IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN
(EXERCISING ITS ADMIRALTY JURISDICTION)

Case No: A107/2013

Case No: A125/2013

Name of ship: MV 'Ainaftis'

In the matter between:

World Fuel Services (Singapore) Pte Ltd
t/a World Fuel Services — First Applicant

World Fuel Services Europe Limited
t/a World Fuel Services and Bunkerfuels — Second Applicant

and

MV 'Ainaftis' — First Respondent

Ainaftis S.A. — Second Respondent

Judgment

Lopes J

[1] This is an application by the applicants (hereinafter referred to collectively as 'the applicants' or by their individual citations) for additional security for interest and costs, in terms of subsec 5(2)(*b*) read with subsecs (*c*),(*d*) and (*f*) of the Admiralty Jurisdiction Regulation Act, 1983 ('the Act').

The application arises out of two actions-in-rem issued by the applicants against the MV 'Ainaftis' ('the ship'), claiming the balance of amounts due for goods sold and delivered. The respondents have counter-claimed for the variation of an order of this court granted in favour of the applicants on the 16th November 2018 against the second respondent, Ainaftis SA, the erstwhile owners of the ship ('the owner', or collectively with the first respondent 'the respondents') for the arrest of its right, title and interest in and to funds held in trust by its attorneys of record.

[2] The history of the actions is as follows:

(a) On the 14th September 2013 under case number A107/2013, the first applicant instituted an action-in-rem against the ship, which was arrested in Durban harbour.

(b) The summons alleged that the first applicant was owed the sum of US$ 79 435.86 being the balance due on account for lubricating oils supplied, *inter alia,* to the ship during 2012 pursuant to a contact concluded with the owner. The summons included amounts due to the first applicant for the supply of lubricating oils and bunkers supplied to four other ships, the MV 'Taisetsu' (two claims), the MV 'Fino', the MV 'Star Reliance and the MV 'Saetta'. It was alleged that those four vessels were associated ships of the ship. Administrative fees, interest and costs were claimed.

(c) On the 13th November 2013, the second applicant instituted an action-in-rem against the ship, and caused it to be arrested at Durban harbour. The summons claimed US$ 27 249.99 for the balance of lubricating oils and bunkers delivered to the MV

'Taisetsu' (two claims) and the MV 'Star Reliance'. The second action is solely based on the allegation that those two vessels were associated ships of the ship.

(d) On the 22nd November 2013, the Associated Steamship Owners Mutual Protection and Indemnity Association, Inc. provided letters of undertaking in respect of both actions. This ensured the release of the ship from arrest. The combined letters of undertaking provided security for:

(i) The capital claims in the sum of US$ 106 168.81;

(ii) Interest for three years' in the sum of US$ 56 904.68;

(iii) Costs in the sum of R250 000.00.

(e) The provision for interest was on the basis that the trial would be heard within a three year period.

(f) The applicants first applied for trial dates on the 5th March 2014, and on the 12th May 2014, the two actions were consolidated. The trial, which was set down for hearing during March 2015, was removed from the roll by consent between the parties, with the applicants to pay the costs of the adjournment.

(g) At the end of 2014, the trial was set down for the second time, to be heard for from the 15th to the 17th April 2015. The respondents had objected to the applicants' supplementary discovery affidavits, and the matter was removed from the roll.

(h) The trial was set down for the third time for hearing from the 7th to the 9th October 2015. At the outset of the trial, the respondents applied for an adjournment, which was opposed, but granted, with

the wasted costs ordered to be paid by the respondents on the attorney and own client scale.

(i) The matter was set down for trial for the fourth time, to be heard from the 20th to the 26th April 2016. At the outset of the trial, the applicants applied for an adjournment, tendering wasted costs. The application was granted, with the applicants to pay the wasted costs on the attorney and client scale.

(i) On the 12th December 2017, the matter was set down for trial for the fifth time, for hearing from the 5th to the 9th November 2018. Shortly before the hearing, the respondents brought a substantive application for an adjournment on the basis that the respondents had changed attorneys, and the new attorneys had had insufficient time properly to prepare. That application was opposed, but granted, with the respondents to pay the wasted costs, on the scale as between attorney and own client, such costs to be paid within 30 days' of the date of taxation or agreement. In the event of the costs not being timeously paid, the applicants were entitled to set the actions down for judgment.

