

**IN THE KWAZULU-NATAL HIGH COURT
DURBAN
REPUBLIC OF SOUTH AFRICA**

REPORTABLE

CASE NO.A167/10

In the matter between

**GOLDEN MEATS AND SEAFOOD
SUPPLIES CC**

Applicant

and

BEST SEAFOOD IMPORT CC

1st Respondent

**CARGO OF CRAB STUFFED IN
CONTAINER NUMBER JXLU 5824733**

2nd Respondent

J U D G M E N T

Del. 9th December 2010

WALLIS J.

[1] Mombasa Shipping Agents Company Limited (‘Mombasa Shipping’) operates a crab fishing vessel off the coast of Kenya. In August 2010 it sold a consignment of frozen golden deep sea crab to Best Seafood Import CC (‘Best Seafood’). The consignment was shipped in two containers from Mombasa to Durban but in consequence of a dispute between Mombasa Shipping and Best Seafood only one container has been delivered to Best Seafood. It alleges that Mombasa Shipping retained the bill of lading in respect of the second container. Best Seafood claims that it is entitled to delivery of the second container, together with its contents, or alternatively to repayment of certain amounts that it says it has paid to Mombasa Shipping. In order to pursue these claims by way of

an action *in rem* against the cargo (to which it proposes in due course to join Mombasa Shipping)¹ Best Seafood caused the cargo of crab in its container to be arrested on 2 November 2010.

[2] The arrest was effected in terms of the provisions of s 3(4)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act') on the grounds that the owner of the crab was liable to Best Seafood in action *in personam* in respect of its causes of action. As those causes of action lay *in personam* against Mombasa Shipping it follows that the foundation for the arrest is that on 2 November 2010 Mombasa Shipping was the owner of the cargo of crab. Golden Meats and Seafood Supplies CC ('Golden Meats') disputes that allegation. It contends that by virtue of an agreement of purchase and sale concluded between it and Mombasa Shipping on 20 October 2010 ownership in the cargo passed to it before 2 November 2010. It accordingly brought the present proceedings with a view to having the arrest by Best Seafood set aside.

[3] Although this is an application to set aside an arrest Best Seafood accepts that it bears the onus of justifying the arrest.² It also accepts that this requires it to show on a balance of probabilities that at the time of the arrest the cargo was the property of Mombasa Shipping. This latter acceptance was, however, subject to one qualification. Ms Donnelly submitted that as Mombasa Shipping was undoubtedly the original owner of the goods the onus of proving that ownership had passed to Golden Meats rested upon Golden Meats. For this she relied upon a *dictum* by van Zyl JP in *Davis v Isaacs & Co and Another*³, a case bearing some similarity to the present one. Mr Davis sought the attachment *ad*

¹ In terms of s 5(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983, as amended.

² *Cargo laden and lately laden on board the mv 'Thalassini Avgi' v mv 'Dimitris'* 1989 (3) SA 820 (A) at 834C-D.

³ 1940 CPD 497 at 510.

fundandam et confirmandam jurisdictionam of goods shipped to him by Isaacs & Co, in order to found jurisdiction in respect of claims he had against Isaacs & Co arising from earlier faulty and defective shipments. Isaacs & Co applied to have the attachment set aside on the basis that ownership in the goods had passed to Yokohama Bank on shipment of the goods to South Africa and delivery of the bills of lading to the bank. After considering the evidence van Zyl JP said that he was not satisfied that the evidence proved a transfer of ownership

‘and as, in my opinion, the *onus* is on S Isaacs & Co to prove that they are no longer the owners of the goods, I must, in the absence of such proof hold that for the purposes of this application, S Isaacs & Co are still the owners of the goods.’

On that basis the attachment was upheld.

