REPORTABLE

CASE NO: 166/2000

NAME OF SHIP: MT *ARGUN*

In the matter between:

THE SHERIFF OF CAPE TOWN	**APPELLANT**
and	
THE MT *ARGUN*, HER OWNERS AND ALL PERSONS INTERESTED IN HER	**FIRST RESPONDENT**
SEA-TECH PTE LIMITED	**SECOND RESPONDENT**
OFFSHORE BUNKERING GROUP LIMITED	**THIRD RESPONDENT**
THE MASTER AND CREW OF THE MT *ARGUN*	**FOURTH RESPONDENT**
THE FORMER CREW OF THE MT *ARGUN*	**FIFTH RESPONDENT**

CASE NO 309/2000

In the matter between:

THE SHERIFF OF CAPE TOWN	**FIRST APPELLANT**
VICTORIA AND ALFRED WATERFRONT CO (PTY) LIMITED	**SECOND APPELLANT**
and	
THE MT *ARGUN*, HER OWNERS AND ALL PERSONS INTERESTED IN HER	**FIRST RESPONDENT**
THE GOVERNMENT OF THE RUSSIAN FEDERATION	**SECOND RESPONDENT**

CORAM:	**SMALBERGER ADCJ, SCOTT, STREICHER, NAVSA et MTHIYANE JJA**
HEARD:	**15 MAY 2001**
DELIVERED:	**1 JUNE 2001**

LIABILITY OF ARRESTING PARTIES TO SHERIFF FOR EXPENSES INCURRED IN PRESERVING SHIP ARRESTED IN TERMS OF ACT 105 OF 1983 – ON THE FACTS, SHERIFF NOT ENTITLED TO ORDER FOR SALE OF SHIP TO RECOVER SUCH EXPENSES.

J U D G M E N T

SCOTT ***JA*****:**

[1] These two appeals were set down for hearing together. They are both concerned with the expenses incurred in preserving the *MT Argun* which was first arrested in Table Bay as long ago as 25 May 1999. Further arrests followed. Security was not put up to procure the release of the vessel. Instead, while the arresting parties and the owners litigated, the sheriff of Cape Town (who was appointed as such in terms of s 2 of the Sheriffs Act 90 of 1986) was obliged to make the necessary disbursements and incur liability in large amounts in order to preserve the vessel. On 30 July 1999 the sheriff applied in the High Court, Cape Town, for an order which, stated shortly, (i) declared the arresting parties to be jointly and severally liable, or alternatively the vessel and her owners to be liable, for the expenditure already incurred in the sum of R78 908,10 and which declared them liable for expenditure reasonably incurred in the future and (ii) directed that in the event of any

arresting party not paying, his arrest would lapse or in the event of the owner not paying, the sheriff would be entitled to apply for the sale of the vessel. The application was opposed. On 27 September 1999 Cleaver J granted absolution from the instance with costs against the sheriff. The judgment is reported *sub nom Sheriff of Cape Town v MT Argun, her Owners and All Persons Interested in Her and Others* 2000 (1) SA 1061 (C). In the meantime the vessel remained under arrest. Neither the arresting parties nor the owners contributed towards her upkeep. This was left entirely to the sheriff. By the end of March 2000 the expenses incurred by the sheriff were said to be of the order of R1.2 million. He again approached the court, this time together with Victoria and Alfred Waterfront Company (Pty) Limited as second applicant which carries on business *inter alia* as a commercial harbour and which by then was owed a substantial sum for providing a berth for the vessel since 5 October 1999. A *rule nisi* was issued calling on the vessel, her owners and all

persons interested in her, as first respondent, and the Government of the Russian Federation, which by then had been declared the owner, as second respondent, to show cause why the vessel should not be sold and a referee appointed to receive claims against the fund established with the proceeds of the sale and to make recommendations regarding such claims. Answering and replying affidavits were filed and on 13 June 2000 after hearing argument Erasmus AJ discharged the rule with costs. The appeals are against the judgments of Cleaver J and Erasmus AJ respectively. Each is with the leave of the Court *a quo.* The appellant in the first appeal is the sheriff. The appellants in the second are the sheriff and the Victoria and Alfred Waterfront Co (Pty) Ltd. When referring to them individually it is convenient to do so by name.