(k) On the 16th November 2018, the applicants applied to arrest the owner's right, title and interest in and to funds belonging to it and being held in its attorney's trust bank account. The order provided that those funds be held for the purpose of providing additional security for interest and costs in the consolidated action. The funds were in the sum of € 29 095.68.

(l) The trial has now been set down for the sixth time, for hearing from the 16th to the 20th November 2020.

(m) On the 14th June 2019, this application was instituted. It is alleged that the application is urgent because of the pending trial.

[3] In respect of the action under case no. A107/2013, the first applicant is presently secured for:

(a) The principal sums claimed against the ship, both in respect of direct claims and associated ship claims, in the sum of US$ 28 271.20.

(b) Administrative fees in the sum of US$ 1 178.36.

(c) Simple interest on those claims, which has been calculated at 18 per cent per annum in the sum of US$ 29 020.92; and

(d) Costs in the sum of R125 000.

[4] In respect of the action under case no. A125/2013, the second applicant is presently secured for:

(a) The principal associated ship claims in the sum of US$ 51 453.90;

(b) Administrative fees in the sum of US$ 2572.70;

(c) Simple interest on those claims, which has been calculated at 18 per cent per annum in the sum of US$ 50 863.45;

(d) Costs in the sum of R125 000.

[5] With regard to the additional security obtained, the order expressed it to be for interest and costs in the consolidated action in the sum of € 29 095. The

applicants concede that that security should only apply to the costs of the consolidated action, because the funds belonged to the owner, who can only be held liable for costs.

(See: Admiralty rule 8(3) – This was, presumably, as no other allegation of submission to jurisdiction had been made: *Transnet Ltd v The Owner of the Alina II* (898/10) [2011] ZASCA 129; 2011(6) SA 206 (SCA); [2011] 4 All SA 350 (SCA) (15 September 2011).

[6] The applicants now claim additional security for:

(a) Interest up to the 1st December 2020 in the sum of US$ 43 387.65;

(b) Costs in the sum of R 1 586 443.90.

The claim for additional security is made because the ship has been sold: the owner is a 'one ship' company with no assets: the owner does not trade: the execution of any judgment would be limited to the security held by the applicants which is presently insufficient to cover their anticipated claims: and the requirements for additional security have been established by the applicants.

[7] The actual claims made by the applicants have changed as each affidavit or heads of argument have been delivered. The Notice of Motion sought judgment against the 'Respondent', without indicating to which respondent reference was being made. In their founding affidavit the applicants sought to compel only the owner to provide increased security for interest in respect of their claims, and for increased security for costs. These claims were purportedly made in terms of subsec 5(2)(*b*) read with subsecs 5(2)(*c*), (*d*) and (*f*) of the Act.

Then, at the end of the deponent's affidavit, he sought security provided by 'the defendants' and 'the defendant'.

[8] Unsurprisingly, the respondents' attorney delivered an answering affidavit dealing with the application as being, *inter alia*, against the owner. In the applicants' replying affidavit (which was also their answering affidavit in the counter-application), a different attorney at the same firm concedes that the arrested owner's funds can only be applied to the costs of the consolidated action, and only in respect of the security put up by the owner, and that is why additional security is sought. At the end of her affidavit, the deponent seeks an order in terms of 'the amended order prayed annexed hereto marked "X". . .'. There is no annexure 'X'.

[9] After the respondents' replying affidavit in the counter-application was delivered, the applicants delivered a supplementary affidavit deposed to by the same attorney, seeking leave to amend the interest calculations referred to in her replying affidavit. She ends off her affidavit by stating that annexure 'X' ('which was annexed to my affidavit') has been revised to incorporate the adjusted interest calculations, and the revised figures are contained in annexure 'Xa'. That document seeks an order against only the ship for apparently revised amounts for both interest and costs.

[10] In the applicants' heads of argument the amounts are again changed, but are sought solely against the ship. No part of the relief sought, save for costs, is directed against the owner.

