In the High Court of South Africa

KwaZulu-Natal Local Division, Durban

(exercising its Admiralty Jurisdiction)

Case No : A 51/2014

Name of ship : mfv '*El Shaddai*'

In the matter between :

Ignacio Arocen Oxacelay	First Applicant
Aston Seafood SA	Second Applicant

And

mfv *'El Shaddai'*	First Respondent
Braxton Security Services CC	Second Respondent
The Master of the mfv *'El Shaddai*'	Third Respondent

Judgment

Lopes J

[1] On the 18th July 2014, and at the instance of the applicants, this court granted an order for the arrest of the mfv *'El Shaddai'* ('the ship') in terms of sub-s 5(3) of the Admiralty Jurisdiction Regulation Act, 1983 ('the Act') for the purpose of providing

security in the sum of $2 781 012,80 (in respect of a capital claim including interest and legal costs), for claims which the applicants commenced against the second respondent, and which are currently pending before the Supreme Court of Justice of the Oriental Republic of Uruguay, Montevideo under UIE docket number 2-18853/2013.

[2] The second respondent has now set the matter down for re-consideration. The second respondent challenges the security arrest order on the following bases :

(a) that the claim of the applicants is not a maritime claim as defined in s 1 of the Act. Accordingly this court has no jurisdiction to order a security arrest in terms of sub-s 5(3) of the Act; and

(b) that the founding papers do not disclose a 'genuine and reasonable need for security' as could justify the grant of an order for the arrest of the first respondent.

[3] The common cause history of the matter may be viewed as follows :

(a) the second respondent, Braxton Security Services CC ('Braxton') is the owner of the ship;

(b) the first applicant, and the second applicant Aston Seafood SA ('Aston') which is described in the founding affidavit as a company incorporated in accordance with the laws of the Oriental Republic of Uruguay, but having its principal place of business in Chile, loaned and advanced certain monies to, inter alia, Braxton. The purpose of the loan to Braxton was to enable it to

conduct a commercial fishing enterprise in the waters surrounding the Republic of South Africa;

(c) an acknowledgement of debt was signed on behalf of Braxton on the 9th February 2012, acknowledging the payment to it of the sum of $2 270 678;

(d) that acknowledgement sets out how the amount loaned is to be repaid by Braxton, by way of instalments calculated by reference to the income received by Braxton from the proceeds of the sale of fish sold pursuant to the fishing enterprise;

(e) the acknowledgement of debt was the document upon which the applicants' claims in the Montevideo court were based.

[4] The applicants aver that their claim constitute a maritime claim as defined in sub-s 1(1)(aa) and/or sub-s 1(1)(ee) of the Act. Those sub-sections provide :

'"maritime claim" means any claim for, arising out of or relating to –

…

(aa) any judgment or arbitration award relating to a maritime claim, whether given or made in the Republic or elsewhere;

…

(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;

…'

[5] Braxton contends that the applicants' claim is nothing more than the repayment of a commercial loan which was advanced to fund the commercial fishing

venture. The parties are agreed that in the event that the applicants cannot establish that their claim is a maritime claim in terms of the Act, or that they have a genuine and reasonable need for security, that the arrest must be set aside.

[6] Whether a claim falls within the definition of a 'maritime claim' depends upon whether it achieves the purpose of establishing a link between the maritime claim alleged and the ship. The purpose is to establish the liability of the owner of the ship and that requires a link between the maritime claim, the ship and the owner of the ship. (F Berlingieri *Berlingieri on Arrest of Ships*, 1 ed, at 75). In establishing a maritime claim it is not a question of whether that claim is 'prima facie established' in the sense of the strength or quality of the claim, but rather whether, given the subject matter of the claim, it is in fact a 'maritime claim'.

[7] Dealing then with whether the fact that the applicants have obtained a judgment against, inter alia , Braxton, establishes in its favour a maritime claim as envisaged in sub-s 1(1)(aa) of the Act. That sub-section envisages two concepts :

(a) a judgment or arbitration award; and

(b) relating to a maritime claim.

[8] The applicants allege that the Montevideo court gave a final judgment in their favour on the 6th November 2013. Although the judgment finds for the applicants on the merits, the determination of the quantum of the applicants' claim has been postponed, and in that sense the proceedings are currently still pending.

