REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **40214/2014**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED ✓

Date: 19/2/16 **WHG VAN DER LINDE**

In the matter between

KUEHNE & NAGEL (PTY) LTD — APPLICANT

And

MONCADA ENERGY GROUP SRL — RESPONDENT

JUDGMENT

VAN DER LINDE J:

Introduction

[1] This is an application for edictal citation and substituted service. The applicant, contrary to the usual practice, gave notice to the respondent of the application. The respondent opposes the application. It also applies in reconvention for the converse of the relief sought in convention. In both convention and reconvention the usual three sets of affidavits were exchanged.

[2] The applicant's intended claim is for payment under what was referred to in argument as two "demand guarantees". The respondent is a peregrinus of this court and this country, but the applicant, who has not secured any attachment of the respondent's local assets, relies on a consent to jurisdiction to this court said to be contained in the demand guarantees. The respondent disputes that such consent as there is, is to the jurisdiction of this court.

[3] Moreover, it argues that the applicant's claims are *"maritime claims"* for the purposes of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Act"), and submits that in that event this court has no jurisdiction in any event. The applicant disputes this.

[4] In the alternative, if this court were to hold that it does not have jurisdiction, the applicant applies from the Bar under s.27 of the Superior Courts Act 10 of 2013, for a removal of the application to the Western Cape Division of the High Court. The respondent resists this, arguing that a substantive application was required for that relief.

[5] Against this background there are therefore three issues: are the applicant's claims under the two guarantees *"maritime claims"*? If they are, then this court has no jurisdiction, since its area of jurisdiction is not adjacent to the territorial waters of the Republic as envisaged in s.3(3) of the Act. If they are not maritime claims, the second issue arises, being whether this court has jurisdiction by virtue of the consent to jurisdiction contained in the demand guarantees. If the claims are maritime claims, or if there is no specific consent to the

jurisdiction of this court, the third issue is whether this court should remove this application to the Western Cape Division. I deal with these issues in turn.

Are these "maritime claims"?

[6] By virtue of s.3(1) of the Act, any *"maritime claim"* may be enforced by means of an action *in personam.* The definition of *"maritime claim"* in s.1(1) of the Act is comprehensive. For present purposes only the following portion is material: *"'maritime claim' means any claim...arising out of or relating to-(p) the remuneration of... any person... who acted... (i)as an...a... forwarding... agent...".*

[7] In this case the respondent's subsidiary, a local company known as Construczioni Moncada South Africa (Pty) Ltd ("the subsidiary"), concluded two Forwarding Services Agreements, respectively on 13 November 2012 and 13 November 2013. The applicant accepted that claims in terms of either of those agreements would qualify as *"maritime claims"* for purposes of that part of the definition that has been quoted above.

[8] In Milan, Italy, on respectively 13 November 2012 and 27 February 2013 the respondent, who is the subsidiary's parent, issued two written documents that were both called *"Parent Company Guarantees"*, in each instance expressly guaranteeing as principal obligator *"the due and the correct and punctual performance by CMSA (the subsidiary) of all its payment obligations to K&N."*

[9] The guarantees went on: *"Should CMSA be in default of any of the Fees Payment under the Agreement, the undersigned undertakes to perform within 7 (seven) days as of relevant written demand delivered either by fax or registered mail to the address stipulated below (stating that CMSA has failed to comply with its payment obligations) perform (sic) such obligations and the undersigned will not determine the validity of the demand or the correctness of the amount demanded or become party to any claim or dispute of any nature which any party may allege."*

[10]Three other sentences of the guarantees are pertinent: *"This Parent Company Guarantee is governed by the South African Laws." "Any dispute hereunder shall be submitted exclusively to the Court of South Africa."*[1] And *"Any payment made hereunder shall be made free and clear of, and without deduction for, any taxes, levies, import fees or other charges whatsoever and by whomsoever imposed."*

[11]The applicant's central argument was that by their very nature, and on a proper interpretation of the terms quoted above, these were demand guarantees in the accepted sense. By that was meant that the preconditions for the respondent's response obligation were merely formal in nature: in this case simply a failure on the part of the subsidiary to have paid the fees on due date, and a written demand delivered to the respondent's appropriate address in Milan, Italy stating that the subsidiary had failed to comply with its payment obligations.