[11] Since the parties had not complied with the Judge President's Directive of the 3rd May 2020 by delivering a 'Joint list of Issues', I requested that they do so. The parties provided a list of matters in dispute together with a list of the issues which I am to determine. They are not the same. The issues I am to decide are:

(a) Whether the applicants have a genuine and reasonable need for further security for costs and interest.

(b) The quantum of the applicants' claims for interest, determined on the basis of the applicants' best reasonably arguable case.

(c) Whether the applicants are seeking an order directing the second respondent to provide security for interest on the indirect claims, and if so, whether this is competent.

(d) Whether the applicants are entitled to advance a claim for security in terms of the provisions relied upon in the Act against the first respondent, and whether they have done so.

(e) The quantum of the applicants' claims for legal costs in the action, determined according to their best reasonably arguable case.

(f) Whether, in the exercise of this court's discretion, the provision of further security should be ordered.

[12] Omitted from the list of issues I am to decide, but included in the issues in dispute, is the applicable rate of interest under the sale agreements. In addition, I was provided with a list of issues I am to determine in the counter-application. Those issues are:

(a) Whether I should condone the late bringing of the counter-application.

(b) Whether I should vary the s 5(3) order so as to reflect that the funds arrested stand as security for costs only, and not for interest.

(c) Whether the respondents should be awarded costs in the counter-application.

[13] I shall deal firstly with the issues in the main application, and in the order which is most appropriate. It is clear that the applicants started out by seeking a claim against the owner for interest and costs, despite the confusing ambiguity of the founding papers. The applicants performed a *volte-face* in reply, seeking to claim security for interest against the ship only, but costs of the consolidated action against both the ship and the owner.

[14] In rule 9(3)(*c*) of the Admiralty Proceedings Rules, litigants are afforded a latitude not accorded to litigants in other courts, inasmuch as they may adduce new matter in reply, or depart from previous allegations which they have made, with the departure to be considered as an alternative to the original allegations.

[15] In their answering/replying affidavit, the applicants withdrew any suggestion that the owner could be liable for interest on any of the claims. The position is then that the applicants avowedly wish to proceed against the ship for additional security for interest and costs, and against the owner for additional security only for costs. Contrary to the submission of Mr *van Eerden* SC, who appears for the respondents, they not only have to answer a case

against the owner, but also against the ship. For the reasons set out above, the fact that the applicants shifted their ground cannot have the effect of limiting their case once they had expanded it in reply. It seems sensible that the respondents should deal with the applicants' altered stance. Supplementary affidavits were delivered by both sides, and the respondents could have dealt with any matters arising there. If I were to dismiss the application on this ground alone, a new application would no doubt be delivered in short order. Accordingly, the answer to the issue in paragraph 11(c) above is that the applicants are not seeking an order directing the owner to provide security for interest on the indirect claims. It is then unnecessary for me to decide whether it was competent for the applicants to have done so.

[16] The applicants have advanced a claim for additional security for interest and costs, and purport to do so in terms of subsecs 5(2)(*b*) and (*d*) of the Act (on the basis that the draft order attached to the applicants' heads of argument is their last word). Those subsecs provide:

> '(2) A court may in the exercise of its admiralty jurisdiction –
>
> . . .
>
> (b) order any person give security for costs or for any claim;
>
> . . .
>
> (d) notwithstanding the provisions of section 3 (8), order that, in addition to property already arrested or attached, further property be arrested or attached in order to provide additional security for any claim, and order that any security given be increased, reduced or discharged, subject to such conditions as to the court appears just;'

[17] Ms *Mills*, who appears for the applicants, submits in her written argument that the respondents 'rely heavily on purely technical points', and that the respondents did not raise the point that the applicants' case is brought against the owner only. I do not agree. Defences which are raised are successful in defeating a claim, or they are not. Parties are perfectly entitled to raise points of defence which they consider to be arguable. Given the very confusing nature of the applicants' notice of motion and founding affidavit, the respondents' could be forgiven for believing that the applicants' case was only against the owners. In paragraph 6 of the founding affidavit, the deponent sets out the purpose of the application, referring only to the owner. The limited extent of the owner's liability for security is pertinently raised in its answering affidavit. The approach of the respondents cannot fairly be described as 'purely technical'.