[9] To qualify as a maritime claim in terms of sub-s 1(1)(aa), the judgment or arbitration award may have been made within the Republic or elsewhere. Mr *Mullins* SC, who appeared for the respondents together with Ms Linscott, submitted that it was necessary to bear in mind the purpose for which the maritime claim is being established. That purpose is to obtain security for the amount of an indebtedness. The Montevideo judgment, however, is not for an amount of money, and on its own, cannot establish the extent of the security the applicants seek to establish in securing the arrest of the ship. Accordingly, it does not fulfil the requisites for a 'maritime claim' in terms of sub-s 1(1)(aa).

[10] Mr *Lamplough*, who appears for the applicants, submitted that the judgment would ultimately be in an amount not less than the sum reflected in the acknowledgement of debt upon which the judgment was based.

[11] In view of the fact that I must determine whether or not the claim of the applicants is a maritime claim in terms of South African law, and as I regard that question as being decisive of this application, there is no need for me to make a ruling on whether or not the judgment obtained in the Montevideo court is sufficient to constitute a 'judgment or arbitration award' sufficient to satisfy the requisites of sub-s 1(aa) of the Act.

[12] This is because the definition of a maritime claim in terms of sub-s (1)(ee) is expressed in wider terms than the other definitions. If the plaintiff's cause of action falls within the definition of that sub-section, then there is no need to consider whether the claim falls within sub-s 1(1)(aa). If, however, the underlying cause of

action (the acknowledgement of debt) does not establish a maritime claim as defined in the Act, the applicants' claim cannot succeed.

[13] In construing the provisions of s 1 of the Act, it is necessary to decide whether the expressions 'arising out of' and 'relating to' are to be regarded as indicating 'a loose or indirect relationship' and hence be broadly interpreted, or whether the expressions are to be narrowly construed to mean 'having some direct or causal relationship with'.

See *M A K Mediterranee 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 – 606 G.

[14] With regard to the proper approach to adopt in interpreting a statutory provision, I refer to the dicta of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA, paragraphs 17 – 26. With regard to the interpretation of the provisions of the Act in this matter, I have also borne in mind :

(a) that the fact that the funds provided pursuant to a contract of loan may have been used for a fishing venture, does not of itself characterise the contractual relationship between parties as a maritime claim, albeit that it is one having a maritime flavour;

(b) the ambit and scope of the jurisdiction provided by the Act is circumscribed by the Act itself;

(c) I refer in this regard to the views of Gys Hofmeyr expressed in *Admiralty Jurisdiction Law and Practice in South Africa* 2nd ed at 21 where the learned author states :

> 'The Act, and more particularly a series of amendments to the Act, have served to expand the boundaries of admiralty jurisdiction further than other jurisdictions which have inherited the philosophy of English admiralty law. This enthusiasm to extend the scope of admiralty jurisdiction must not, it is submitted, be allowed to result in the abrogation of principle and the inclusion of claims which do not properly fall within the purview of admiralty proceedings. If the boundaries of jurisdiction are stretched too far, well-recognised principle will be diluted and the rationale for a separate admiralty jurisdiction will be undermined.'

[15] As stressed by Hofmeyr in a footnote to the above quote, it is important to note that the special rules and procedures relating to the exercise of admiralty jurisdiction are justified by the need to accommodate peculiarities of admiralty matters. There is no need, nor should there be any desire to extend admiralty jurisdiction to matters which have what the learned author refers to as 'no meaningful maritime connection', and by which I would understand him to mean the extension of admiralty jurisdiction to matters which can otherwise easily be dealt with within the usual jurisdiction of the High Court.

[16] In dealing with sub-s 1(1)(ee) of the Act, Hofmeyr describes it as a 'catch-all provision' designed to bring into the net of maritime claims any matter not covered by the preceding paragraphs in sub-s 1(1) which should, by reason of its nature or subject matter, fall to be dealt with by a court exercising its admiralty jurisdiction. The learned author reasons that the phrase 'marine or maritime matter' creates the

impression that two separate categories are included, and this impression may lead to the inclusion in admiralty jurisdiction of matters which should not be included.

[17] In this regard I was referred to the *Galacia : Vidal Armadores SA v Thalassa Export Co Ltd* SCOSA D252 (D). The *Galacia* concerned the definition of a maritime claim in respect of a summons in an *in rem* action against the ship which harvested a catch of Patagonian Tooth Fish. The respondent's claim had arisen when a cargo of fish destined for importation into the USA was seized and declared forfeit by the authorities in that country. The reason for the seizure by the authorities was the incorrect or faulty documentation submitted by the purchaser of the cargo. In this regard, Combrinck J recorded at D 261 C :

'The contract was simply one of purchase and sale of frozen fish. That the fish had been harvested by a certain vessel is neither here or there. The mere fact that the subject matter of the claim is fish caught by a fishing vessel in the sea cannot in my view bring the respondent home under the provisions of sub-section (ee). If this same consignment of fish were to have been destroyed in a collision while being conveyed by road from New York to Chicago the claim against the driver who negligently caused the collision cold surely not be classified as a maritime claim.'