[12]On this argument there was no entitlement on the part of the respondent to challenge the applicant's underlying claim against the subsidiary, meaning that the respondent was not entitled to raise the subsidiary's defences to the underlying claim, as defences against the applicant's claim against the respondent under the guarantee.

[13]In support of its argument the applicant referred to paragraphs [12] and [13] of Coface SA v East London Own Haven, 2014(2) SA 382 (SCA). There Navsa, ADP and Pillay, JA referred to the two other judgments of that court that stressed the autonomous nature of letters of credit, and that the obligations of banks under those were wholly independent of the underlying contract. Reference was also made to State Bank of India v Denel SOC Limited, (947/13) [2014] ZASCA 212 (3 December 2014) at paragraph [16], where these principles were applied to what was referred to there as a "first demand" guarantee.

[14]It followed, according to the argument, that the applicant's claim under the guarantee could not be characterised as a maritime claim, even accepting that the applicant's claim against

[1] Emphasis supplied. Note the form of *"Court"* in the singular.

the subsidiary was indeed such. Put differently, and with reference to that portion of the definition of *"maritime claim"* quoted above, the applicant's claim under the guarantee was not a claim *"arising out of or relating to the remuneration of a forwarding agent."* Rather, it was the applicant's underlying claim against the subsidiary that arose out of or related to the remuneration of a forwarding agent; the applicant's claim against the respondent under the guarantee arose out of or related to the Parent Company Guarantee.

[15]As support for its argument in the context of the Act, the applicant referred also to Repo Wild CC v Oceanland Cargo Terminal (Pty) Ltd, case no. 23044/2010, an unreported judgment by Wepener, J in this court delivered on 14 November 2013; and MFV EL SHADDAI, Oxacelay and Another v MFV EL SHADDAI and Others, 2015 (3) SA 55 (KZD). I deal with these judgments below.

[16]The respondent argued that on an application of the ordinary meaning of the words of the definition of *"maritime claim"* quoted above, the applicant's claim under the guarantee arose out of or related to the remuneration of a forwarding agent. Both the applicant's claim against the respondent under the guarantee, and the applicant's claim against the subsidiary under the forwarding services agreement, was a maritime claim, since both arose out of or related to the remuneration of a forwarding agent.

[17]The respondent argued that this conclusion followed as a matter of interpretation of the Act. It did not matter for its argument whether the demand guarantee was one in the strict sense as contended for by the applicant, or whether the terms of the demand guarantee actually permitted the respondent to raise against the applicant the defences that are available to the subsidiary.

[18]Not unexpectedly, the two parties' submissions were rather on the opposing ends of the ostensibly elastic *"relating to"*. The respondent gave examples in case law that would, at first blush, stretch the reach of this concept; the applicant pointed to case law that seemed to curtail the reach. These cases are of course helpful, but one must not over-estimate by just

how much. Context is crucial, and one must, I suggest, accept that the ordinary grammatical meaning of a word in an enactment, such as *"relating to"*, may have different applications if its milieu shifts.

[19] I will revert to the ordinary grammatical meaning below but focus first on the milieu. The milieu into which the applicant's claim here fits is the guarantee[2] and its meaning. It is at least uncontroversial that South African law applies to it. According to our law, the interpretative function of written agreements includes not only the ordinary grammatical meaning, but also context, which in turn includes reference to that which was probably to the minds of the parties when the agreement was entered into.[3] The document itself is a good source of what was probably within the parties' contemplation.

[20]The first numbered paragraph of the guarantee identifies the underlying written Forwarding Services Agreement. I will refer to this agreement as "the underlying agreement". In the second numbered paragraph it is recorded that the subsidiary had undertaken, in terms of the underlying agreement, to *"release"* a parent company guarantee in favour of the applicant in order to warrant the payment of the fees.