[18] In my view, the applicants are entitled, in terms of subsec 5(2)(*b*) of the Act, to advance a claim for additional security against the ship, as they clearly purport to have done. This is because this court already has jurisdiction over the claims, and the words 'any claim' are sufficiently wide in my view, as to incorporate a claim for additional security. That claim is clearly available to the applicants in terms of subsec 5(2)(*d*), provided the requisites therefor are established. That disposes of the issue in paragraph 11(d) above.

[19] I now deal with whether the applicants have a genuine and reasonable need for further security for costs and interest. In answering that question, I shall also deal with whether, in the exercise of my discretion, the provision of further security should be ordered. I appreciate that those matters are separate issues.

[20] In order to establish a need for additional security, an applicant is required to demonstrate that:

(a) *prima facie*, it has such a claim for additional security, which claim is justiciable in this court; and

(b) on a balance of probabilities, it has a genuine and reasonable need for security.

See: *MV 'NYK ISABEL': Northern Endeavour Shipping Pte Ltd v Owners of the MV 'NYK ISABEL' & another* 2017 (1) SA 25 (SCA) paras 40-58.

[21] Ms *Mills* raises the following points in support of the applicants' submission that they have established a genuine and reasonable need for security:

(a) After the arrest of the ship, security was put-up to ensure its release.

(b) That security included provisions for both interest and costs.

(c) The amount of security was calculated on the belief of the applicants that the actions would be finalised within approximately three years'.

(d) The latest set down date for the consolidated action is from the 16th to the 20th November 2020, some seven years' and two months' after the first arrest and seven years' after the security was provided.

(e) As a result, the provisions made for interest and costs are inadequate and the applicants will be under-secured when the trial is heard. The amount of security is established on the applicants'

'best reasonably arguable case', a level of proof below a prima facie case.

(f) The party to blame for the inordinate delays in finalising the action is the owner. It would accordingly be just and equitable were it to be held responsible for any shortfall in the security held by the applicants.

(g) The applicants are fully secured for the capital claims. They have accepted that they may recover only the costs of the consolidated action from the owner. In addition to the initial security provided, the applicants secured a further sum of € 29 095, but even with the R500 000 initially provided for costs, it is not enough.

[22] It becomes necessary, then to inspect the reasons for the seven year delay more closely. The applicant's chronology reveals that, contrary to what is submitted by both parties, the trial has been set down on six occasions. The reasons for the consolidated action either being removed from the roll or adjourned, with or without orders for costs are the following:

(a) The first set-down was removed from the roll by consent.

(b) The second because the applicants' discovery was incomplete.

(c) The third because the respondents' witnesses were not available.

(d) The fourth was at the request of the applicants.

(e) The fifth because the respondents changed their attorneys shortly before the hearing.

[23] Far from the respondents being the principal cause of delay, it seems that the blame may be fairly evenly balanced – two at the fault of the applicants' behest, two at the fault of the respondents, and one by consent (requested by the respondent). The rules of court provide every avenue to a litigant (on either side) to ensure that proceedings are dealt with expeditiously. It is really up to the parties, if they wish to proceed to trial speedily, to do so. It ill-behoves any party to an action to complain about a lack of expedition on the part of the other party, when they have also been remiss. This lack of effort is often easily seen in the lack-lustre attitude assumed to time limits for pleadings, etc. This action is no exception – ship arrested on the 14th September and 19th November 2013 - pleas delivered on the 14th and 16th January 2014 - actions consolidated on the 12th May 2014 – after the adjournment in April 2016, the matter was only again set down on the 12th December 2017. This application was afforded urgency because both parties requested a preferential date.

[24] I am by no means convinced that the delays in bringing these actions to trial can be attributed to the conduct of the respondents to the extent that I would be inclined to order further security on that basis. If the applicants had been more astute in prosecuting the consolidated action, it would, in all probability, have been disposed of years' ago. In such circumstances, they cannot be heard to complain of being under-secured for either interest or costs.

