic. No exceptional circumstances exist for the recognition of the trustee in this case.

17.2 *On 28 August 2009 the trustee brought an application to abandon a number of vessels owned by the companies falling under his control, including the MV “E W Cook”. On 3 September 2009 the bankruptcy judge issued an order authorising the trustee to abandon the vessel.*

17.3 *I have been advised by Mr Lyons who is a counsel practising in New York experience in the American law of bankruptcy that the effect of the abandonment order is that the property ceases to be part of the estate administered by the trustee and reverts back to the debtor (Eastwind Development in this case) and stands as if no bankruptcy petition had been filed. Following abandonment the estate has no interest in the property and the trustee ceases to have any rights in the property. It follows, therefore, that the trustee has no claim, qua trustee, to the Fund, and therefore is not entitled to recognition by this honourable court.*

17.4 *The “E W Cook” was registered in Panama. As will appear more fully from what I say below I have been advised by Mr Fancixco Carreira-Pitti, an experienced legal practitioner practising in Panama that the purported assignment of the first and second*

naval mortgages by Nordea Bank Finland PLC to the trustee would not be regarded as valid in accordance with Panamanian law as the assignment of the mortgage bonds was not registered. The assignment was therefore not effected and is not valid in accordance with the law of the flag of the "EW Cook" and does not constitute a valid claim against the Fund as described in section 11(4)(d) of the Admiralty Act, or any other section.

17.5 Should this honourable court grant an order recognising the trustee then, for the reasons set out below Baltic Reefers avers that it is in fact appropriate that the trustee be ordered to furnish security to the master of this honourable court in respect of the recognition of his appointment as bankruptcy trustee of Eastwind Development SA."

[12] The reason for the present application is that a foreign appointed representative requires recognition by an order of a South African court before he is entitled to deal with local assets. See *Moolman v Builders Developers (Pty) Ltd (in Provisional Liquidation): Jooste intervening* 1990 (1) SA 954 (AD) at 959G/H-I:

"... ..it is a well-recognised principle that

'where a foreign representative, such as an executor, liquidator, or receiver, wishes to deal with assets in this country in his representative capacity and by virtue of his foreign authorisation

he must first be recognised in his appointment by a Court of law or person of competent jurisdiction in South Africa before he is entitled to act'

(per Watermeyer J in Liquidator Rhodesian Plastics (Pvt) Ltd v Elvinco Plastic Products (Pty) Ltd 1959 (1) SA 868 (C) at 869C - D)."

The court exercises a discretion and it is guided by grounds of comity and convenience (see page 961C-D/E of the judgment).

See also *Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (A) at 179 EF – F/G;

[13] Mr M J Fitzgerald SC, assisted by Mr P van Eeden, appeared on behalf of applicant. He submitted that applicant was duly appointed as trustee in the country where Eastwind had its principal place of business. As such he is entitled to recognition in order to enforce the claim or claims which the applicant as trustee may have against the Fund.

[14] Mr M Wragge SC appeared on behalf of the intervening party, Baltic Reefers. He advanced two main contentions. He submitted first that applicant is not entitled to a recognition order

as he was appointed by a court which is not the court of the country of Eastwind's domicile, namely Panama, where it is incorporated.

[15] Mr Wragge's second main contention is that applicant has failed to establish that the company in liquidation has a valid claim against the Fund. He submitted that applicant was required to establish in the present proceedings, on a balance of probabilities, that he has such a claim. Applicant, according to him, has not provided such proof in the light of the defences raised in sub-paras 17.2, 17.3 and 17.4 of Baltic Reefers' answering affidavit.

[16] Mr Wragge's first main contention is based on two propositions. He submitted first that a foreign trustee of an insolvent estate is only entitled to recognition in this country when the insolvent was domiciled in that foreign state. See in regard to this rule *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C) and earlier cases cited therein. The second proposition is that a company is domiciled in the country where it is registered. It follows, according to his argument, that the trustee of Eastwind, which is domiciled in Panama, is not entitled to recognition in South Africa.

[17] For purposes of this judgment I am prepared to accept that the first proposition is correct although it is based on a fiction expressed in the maxim *mobilia sequuntur personam*. See *Re Estate Morris* 1907 TS 657 at 666. The validity of this maxim has been questioned as long ago as 1909 in *Estate Fletcher v Estate Fletcher* 1909 (26) SC 303. It finds little application today. See *Bominflot Ltd v Kien Hung Shipping Co Ltd (Central Leasing Corporation and Another Intervening)* 2004 (2) SA 556 (C) at 562A-C:

“C F Forsyth Private International Law 3rd ed at 321 - 4 contends that the lex situs governs most questions concerning movables. However, in certain circumstances, South African law might apply the maxim mobilia sequuntur personam, whereby a person's movables are deemed to be situated in the place of his or her domicile. However, Forsyth states at 322 that

'the lex domicilii of the owner is generally applied in questions affecting movables. However, although the classical sources consider the lex domicilii rule as the basic rule, the truth today, it is submitted, is that the lex situs is the basic rule with the lex domicilii applying exceptionally. The reason for this is in part simply practical - if ownership of the res is disputed, the lex domicilii of the owner may be unknown, so the lex domicilii rule is unworkable - and in part common sense since the application of the lex situs accords with the expectations of the parties.'