[21]Immediately thereafter follows the phrase that introduces the terms of the demand guarantee: *"Accordingly, by virtue of such covenant in the Agreement..."*.

[22]Turning to the underlying agreement: in paragraph A of its preamble, the agreement identifies the subsidiary as belonging to the Moncada Energy group; this is also the description of the respondent on the first page header of the demand guarantee. In clause 5.9 the subsidiary, *"to warrant the Fees payment,"* undertakes to provide the applicant with a parent company guarantee in the form attached as Annex C to the underlying agreement.

[23]This is no doubt the undertaking that is referred to in numbered paragraph 2 of the guarantee. Annex C to the underlying agreement is the form in which the demand guarantee

---

[2] The parties were agreed that the two guarantees had the same meaning.
[3] Natal Joint Municipal Pension Fund v Endumeni Municipality, 2012 (4) SA 593 (SCA) at [18].

was in the event issued, identifying also the respondent as the parent who would be required to issue the guarantee.

[24]There is an arbitration agreement in clause 13 of the underlying agreement. In clause 15.1 of the underlying agreement the parties agree that the laws of South Africa govern the agreement. Then the following sentence appears: *"The Parties submit to the exclusive jurisdiction of the courts of South Africa and any courts that may hear appeals from these courts regarding any proceedings under or in connection with this Contract."*[4]

[25]Against this background, juxtapose now the ordinary grammatical meaning of the words, *"any claim relating to the remuneration of a forwarding agent"*, being the words in the definition of a *"maritime claim"*, on the one hand, with the claim intended to be made here, being a claim against the respondent whose guarantee was issued pursuant to the subsidiary's undertaking to do so, as a warranty for the payment of the forwarding agent's (the applicant's) fees. Since language remains the starting point of interpretation of statutes, as the Constitutional Court has recently reaffirmed,[5] does the claim being made here *"relate"*, in accordance with the ordinary grammatical meaning of that word, to the remuneration of a forwarding agent?

[26]In my view the claim intended to be made here does so relate to the remuneration of a forwarding agent, for the following reasons. First, Webster's Unabridged Dictionary, 2nd ed, 2001 Random House, Inc, describes as the second meaning of the verb, *"to bring into or establish association, connection, or relation: to relate events to probable causes."* These are words of wide meaning. The wideness of the meaning is of course not the conclusive answer to the interpretative exercise, because words in legislation should be interpreted purposively, so as to give effect to the discernible purpose for which they were used. But the wideness of the meaning remains a legitimate starting point and reminder.

---

[4] Note the reference here to *"the courts of South Africa"*, the plural form.

[5] Cool Ideas 1186 CC v Hubbard and Another, 2014(4) SA 474 (CC) at [28].

[27]Second, the statutory enumeration of what is included in a *"maritime claim"* is comprehensive. Matched with the wideness of *"relating to"*, it seems evident that the legislature was intent on casting the proverbial net wide. I suggest the reason for this and so the purpose for which the language was so cast, is that the legislature acknowledged that admiralty jurisdiction imports a specialised field of the law, and so as a matter of policy all issues that are connected with an admiralty issue should be decided by those courts that are seized with admiralty jurisdiction.

[28]Third, wideness accepted, one accepts that the legislature intended that there must be some limitation to the concept. This follows from the very policy suggested above: issues that are unconnected with an admiralty issues should not be decided by courts in the exercise of their admiralty jurisdiction. In his book, Admiralty Jurisdiction: Law and Practice in South Africa, 2nd ed, Juta & Co, Advocate Gys Hofmeyr, SC cautions[6] in this regard that the Act and particularly amendments to it, have expanded the boundaries further than other jurisdictions which have inherited the philosophy from English Admiralty Law. He warns that if these boundaries are stretched too far, this will result in the dilution of well-recognised principles, and the undermining of the rationale for a separate admiralty jurisdiction.