[25] Those are not the only reasons for my reluctance to order additional security. There is an unfortunate tendency in admiralty matters to treat each one as a *cause celebre.* These actions are no exception. The pleadings alone in the consolidated action run to some two hundred and eighty-six pages. Had the applicants' legal representatives paid attention to the rules, the pleadings could

have been restricted to some forty to fifty pages, for both actions. One can only speculate why it was necessary to annex so many documents to the summonses (and duplicate many). Whatever the reasons, at the end of the consolidated action, someone will have to pay for the costs of doing so, when neither party should be burdened with that cost. The annexed documents would have been revealed in the discovery proceedings, and I have not been made aware whether they were again duplicated for that purpose.

[26] A further spur to my reluctance not to order additional security is the computation of the amounts for interest. The applicants were initially clearly over-secured when they requested an excessive interest rate. The interest calculations themselves are not correct, not even on the figures produced by the applicants in their heads of argument. The first interest calculation in the applicants' schedule is for interest at 18 per cent per annum on a capital sum of US$ 30 805.96 for 130 days'. The sum of interest should be US$ 1 974.95, not US$ 2 002.39 as contained in the applicants' schedule. Every other interest calculation on that sheet is similarly out of kilter. There are also disputes regarding the number of days in many of the calculations. I first noticed the discrepancy in the interest calculations when reading the print-outs in the papers (with a magnifying glass because the rules regarding the presentation of documents were simply ignored). Using the simple arithmetical method of calculating simple interest (capital x 18% x number of days divided by 365), one arrives at different figures, which is confirmed by Mr *van Eerden* in his heads of argument.

[27] The discrepancy arises because the programme used by the applicants (or their accountants or legal representatives) computed the interest calculations on

the basis of a 360 day year. That is an unusual, but not unknown, banking practice usually used for convenience in the computation of bond repayments made quarterly. If it is to be used, it is always provided for in the contract. It was not so provided for here, because the interest rate was penned at 2 per cent per month or the maximum rate permitted by the applicable law. The applicants have produced expert evidence to demonstrate that the maximum permissible interest rate in terms of the law of Florida is 18 per cent per annum, simple interest. Accordingly, the applicants' calculations for interest are overstated.

[28] With regard to the matter of additional security for costs, the applicants rely upon a *pro forma* bill of costs based upon the anticipated preparation by the applicants' legal representatives, and the costs of the hearing, were it to run for a full five days'. The bill was prepared by attorneys who allegedly specialise in drawing bill of costs. The owner submits that a previous bill of costs presented by the applicants was taxed-off by the Registrar to the extent of 54 per cent. That bill was drawn by the same firm of attorneys. Reducing the costs on that basis would result in the applicants being over-secured for costs. This enforces my view that a genuine and reasonable need for additional security is not established by the applicants' allegations and submissions.

[29] With regard to the exercise of my discretion whether to order additional security for interest and costs, the owner has indicated that it is not in a position to provide further security. If that is indeed the case, then any such order I make may result in the owner being denied the opportunity to defend the consolidated action. The applicants submit that the owner has a weak case, both with regard to the direct claims, and the associated ship claims. The applicants also submit that the owner is obliged to disclose why it cannot obtain security from sources

related to it, and in particular the companies forming part of the associated ship allegations.

[30] The owner, however, has denied the claims of association. If the denials are genuine, what more can the owner do? The applicants accept that the owner sold the ship in 2013, has no other assets, and no longer trades. It is common cause that the owner cannot provide security, other than with the assistance of other connected or associated companies. If they don't exist (as alleged by the owner) there are no such funds in existence. It is not for me to prejudge the matter of association. This aspect is hardly dealt with on the papers, save for allegations of the common management of the ships. The authorities regard that as insufficient, on its own, to conclude that an association exists. In my view, the applicants have not established the requirements for additional security for either interest or costs. Given the conclusion at which I have arrived, it is not necessary for me to determine the quantum of those items. That disposes of the issue in paragraph 11 (a) above, and it not necessary for me to decide the issues in paragraphs 11 (b) and (e) above.