[4] Ms Donnelly argued that this approach was consistent with what Botha JA had said in the *Dimitris* and in particular the following passage⁴:

‘One further observation should be made in regard to an application by the shipowner for setting aside such an order. While the party who obtained the order bears the same *onus* of justifying the granting of it as would have applied had the original application been opposed after notice to the shipowner, the latter, by the same token, remains burdened with the *onus* of proving any countervailing circumstances which he could have raised and proved in answer to the original application. Thus, while the claimant must still show that he has a *prima facie* cause of action, *prima facie* enforceable in the foreign Court of his choice in the sense explained earlier, the shipowner, if he alleges that the foreign Court would as a matter of fact decline to exercise its jurisdiction to adjudicate upon the matter, or that the foreign Court would not afford him a just and fair hearing, is still required to discharge the *onus* of proof in that regard.’

Ms Donnelly contended that as Mombasa Shipping originally owned the crab the *onus* rested on Golden Meats to put before the Court

⁴ At 834 D-F.

‘countervailing material’ and to prove those facts on which it relied in contending that there had been a change in ownership.

[5] In my view, and with all due respect, the *dictum* of van Zyl JP is inconsistent with subsequent binding authority, is incorrect and not supported by the passage from the *Dimitris*. I deal with the latter point first. Botha JA was not there dealing with the rebuttal of an essential element of the arresting party’s case. His judgment is clear that the arresting party throughout bears the *onus* of justifying the arrest. The application in the *Dimitris* was for the arrest of a vessel in terms of s 5(3) of the Act. The learned judge summarised the requirements for such an arrest as being a claim enforceable by an action *in rem* against the ship in question or an associated ship; a *prima facie* case in respect of such claim that is *prima facie* enforceable in the chosen forum and a reasonable and genuine need for security in respect of that claim. He went on to say, before the passage relied on by counsel, that:⁵

‘It follows, then, that when once the criteria mentioned above are met, the respondent shipowner who would oppose the granting of an order must raise, and discharge the onus of proving, some countervailing factor of sufficient weight to persuade the Court not to grant the order.’

Before any question of countervailing matter arises therefore the applicant must discharge the onus of proving all the requisite elements for an arrest. Where it has done so it is nonetheless open to the respondent to seek to persuade the court, in the exercise of its discretion, that the arrest should not be granted. Possible grounds upon which a court might decline to grant an arrest would be that the foreign court identified by the applicant although having jurisdiction would decline to exercise it, or that the foreign court would not afford the respondent a just and fair hearing. The only point that Botha JA was making was that where a respondent

⁵ At 833C-D.

relies upon such circumstances it is for the respondent to prove these on the requisite balance of probabilities.

[6] Turning to deal with the *dictum* by van Zyl JP it is inconsistent with the statement of Corbett JA on precisely that subject in *Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola & Others*⁶ that ‘It is clear law that an applicant seeking the attachment of his debtor’s property *ad fundandam jurisdictionam* must satisfy the Court, on a balance of probabilities, that the property to be attached belongs to the debtor. The *onus* is upon the applicant to do so.’

That statement was made in the context of an attachment *ad fundandam et confirmandam jurisdictionam* but the same principles apply in regard to an arrest *in rem* as appears from the decision in the *Dimitris*⁷ and the fact that Corbett CJ, placed an attachment and an arrest on the same footing so far as onus is concerned in *The Shipping Corporation of India Ltd v Evdomon Corporation and Another*⁸. If any doubt remained it was dispelled in *Bocimar NV v Kotor Overseas Shipping Ltd*⁹ where it was expressly held that the approach in *Lendalease Finance* applies also to applications to arrest a vessel *in rem* in terms of ss 3(4) and 5(3) of the Act.

[7] In the face of these authorities the *dictum* by van Zyl JP must be taken to be incorrect. The true position is that from first to last the onus rested upon Best Seafood to establish that the cargo of crab contained in the container was the property of Mombasa Shipping. The fact that Golden Meats contends that ownership passed from Mombasa Shipping to Golden Meats prior to 2 November 2010 does not affect this. I appreciate

6 1976 (4) SA 464 (A) at 489 B-C.

7 At 834 D-F.

8 1994 (1) SA 550 (A) at 556 D-E.

9 1994 (2) SA 563 (A) at 581 B-E.

that it has as a consequence that Best Seafood is required to prove a negative, namely that ownership has not passed to Golden Meats as alleged, and to do so on a balance of probabilities. However our law recognises that there are circumstances in which a party may be burdened with such an onus¹⁰.