[29] Hofmeyr quotes[7] from the (then) House of Lords' speeches in The Sandrina [1985] 1 Lloyd's Rep 181 (HL), in which Lord Keith said,[8] with reference to *"relating to"*, *"There must, in my opinion, be some reasonably direct connection with such activities."* Mr Burger, SC, for the applicant, relied specifically on this passage.[9]

[30]Fourth, it is difficult, and probably inappropriate, to try defining universal boundaries to the reach of these words. But for purposes of this case, I suggest that it must be accepted that there has to be at least a legally relevant connection between, on the one hand, the claim being made and, on the other hand, the object to which the claim is required to relate for

[6] At p21.
[7] At p33.
[8] At p187 to 188.
[9] Later in this judgment I refer to authorities that go the other way.

purposes of the definition of *"maritime claim"*. By *"legally relevant connection"* in this sense I mean that the claim and its object, in this case the applicant's intended claim against the respondent and its object, being the applicant's claim against the subsidiary for fees, must be connected in such a way that either in procedural or substantive law the determination of the one could be influenced, legally, by the determination of the other.

[31]Such a connection would explain why a court hearing a claim in admiralty would want to be able, if called upon by the parties, to deal with all issues that are legally relevant to that claim, but with no issues that are legally irrelevant to that claim.

[32] Fifth, apply that approach to the present matter. Accepting in the applicant's favour that this is a demand guarantee in the strict sense, i.e. no defences arising from the underlying agreement are permitted, then still it is not possible to immunise the claim under the demand guarantee from the underlying agreement and a claim for fees under it. This is illustrated by the following example.

[33]In paragraph 37.4 of its answering affidavit, the respondent says: *"Furthermore, I am advised that (irrespective of the terms of the guarantee) where a beneficiary who makes a call on a guarantee does so with knowledge that it is not entitled to payment, our courts will step in to protect the guarantor and decline enforcement of the guarantee in question."*

[34]No-one has suggested in this matter that the respondent has by this paragraph already alleged fraud on the part of the applicant. But the possibility of fraud being alleged and, if it is alleged, its consequence, is relevant, because it illustrates that the claim made by the applicant against the respondent under the demand guarantee is not so remote from the underlying agreement as to render the underlying agreement legally irrelevant to the claim under the demand guarantee. Depending on the defences yet to be raised, note not the claim, the claim under the demand guarantee and the underlying agreement may therefore potentially stand in a direct legally relevant relationship.

[35]I accept that the commercial viability of demand guarantees is dependent on them being able to be enforced speedily, and not to permit of underlying defences, spurious or not, derailing their traction. But that consideration does not go to the issue of jurisdiction; it goes to the issue of the nature of the defences raised against a demand guarantee. The High Court, sitting in the exercise of its admiralty jurisdiction, will deal as swiftly with defences that are irrelevant to the claim based on a demand guarantee as will the High Court applying its ordinary jurisdiction.

[36]Do Repo Wild and EL SHADDAI have a different impact? In Repo Wild the plaintiff's claim against the defendant was for damages arising from the breach of the defendant of its contractual obligation to insure the contents of a shipping container which the defendant had to convey to Kazerne in Johannesburg for the plaintiff. The containers would remain in Kazerne pending further instructions from the plaintiff for the conveyance to the port of Durban, when they would be carried by ship for discharge in Shangai in terms of a different agreement. One container and its contents were lost and the plaintiff suffered damages.

[37]Wepener, J held that on the facts the agreement between the parties which was said to have been breached, related to the conveyance of the plaintiff's goods. It did not relate to the storage of the container. He held that the fact that the plaintiff intended to convey the goods by sea at some later stage had no bearing on the terms of the agreement between the parties.

[38]That conclusion fits with the approach that I have adopted here, being the requirement for a legally relevant connection between the claim and its object. The plaintiff's claim was not connected in a legally relevant way to the defendant's container.[10] The agreement was that the defendant would convey the plaintiff's goods to Kazerne. Its further path to Durban and thence to Shangai would be the subject of a different agreement.[11]

---

[10] The definition of *"maritime claim"* includes *"any claim...relating to...any container..."*; see s.1(1)(i) of the Act.
[11] See paragraphs [2] and [3] of the judgment.