[31] With regard to the counter-application, the applicants concede that no order for additional security for interest from the owner should be made, and that the counter-application should be granted, but submit that it would make no practical difference to grant it, and to do so is unnecessary. The fact is that the applicants sought and were granted an order to which they were not entitled. As s 5(2)(*d*) of the Act provides, a court may '. . . order that any security given be increased, reduced or discharged, subject to such conditions as to the court appears just;' I am of the view that the order of the 19th November 2018 falls to be amended as set out in my order below.

[32] With regard to the time limit within which the respondents' were to have delivered an application to vary or set aside the orders of the 16th and 19th November 2018, the applicants submit that there is no good cause shown by the respondents to extend the time period of one month. The form of the order in paragraph 8 has always been somewhat contentious. It was introduced into admiralty practice in Durban during the late 1990s. The justification for the order was that unscrupulous owners could wait until the last minute before bringing an application to challenge the arrest and/or provision for security. If they were set aside, the plaintiff could be left unsecured, and could have incurred vast irrecoverable legal costs and might not have time to establish an alternative form of security before time-bars might prevent it from doing so. This is, however, a problem for any litigant claiming security. If the defendant is an *incola*, matters may well be different. In admiralty proceedings, defendants are almost always *peregrini,* with little hope for the applicants of establishing security in South Africa. The unfairness of such an order unduly restricting the respondents' time limits may be viewed in the time periods accorded to *peregrini* in edictal citation proceedings – ie usually one month after service – and the provisions of s 24(*a*) of the Superior Courts Act, 2013.

[33] The order for a restricted time limit for bringing an application to set aside an arrest for security was originally couched in more peremptory terms, but was amended in Durban as a result of judicial pressure, mainly because of the unfairness of such a peremptory term in an ex-parte application. *In MV Rizcun Trader (4):MV Rizcun trader v Manley Appeldore Shipping Ltd* 2000 (3) SA 776 (C), van Heerden J dealt fully with the peremptory form of the order. He held in essence that that the order was procedural in nature, and that there

was no reason why the requirements for setting aside a final judgment – ie that the application to correct, alter or supplement the order should be brought within a reasonable time of the granting thereof – should not be applicable. He reasoned that 'good or sufficient cause' would encompass (a) a reasonable explanation for the non-compliance within the stipulated period; (b) a full motivation why a reconsideration of the order was necessary; and (c) that any proceedings that may ensue have a reasonable prospect of success.

[34] In my view, the respondents have given a reasonable explanation for the delay – that to review the order would have been too costly in the circumstances. The explanation covers why a re-consideration was necessary. The prospects of success are revealed by the applicants' concession. The only complaint by the applicants is they do not wish to pay the costs of the counter-application. The applicants must have realised that the original order was wrong, but took no steps to remedy it. In those circumstances, they cannot complain about having to bear the costs of the counter-application. That disposes of the issues in paragraph 12 above.

[35] In all the circumstances, my answer to the issue in paragraph 11(f) above is that it would not be just or equitable for me to order the provision of additional security for interest and costs. With regard to costs, they must follow the result, both in the main application, and in the counter-application.

[38] I make the following order:

(a) The applicants' application for condonation of the late filing of its heads of argument is granted, with no order as to costs.

(b) The applicants' application for additional security for interest and costs is dismissed.

(c) The time limit set out in paragraph 8 of the order of this court dated the 16th November 2018 within which the respondents were to have delivered their application to vary that order, is extended to the date of delivery of its counter-application in these proceedings.

(d) The respondents' counter-application for a variation of the orders of this court dated the 16th and the 19th November 2020 is granted, and the order of the 16th November 2018 is varied by the deletion of the words 'claims for interest and' in line 4 of paragraph 1 of the order, and the substitution therefor of the words 'claim for'.

(e) The applicants are directed, the one paying, the other to be absolved, to pay the costs of both the application and the counter-application, such costs to include those consequent upon the employment of senior counsel, and the costs of written argument.

Lopes J

Date of hearing:	28th May 2020 (matter heard on the papers).
Date of judgment:	26th June 2020 (to be handed-down electronically).
For the applicants:	Ms LM Mills (instructed by Bowman Gilfillan Inc, Durban).
For the respondents:	P A van Eerden SC (instructed by Shepstone & Wylie, Durban).