[8] In order to discharge this onus it was necessary for Best Seafood to prove on a balance of probabilities that Mombasa Shipping still owned the cargo of crab on 2 November 2010. As Golden Meats only concluded its agreement of purchase and sale with Mombasa Shipping in respect of the crab on 20 October 2010 and the arrest took place on 2 November 2010 it was only necessary for Best Seafood to establish that ownership did not pass to Golden Meats during this period. That requires close scrutiny of the basis upon which Golden Meats contended that ownership had passed to it.

[9] The relevant allegations in the founding affidavit of Mr Allan Chetty concerning the circumstances in which Golden Meats claimed to have acquired ownership of the cargo of crab are as follows:

- '20. On or about 25 October 2010 Mombasa Shipping, pursuant to its obligations in terms of the sale agreement with Golden Meats instructed Zim to issue a new bill of lading in respect of the Cargo reflecting Golden Meats as the consignee. Attached marked "D" is a copy of that bill of lading.
- 21. This bill of lading is dated Mombasa 6 September 2010 which was the date on which original bill of lading in respect of the two forty foot containers of the August 2010 shipment was issued.
- 22. That bill of lading was received by Golden Meats on or about 27 October 2010.
- 23. On 1 November 2010 Golden Meats received on arrival notice from Zim

¹⁰ *Kriegler v Minitzer and Another* 1949 (4) SA 821 (A) at 828 – 829; *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 (3) SA 470 (A) at 474 A-C; *Pratt v FirstRand Bank Ltd* 2009 (2) SA 119 (SCA) para [12].

Integrated Shipping Services Limited advising that the container had arrived in Durban and was available for release.

24. I am advised by Golden Meats' attorneys that, under South African Law, in the absence of a reservation of title clause in a credit sale agreement, ownership of the goods sold passes to the buyer on delivery. I am further advised that receipt by Golden Meats of the original bill of lading entitling it to claim delivery of the Cargo constituted delivery and accordingly that Golden Meats became the owner of the Cargo on or about 1 November 2010.'

[10] Best Seafood challenged these allegations and it transpired that they are not in all respects correct. In consequence of enquiries made by Best Seafood's lawyers it emerged that Golden Meats was not in fact in possession of the bill of lading issued to Mombasa Shipping on 25 October 2010 nor had such bill of lading been received by it on or about 27 October 2010 as alleged by Mr Chetty. In the light of this Golden Meats changed its stance and alleged that the bill of lading had been surrendered to the carrier's agent in Kenya and the carrier 'completed a telex release of the cargo'.

[11] Mr Chetty formulated the revised case on behalf of Golden Meats in his replying affidavit in the following terms:

'7. On or about 27 October 2010, pursuant to the agreement concluded by the applicant with Mombasa the full set of the original bills of lading naming the applicant as the consignee was surrendered to the shipping line in Mombasa and the shipping line was instructed to release the container to the applicant. This is reflected in the attached exchange of e-mails marked "A1" to "A2".'

The carrier's agents in Mombasa sent the relevant e-mail on 27 October 2010 to the freight manager of the same firm of agents in Durban, who in turn forwarded it to Golden Meats. The e-mail refers in the heading to the bill of lading number and the particular container on the route from Mombasa to Durban and says:

‘Kindly release subject reefer container to consignee without presentation of OBL¹¹ as full set has been surrendered to us. Pls release upon collection of any other charges due your end. Prepaid charges paid.’

[12] Mr Chetty said the following about the contents of this e-mail:

‘11. A telex release is routinely used by shipping lines where the original bills of lading are not sent to the port of discharge. The original bills of lading are surrendered on behalf of the consignee at the load port and the shipping lines’ agent at the load port confirms receipt of those original bills of lading and instructs its agent at the discharge port to release the cargo to the consignee.