[39]In El SHADDAI the two applicants had lent money to the owner of a ship to enable it to conduct commercial shipping operations in the waters surrounding South Africa. The debtor signed an acknowledgement of debt which fixed the terms of the repayment. Founding a claim on that document, the applicants instituted action in Montevideo, Uruguay, and pending that action, applied to a South African court, exercising its admiralty jurisdiction, for the arrest of the ship to provide security for its claim. The arrest was granted, and the matter came before Lopes, J thereafter for reconsideration of the arrest. It appears that in the meantime the Montevideo action had resulted in a judgment in that court in favour of the applicants.

[40]Lopes, J had to decide, amongst others, whether the Montevideo judgment *"related to"* a maritime claim for purposes of s1(1)(aa) of the Act. He chose however to pitch the threshold higher, and set out to decide whether the applicant's claim qualified as a *"maritime claim"* for the purposes of s.1(1)(ee) of the Act. The learned judge reasoned, no doubt, that since the latter was a much wider definition than any of the others, if the applicant's case did not pass that threshold, then a fortiori it would also fail any of the narrower ones.[12]

[41]Lopes, J referred to Hofmeyr[13] and judgments[14] that stressed the need for a restrictive interpretation of the definition of *"maritime claim"*, and ultimately concluded: *"[24] The fact remains that the underlying nature of the claim is a loan of moneys. That the loan may have been intended to enable Braxton to carry out a fishing venture in South Africa does not render the nature and purpose of that loan a maritime matter. In addition, the loan was to*

---

[12] S.1(1)*"(ee) any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs."*

[13] Op cit, p21.

[14] MAK Mediteranee SARL v Fund Constituting the Proceeds of the Judicial Sale of the MC Thunder (SD Arch, Interested Party), 1994 (3) SA 599 (CPD) at 605 G to 606 G; Peros v Rose, 1990 (1) SA 420 (N) at 426E; Minesa Energy (Pty) Ltd v Stinnes International AG, 1988 (3) SA 903 (D) at 906 G. On the question of whether a broad or a narrow approach should be followed in interpreting the concept *"relating to"*, there are weighty views locally that say those words were deliberately widely cast; DJ Shaw, QC, Admiralty Jurisdiction and Practice in South Africa, Juta & Co, Ltd, 1987, at p8; John Hare, Shipping Law & Admiralty Jurisdiction in South Africa, Juta & Co, Ltd, 2nd ed, 2009, at p53.

more than one party. That fact and that the second applicant (if that is indeed the company that lent the money) reserved the right to exercise an option to acquire an interest in the shareholding of both Braxton and Ice Marine Inc SA (a company which was formerly the owner and operator of the ship), do not assist the applicants.

[25] The nature of the agreement between the parties was a loan and its purpose was to finance a company. The nature and purpose are not altered by the fact that the company was to repay the loan out of the proceeds of its fishing operations. As the underlying loan would not constitute a 'maritime claim' in terms of the Act, the applicants cannot rely upon the judgment of the Montevideo court to establish a claim in terms of s 1(1)(aa) or s 1(1)(ee) of the Act. In my view it would be both unnecessary and undesirable to extend the jurisdiction of the admiralty court to include loans of this nature as maritime claims."

[42]There was in the matter before Lopes, J no legally relevant connection between the claim – repayment of the loan – and the fishing venture. The repayment of the loan was not contractually dependant on the success of the fishing venture. With respect to the learned judge, I therefore agree with his conclusion.

[43]For the reasons I advanced earlier, I have come to the conclusion that the claims based on the demand guarantees, accepting in the applicant's favour that they permit of no defences that arise from the underlying agreement, except fraud, are nonetheless *"maritime claims"* as envisaged in the Act. It follows that this court has no jurisdiction to try them.

Consent to the jurisdiction of this court?

