THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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MV 'TARIK III' Credit Europe Bank N.V. v The Fund Comprising the Proceeds of the Sale of the MV Tarik III and Others

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The Supreme Court of Appeal (SCA) today dismissed an appeal against an order by the KwaZulu-Natal Division of the High Court, Durban (high court), which arose from claims lodged against a fund comprising the proceeds of the judicial sale of the 'MV Tarik III' (the Fund), a motor vessel owned by Garanti Finansal Kiralama A.S. (Garanti). On 31 October 2007 a charterparty (or the agreement) was entered into between Garanti and Hazar Denizcilik Ic Ve Dis Ticaret (Hazar). On 14 February 2014 Garanti and Hazar extended the charterparty to 15 December 2015. Caliskan Ic Ve Dis Ticaret Sanayi A.S. (Caliskan) subsequently took over business operations from Hazar and replaced it as the bareboat charterer upon the same terms and conditions as originally entered into between Garanti and Hazar.

Caliskan, in terms of the Turkish Enforcement and Bankruptcy Code, obtained a preliminary injunction on 17 March 2014, which protected it from creditors and required that any subsequent transactions required the joint approval of two appointed trustees. On 15 April 2014, Garanti sent Caliskan a written notice for the payment of arrears, to be paid within 60 days, failing which the agreement would terminate. However, during the 60-day period, on 24 April 2014 Garanti and Caliskan concluded what was styled a revised payment plan. This was apparently done without the required approval of the trustees.

The appellant, Credit Europe Bank N.V, arrested the vessel on two separate occasions, namely by way of an in rem arrest on 26 March 2014 and in terms of s 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983. In effecting the arrest, the appellant relied on the deeming provision in s 1(3) of the Act. On 5 December 2014, the high court granted an order for the sale of the vessel and appointed a referee to act in respect of claims lodged against the Fund resulting from the vessel's judicial sale. Various claimants, including the appellant and the three respondents all lodged claims against the Fund. The referee delivered a report, in which he: (a) recommended payment of the appellant's claims; (b) determined that the agreement was still extant at the date of the sale; and (c) as such that the other claimants including the three respondents were entitled to rely on the deeming provision.

Before the SCA, the appellant contended that the referee erred in concluding that the agreement had not terminated and that it was still extant at the time of the sale of the vessel. Consequently, the referee should have disallowed the respondents' claims. The SCA found that neither the appellant, nor any other party to the matter had been aware of the dealings between Garanti and Caliskan. Both performed in terms of the agreement and agreed that the agreement was, at all relevant times, valid and binding. The appellant sought to suggest that a dispute of fact existed in relation to whether or not the agreement had terminated. However, the SCA found that no such dispute existed and the various considerations relied upon by the appellant in its quest to prove that the agreement had terminated did not raise a genuine dispute of fact. It found that the claims in question were claims against the Fund, which were not disputed by the two parties to the agreement, Garanti and Caliskan.

Furthermore, the appellant contended that as a matter of Turkish law the agreement had terminated. In that regard, so held the SCA, the onus of proof was important. The majority of the judges took the view that, in the circumstances of this case, it was for the appellant to prove that the agreement had terminated, not for the respondents to prove the negative. One of the judges held that to bring themselves within the scope of the deeming provision, it was for the respondents, as claimants, to prove that they had a valid claim, this included establishing that the agreement was still extant at the date of the sale of the vessel. Accordingly, as the respondents had failed to discharge the onus resting upon them, that judge would have allowed the appeal.

The majority found however that the appellant was unable to rely on a single clear date, cause or mechanism upon which the agreement purportedly terminated. Instead, reliance was placed

on several alternatives which the majority found to have been pieced together from selected circumstantial evidence. As there was a stark dispute between the Turkish Law experts as to the effect of the revised payment plan, which could not be resolved on the papers, the appellant had to fail.

In conclusion, an important secondary question was addressed by the Court, being whether a claimant was entitled to lodge a claim against the Fund without first having arrested the vessel concerned. The appellant contended that claimants who had not arrested the vessel were precluded from lodging a claim against the Fund. After a survey of the relevant authorities, the SCA concluded that it would have been a purposeless technicality to have insisted that the vessel be arrested after its sale had already been ordered.

In the result, the SCA dismissed the appeal. In a separate dissent, one of the judges would have upheld the appeal and disallowed the claims of the respondents.

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