12. I am advised that in those circumstances, in law, the load port agent, on receipt of the bills of lading, is holding them as agents on behalf of the consignee which in this case is the Applicant. In those circumstances I am advised that with effect from 27 October 2010 the carrier’s agent at the load port were holding the bills of lading on behalf of the Applicant. Accordingly the bills of lading, which evidence title in and to the Second Respondent, had been delivered to the Applicant [Golden Meats] and the Applicant accordingly became the owner of the cargo.’ (My insertion.)

There being no basis upon which Best Seafood could dispute the factual correctness of these allegations the argument revolved around the question whether they support the contention that ownership of the cargo of crabmeat passed to Golden Meats.

[13] Both parties accepted that as the cargo was in Durban throughout the relevant period the law to be applied in determining whether ownership had passed to Golden Meats is South African law as the *lex situs*.¹² This requires that the goods be delivered to the transferee, either actually or by one or other form of symbolic delivery, with the intention of passing ownership. In support of the contention that ownership passed to Golden Meats Ms Olsen referred to those authorities in which, for the purpose of

¹¹ Original bills of lading.

¹² *Macard Stein & Co v Port Marine Contractors (Pty) Ltd and Others* 1995 (3) SA 663 (A) at 667 B-J.

passing ownership, delivery of a bill of lading has been held to constitute symbolic delivery of the goods themselves, because of the function of the bill of lading as a document of title to the goods themselves.¹³ However, in considering those authorities sight must not be lost of the context. They are cases dealing with sales of goods, especially, but not exclusively, in the context of sea transit of goods. This is not that kind of case because the goods were already in Durban and were available to be delivered here to Golden Meats, which could arrange to collect them from storage. There is no apparent reason why the bill of lading would need to be delivered to Golden Meats in order for it to obtain ownership of the cargo. All that was required in practical terms was for Mombasa Shipping to make arrangements that would enable Golden Meats to collect the container from storage, as indeed it did. It was not essential for this purpose that delivery should take symbolic form. Actual physical delivery was feasible.

[14] It must also be borne in mind that in those cases where delivery of the bill of lading serves as delivery of the goods that is because this is the intention of the parties as embodied in the underlying contract of purchase and sale. As Corbett JA put in *Lendlease Finance*¹⁴

‘Under the c.i.f. contract, in its usual form, the seller is obliged to ship and insure the contract goods and to invoice them to the purchaser for an amount which includes the price of the goods, the cost of the insurance and the amount payable under the contract of affreightment. As soon as reasonably possible after shipment the seller must tender to the buyer or his agent, in proper form, the bill of lading, evidencing the contract of affreightment, the policy of insurance and the invoice, these being collectively referred to a “the shipping documents”. In the absence of some special agreement, this is all that the buyer can demand of the seller and normally his

13 The authorities are collected in the judgment of *Lendlease Finance*, *supra*, 491 B-492 D. See also P J Badenhorst, Juanita M Pienaar and Hanri Mostert, *Silberberg and Schoeman’s The Law of Property* (5th Ed) 181-2.

14 At 491 G – 492 A.

obligation to pay, or assume liability to pay, the invoice price arises upon such tender. The buyer is covered by the contract of insurance against the risk that at the time of tender, or subsequently, the goods themselves have become, or become lost or destroyed. As it is put in *Halsbury* ... “the contract is thus in a commercial sense an agreement for the sale of goods to be performed by the delivery of documents...”

The learned judge was there dealing with a CIF sale. The position will be different in the case of a sale FOB, where ordinarily ownership passes when the goods are loaded on board the vessel. Whilst the bill of lading will still be delivered to the consignee and will have to be surrendered to the carrier in order to obtain physical delivery of the goods it does not usually have any role to play in passing ownership of the goods. This illustrates the point that the role of the bill of lading depends upon the terms of the underlying contract of sale.

[15] It is therefore necessary to examine the agreement between Mombasa Shipping and Golden Meats. It reads as follows:

‘AGREEMENT

This agreement is made between MOMBASA SHIPPING AGENTS CO. LTD and GOLDEN MEATS C/O AMAKHAZA COLD STORAGE. We hereby confirm that the agreed price for the container numbered JXLU 5824733 containing 1445 Cartons of frozen crab, will be \$6.30 per kilo. Calculations will be as follows.