[44]By virtue of s.3(3) of the Act, a maritime action enforced by means of an action *in personam* may not be instituted in a court of which the area of jurisdiction is not adjacent to the territorial waters of the Republic. That applies to this court, and its admiralty jurisdiction is thus statutorily precluded. That means that even if the consent to jurisdiction were to this division of the High Court, it would be legally incompetent.

[45]Since the matter was however fully argued on an appropriate hypothesis, I state my views briefly. The consent to jurisdiction in the demand guarantee is in my view a consent to the jurisdiction of the South African court that would, according to the laws of South Africa, have jurisdiction in the matter, for the following reasons.

[46]First, the consent does not expressly refer to the jurisdiction of this court, and so a tacit term would have to be imported. That cannot be done unless it is necessary to give business efficacy to the demand guarantee. But it is not necessary to give business efficacy to the demand guarantee, because it express provisions are sufficient to afford it workability. These include the agreement that South African law applies. South African law pertaining to jurisdiction is sufficiently refined to determine which court will have jurisdiction.

[47]Second, the consent in clause 15.1 of the underlying agreement to the *"exclusive jurisdiction of the courts of South Africa"*, employing the plural form, suggests that the parties to that agreement intended for the local court of appropriate jurisdiction to be the forum of choice. It does seem probable that the parties to the demand guarantee would have had the same intention. After all, the furnishing of the demand guarantee is an express obligation on the part of the subsidiary, with whom the applicant had expressly agreed the jurisdiction of the appropriate South African court. Why would they design a different jurisdiction for the demand guarantee?

[48]Third, the fact that the respondent is not located in South Africa presents no difficulty in identifying a local court of appropriate jurisdiction. As it happens, I do not agree with Mr van Eeden, SC who appeared for the respondent, that this may even entail having to attach to found or confirm jurisdiction; after all, the very point about consent is to avoid such attachment. But it is quite possible that the court of the area where the applicant demanded performance be made, namely the KwaZulu – Natal division, would have jurisdiction.

[49]Fourth, the fact of the arbitration agreement in the underlying agreement also does not, in my view, present a difficulty. According to our law, the High Court retains residual

jurisdiction in arbitrations and, depending on the circumstances, it may direct that issues that were agreed to be subject to arbitration, be tried instead in the High court.

[50]It follows that I would in any event not have found that the demand guarantee contains a consent to the exclusive jurisdiction of this court.

Should this application be removed to the Western Cape division of the High Court?

[51]There are two reasons why I do not believe it would be appropriate to accede to the applicant's request. The first is that applications of this nature require facts, and they are usually not moved from the Bar for that reason.

[52]The second reason is that I am in any event not convinced that that court is the court of appropriate jurisdiction. If anything, the KwaZulu-Natal Division has jurisdiction, although I express no firm view on this.

Conclusion

[53]The application in convention must be dismissed with costs. The application in reconvention merely askes for the dismissal of the application in convention, with costs. It is problematic for two reasons. First, such relief is appropriately asked for in the answering affidavit in the conventional application.

[54]But second, I am not persuaded that this court can grant any relief in favour of the respondent on the positive prayer of the latter. The respondent has contended, successfully it has transpired, that this court has no jurisdiction. The consequence is that the application in convention fails, with costs, and that is the end of it. In my view no order should accordingly be made on the application in reconvention.

[55]In the result I make the following order:

(a) The application in convention is dismissed with costs.

(b) No order is made on the application in reconvention.

WHG van der Linde
Judge of the High Court

For the applicant: Adv. L Burger, SC (0721522278)
Instructed by
Shepstone & Wylie Attorneys
Applicant's Attorneys
Ground Floor, The Lodge
38 Wierda Valley West, Wierda Valley
Sandton, Johannesburg
011-2902540
aharpur@wylie.co.za
Ref. PP/AGH/bk/KUEN17441.116

For the respondent: Adv. P van Eeden, SC (0823722267)
Instructed by
Bowman Gilfillan Inc
Respondent's Attorneys
165 West Street
Sandton, Johannesburg
011-6699000
Ref. 6126403

Date of hearing: 12 February 2016
Date of judgment: 19 February 2016