Be that as it may, the rule was recognised in *Ex parte Palmer NO: In re Hahn, supra* and I do not find it necessary for present purposes to question it.

[18] Mr Wragge's second proposition is, however, vulnerable. Firstly, in regard to a company there is no rule that the property of the company vests upon liquidation in the liquidator. See *Soane v Lyle* 1980 (3) SA 183 (D) at 186B-F. In terms of South African law the property, in this case the vessel (or the Fund), was at all material times within the area of jurisdiction of this court.

[19] Secondly, it does not appear to me to be of assistance in the present context to refer to the concept of the domicilium of a company. It is more helpful to consider the question of jurisdiction over the company. In terms of South African law jurisdiction over a company is not confined to the country where its registered office is. In terms of section 12 of the Companies Act 61 of 1973 the court in whose area of jurisdiction the principal place of business of the company is situate, also has jurisdiction under that act over the company. For purposes of jurisdiction to determine a claim sounding in money, also, a company may reside both where its principal place of business is and where its registered office is

situate. Thus where the registered office and principal places of business of a company are at two different places, the company is regarded as having two places of residence and if they are in different jurisdictions then either court may assume jurisdiction. See *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (AD).

[20] In the present case the New York bankruptcy court had jurisdiction to grant the bankruptcy order which it did by reason of the fact that Eastwind's principal place of business was situated in its area of jurisdiction. In South Africa a court would have had jurisdiction to liquidate a company on similar grounds. This to me is a relevant factor to be taken into account.

[21] Mr Wragge's second main contention appears to be based on an erroneous assumption as to the nature of the court's function at this stage of the proceedings. The court is not called upon to decide whether the claim which the foreign representative wishes to pursue is indeed a valid claim. That will be decided in whatever proceedings he launches in his representative capacity. In the present case applicant intends to file a claim with the referee and to contest rival claims. It will be the referee's function to

determine the validity of such assertions. This court cannot usurp the referee's functions. The position may be different, I may add, where a claim does not appear to be *bona fide* or is vexatious but that is not the case here.

[22] On the information before me I have no reason to believe that applicant is not acting *bona fide* and in the furtherance of his duties as trustee. He would indeed fail in his duties if he did not pursue claims which he regards as valid. Had the position been reversed a South African liquidator would similarly have been obliged to take reasonable steps to deal with assets or pursue claims which belong to the company in liquidation but were situated in the United States of America.

[23] In all the circumstances it seems to me that considerations of comity and convenience favour the order sought by applicant.

[24] It has been suggested that I should issue a *rule nisi* if I am inclined to grant the relief sought by applicant. I do not, however, think it is necessary. The matter was fully argued before me and the referee is required to embark upon his functions as a matter of urgency.

[25] Baltic Reefers suggested that applicant should be required to furnish security for costs. It seems to me, however, that questions of security for costs, if any, should have been regulated by the provisions of the court order authorising the sale of the vessel. There are none.

[26] The intervening party's opposition to the application has been unsuccessful and it should pay applicant's costs occasioned by its opposition.

[27] The parties agreed that the court order dated 10 September 2009 may be varied to fit in with the delay caused by this application.

[28] In the result, I grant the following orders:

(a) Applicant is recognised as the duly appointed bankruptcy trustee of Eastwind Development SA, a company duly incorporated in accordance with the company laws of Panama, for the purpose of exercising the rights and fulfilling the relevant obligations contained in the Order of this Court granted on 25 August 2009 under case no. AC 76/2009

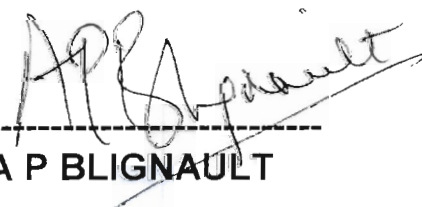
(which was made final on 10 September 2009) in particular paragraph 12 thereof relating to the filing of claims and any objections to the claims asserted by other claimants.

(b) Applicant is absolved from providing security to the Master of this Court in respect of the above recognition.

(c) The intervening party is ordered to pay the costs occasioned by its opposition to the application.

(d) By agreement between the parties the court order dated 10 September 2009 is varied as follows:

Applicant is required to file its claim with the referee within 3 days after the date of this judgment and to assert its objections to the claims of other claimants within 10 days after the date of this judgment.



A P BLIGNAULT