1445 cartons x 15 kg x 6.3 OUSD = 136,552.50 USD

It has also been agreed that the balance for container number JZLU 5824733 which is 136 552.50 USD will be paid via International TT on the following dates.

26 th October 2010 (ADVANCE PAYMENT)	20 000.00 USD
10 th November 2010-12-06	57 877.50 USD
20 th November 2010-12-06	58 674.50 USD

All landside expenses within South Africa are to be paid by GOLDEN MEATS C/O AMAKHAZA STORAGE. In addition, MOMBASA SHIPPING AGENTS CO. LTD has also paid for all local charges with the Republic of Kenya.’

[16] This agreement does not embody a CIF sale, which is hardly

surprising as the goods were already in Durban. All that was required was for the purchaser to collect them. Secondly, there is no mention of a bill of lading being issued, much less being delivered to Golden Meats or any person acting as agent on its behalf. On its face the agreement is a straightforward sale on credit terms of the cargo contained in a particular container on the basis that Golden Meats, as the purchaser is to pay the purchase price and all landside expenses within South Africa. There are no special terms concerning the mode of delivery and no suggestion that the manner of effecting delivery is to be by way of the delivery of a bill of lading in respect of the cargo. Of importance is that there were charges that had to be paid in Durban before Golden Meats would be entitled to the cargo. That is some indication that actual delivery was intended and not symbolic delivery. What then was the purpose of issuing a fresh bill of lading and surrendering it to the carrier's agents in Mombasa?

[17] The original bill of lading under which this container and its contents had been carried from Mombasa to Durban showed Mombasa Shipping as the shipper and Best Seafood as the consignee. That posed a difficulty for Mombasa Shipping in giving effect to its sale agreement with Golden Meats because the shipping line would not release the cargo to Golden Meats on presentation of that bill of lading. To do so would be in conflict with its obligations under the bill of lading to deliver the cargo to the named consignee. As Rix J said in *Motis Export Ltd v Dampskibsselskabet AF 1912 Aktieselskab*:¹⁵

‘... it is of the essence of [a bill of lading] contract that a shipowner is both entitled and bound to deliver the goods against production of an original bill of lading, provided that he has no notice of any other claim or better title.’¹⁶

¹⁵ [1999] 1 Lloyd's Rep 837 at 840.

¹⁶ See the discussion on delivery in Richard Aikens, Richard Lord and Michael Bools *Bills of Lading*, Chapter 5 especially paras 5.3 to 5.10, 5.31 to 5.33 and 5.36 to 5.55.

The general rule is as follows:

‘...in the normal case, the carrier undertakes to deliver the goods, and to deliver them only, to the person in possession of the bill, whether as original shipper or as indorsee of the bill or as consignee. The carrier is not bound to deliver the goods except on production of the bill, and is liable to the holder of the bill if he wrongfully delivers the goods to anyone else.’¹⁷

It is for this reason that the ordinary and common practice of carriers is to require that the person claiming delivery of the goods should surrender the original bills of lading. Whilst this does not affect pre-existing contractual rights or create fresh ones it marks a stage in the performance of the contract.¹⁸

[18] This problem could, however, be circumvented by the issue of fresh bills of lading reflecting Golden Meats as the consignee and such bills of lading were issued at the request of Mombasa Shipping by the vessel’s agents in Mombasa. The issue of the fresh bills of lading accompanied so it is alleged, without dispute, by the cancellation of the original bills, (which it will be recalled had remained in the possession of Mombasa Shipping), provided the means of enabling Mombasa Shipping to effect delivery to Golden Meats of the cargo of crab in its container that was already situated in Durban. However, that is not because it was a requirement of its contract with Golden Meats that it effect delivery symbolically by way of the delivery of a bill of lading. It is because without the cancellation of the earlier bills of lading and the production and surrender of the fresh bills of lading the carrier would not be protected from claims by third parties who came into possession of the original bills or had some other claim to the cargo. Accordingly these arrangements are not an indication that Mombasa Shipping intended to

¹⁷ Sir Guenter Treitel and F M B Reynolds, *Carver on Bills of Lading* § 6-005.