[18] The question which must ultimately be considered is whether the claim is such that its relationship with 'marine or maritime' matters is sufficiently close that it is necessary for it to be heard as a maritime claim in this court.

[19] In this regard see *Peros v Rose* 1990 (1) SA 420 (N) at 426 E and *Minesa Energy (Pty) Ltd v Stinnes International AG* 1988 (3) SA 903 (D) at 906 G. Both these cases adopted a restrictive approach to defining 'maritime claims'. I am aware

that sub-s 1(1)(aa) and sub-s 1(1)(ee) were introduced after these two cases were decided.

[20] Mr *Mullins* also referred me to the *Mineral Ordaz : The Mineral Ordaz v Ostral Shipping Co Ltd* SCOSA D 41 (D). A ship had been arrested as security for arbitration proceedings in London. Prior to the finalisation of the arbitration proceedings they were settled by agreement between the parties. The learned judge found that the use of the words 'any claim for, or arising out of or relating to' in the introductory part to sub-s 1(1) defining a maritime claim was sufficiently wide to cover a settlement agreement arising out of a charter party. He found that any doubt in that regard would be removed by the wording of sub-s 1(1)(ee). In analysing the provisions of that sub-section the learned judge drew attention to the fact that the words 'any other matter which by virtue of its nature or subject matter …' refers to the essential qualities of a thing and the inherent and inseparable combination of properties pertaining to anything and giving it its fundamental character. 'Subject matter' referred to a thing affording action of a specified kind, a ground, motive or cause. These definitions he derived from the *Shorter Oxford English Dictionary*, and suggested that the provision was intended to cover anything which *per omissio* is not covered in the preceding list of definitions. The learned judge pointed out that one could not wish away the underlying cause of the settlement agreement and that the claim (in the arbitration proceedings) had been compromised solely as to the amount. In those circumstances the applicant would not be able to go back and sue on the underlying charter party, but that the nature or subject matter of the settlement agreement maintained its marine or maritime character. Those facts are

distinguishable from the facts in this case in that the link created by the underlying charter-party brought the matter within the definition of a maritime claim.

[21] Mr *Lamplough* referred to the matter of *The Madagascar : Maree NO v Fund Constituted from the sale of the Madagascar* SCOSA D 322 (D) as authority for the proposition that a payment to a ship owner may fall within the definition of a maritime claim. The facts of that matter are, however, distinguishable from the circumstances of this matter, because the applicant had paid the crew's wages directly, and did not loan the monies to the owner of the ship.

[22] In this case the decision of the Montevideo court was based upon an acknowledgment of debt dated the 9th February 2012. That acknowledgement of debt records that Mr Ignacio Arocena acted on behalf of an entity described as 'Aston Seafood Corp' domiciled in Chile (and for the purposes of the acknowledgement of debt also domiciled in Uruguay), and Braxton was represented by Albino Dominguez Miranda. The agreement records that Aston has capitalised Braxton for a sum of $2 270 678 'in order to execute a commercial fishing venture' undertaken by Braxton in the Republic of South Africa with regard to the ship.

[23] In assessing the underlying cause of action, I have assumed that Aston Seafood Corp is the same legal entity as Aston Seafood SA, because that appears to be what was accepted by the Montevideo court.

[24] The fact remains that the underlying nature of the claim is a loan of monies. 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 to be a maritime matter. In addition, the loan was to 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 applicant.

[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 sub-s 1(1)(aa) or sub-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.

[26] Having found that the applicants' claim is not a maritime claim as defined in the Act, it is unnecessary for me to deal with the matter of whether the applicant has demonstrated a genuine and reasonable need for security.

[27] I accordingly make the following order :

(a) The order of this court made on the 18th July 2014 for the arrest of the mfv *'El Shaddai'* is set aside;

(b) The Registrar is directed forthwith to issue a warrant of release for the mfv *'El Shaddai'*;

(c) The applicants are directed, jointly and severally, the one paying the other to be absolved to pay the respondent's costs in setting aside the original order, such costs to include those consequent upon the employment of two counsel.

Date of hearing : 29th August 2014

Date of judgment : 5th September 2014

Counsel for the Applicants : A J Lamplough (instructed by Shepstone & Wylie)

Counsel for the Respondents : S R Mullins SC, with him, SJ Linscott (instructed by Arnott and Associates)