¹⁸ *Carver on Bills of Lading, supra*, § 5-018.

effect delivery of the cargo under its agreement with Golden Meats by way of the delivery of a bill of lading.

[19] The e-mail message on which Golden Meats now relies does nothing more than instruct the vessel's agents in Durban to release the goods without presentation of the original bills of lading. The explanation given for this request is that the bills of lading have already been surrendered to the agents in Mombasa. For the reasons given above that would have been required by the carrier in order to protect its position and it would have been more convenient to surrender the bills of lading in Mombasa than to bring them to Durban for surrender here. It does not mean, however, that the bills of lading were in possession of the vessel's agents in Mombasa as agents on behalf of Golden Meats. As appears from the copy of the bill of lading in the papers the vessel's agents in Mombasa had issued the bills of lading as agents for and on behalf of the carrier. The bill identifies Mombasa Shipping as the shipper of the goods. At most on the facts contained in these affidavits the carrier's agents handed the bills of lading to a representative of Mombasa Shipping and that representative surrendered the bills to the carrier's agents. This may all have taken place in a single transaction. In receiving the bills of lading the agents would have been acting on behalf of the carrier, not Golden Meats. That is why the consequence of the surrender of the bills to the agents was the instruction to the carrier's agents in Durban to release the container to Golden Meats as the named consignee in the bill. If they had been handed to the carrier's agents as agents on behalf of Golden Meats it would still have been necessary for them to be surrendered.

[20] To sum up therefore the agreement of purchase and sale in respect of this cargo does not contemplate delivery being effected to Golden Meats

by way of the delivery of a bill of lading. Not only does the contract not say that, there was no need for such a course. Delivery could be effected by authorising Golden Meats to collect the container from the place where it was stored in Durban harbour and making sure that it would be released to them when they came to take delivery. In order to achieve that the Durban agents representing the carrier were instructed to release the cargo to Golden Meats without the need for original bills of lading to be produced. The surrender of the bills of lading to the agents in Mombasa protected the position of the carrier by removing the bills of lading from circulation.

[21] All this is consistent with the description of events by Mr Chetty in paragraph 11 of his replying affidavit. It is not, however, consistent with the legal proposition advanced in the following paragraph namely that:

‘...in those circumstances, in law, the load port agent, on receipt of the bills of lading, is holding them as agents on behalf of the consignee...’

There is no warrant for that conclusion on the application of basic legal principles to the facts. It is not what is reflected in the agreement of purchase and sale. It seeks to transform the routine surrender of original bills of lading to the carrier’s agent into a situation where the carrier’s agents becomes the agent of the consignee for the purpose of passing ownership of the goods. What is more it does so without any indication either that the named consignee (Golden Meats) intended to constitute the carrier’s agent as its agent for this purpose, or that the carrier’s agent intended to undertake such a function on behalf of the consignee. Indeed Mr Chetty does not even say that Golden Meats was aware of what was happening in Mombasa. The agency is said to be one that arises as a matter of law where bills of lading are surrendered to the carrier’s agent at the load port rather than to the carrier’s agent at the port of delivery.

Counsel frankly conceded that she was not aware of any authority to support that proposition and nor am I. It is in my view incorrect.

[22] In those circumstances I am satisfied that ownership of the cargo did not pass from Mombasa Shipping to Golden Meats in the period between 20 October and 2 November 2010. Such ownership accordingly remained vested in Mombasa Shipping. Best Seafood has therefore discharged the onus of proving that Mombasa Shipping owned the cargo it arrested. The application to set aside the arrest must therefore fail. It is dismissed with costs.

DATE OF HEARING	3 DECEMBER 2010
DATE OF JUDGMENT	9 DECEMBER 2010
APPLICANT'S COUNSEL	MS L OLSEN
APPLICANT'S ATTORNEYS	DENEYS REITZ INC
RESPONDENTS' COUNSEL	MS D DONNELLY
RESPONDENTS' ATTORNEYS	SHEPSTONE AND WYLIE