[2] The first arrest on 25 May 1999 was at the instance of Sea-Tech Pte Ltd, a company incorporated according to the laws of Singapore, in

pursuance of an *action in rem* for payment in respect of repairs and materials supplied. Sea-Tech became the second respondent in what I shall refer to as "the first application".

[3] At the time of the arrest the sheriff seized the vessel's registration certificate. This reflected the owner as being a Panamanian Company, National Pacific GSC SA. Ship's agents appointed by this company attended to the needs of the vessel until 30 June 1999 when their mandate was terminated. Subsequently the Government of the Russian Federation ("GRF") laid claim to the vessel. It alleged that her demise charterers had connived with National Pacific to have the vessel registered in the name of the latter. On 25 November 1999 and at the instance of GRF an order was made declaring it to be the owner. (When convenient, I shall refer to the GRF as "the owners".)

[4] In the meantime and on 14 July 1999 the vessel was arrested at

the instance of Offshore Bunkering Group Ltd, a company carrying on business as ship charterers and bunker suppliers in the British Virgin Islands. The arrest was effected in terms of s 5 (3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Act") to provide security for a claim arising out of an alleged breach of a charter party. Offshore Bunkering was cited as the third respondent in the first application.

[5] On the same day, 14 July 1999, the vessel was arrested at the instance of the master and crew for arrear wages. On 22 July 1999 a further arrest was made, this time at the instance of the former crew, also for arrear wages. The master and crew and the former crew were cited respectively as the fourth and fifth respondents in the first application.

[6] All the claims were disputed. The master and crew, and the former crew, succeeded in obtaining judgment by default but the GRF applied for rescission of both judgments. The matter is pending. Offshore Bunkering

later withdrew its arrest and a subsequent arrest at the instance of a Russian company has been set aside. We were advised by counsel that the mortgagees have also arrested the vessel and that it is unlikely that the litigation will be resolved in the near future.

[7] Admiralty Rule 21 (1) provides that any property arrested shall be kept in the custody of the sheriff -

> "… who may take all such steps as the court may order or as appear to the sheriff to be appropriate for the custody and preservation of the property, …"

In *The MV Avalon: Curnow Shipping Ltd v Brooks NO and Another* 1996 (4) SA 989 (D) at 1000 D – H. Thirion J held that notwithstanding the use of the word "may" which usually connotes the conferment of a permissive power, the Rule had to be construed as imposing a duty on the sheriff to take the steps referred to. This was accepted by King J in *MV Ocean King Den Norske Bank ASA v MV Ocean King, Her Owners and All Other Parties*

Interested in Her (Sheriff for the District of the Cape Intervening) (NO2) 1997 (4) SA 349 (C) at 353 J – 354 C. I respectfully agree. Indeed, it was not contended that the position was otherwise.

[8] At the time of the initial arrest the *Argun* was berthed in the port of Cape Town. Because of lack of space in the harbour she was subsequently ordered by the port captain to be moved to an anchorage in the roadstead. On 30 June 1999 when the agents' mandate was terminated the master handed the sheriff a list of his requirements. These included water and food for the crew as well as gas oil. The latter was necessary to light the vessel at night and to start the main engines should the need arise. The sheriff sought the assistance of the arresting parties and National Pacific, but none was forthcoming. By 30 July 1999 when the first application was launched the sheriff says he had either paid or become obliged to pay the sum of R78 908,10 in respect of bunkers, water, food, carrier and agency services for

the vessel as well as for a survey required for insurance purposes. He stressed in his founding affidavit the financial difficulty he would experience in the event of being obliged to pay the expenses of preserving the *Argun* for any length of time.

[9] As the judgment of Cleaver J is reported, his reasons for arriving at the conclusion he did need not be stated in any detail. His starting point appears to have been that the sheriff has the security of the ship; in the event of a sale his expenses would be a first charge on the fund; in the event of it being established that there was to be no sale, he would be entitled to refuse to release the ship until his expenses had been paid. Until the occurrence of either event, the learned judge held, there was no basis, whether at common law or in contract, on which the sheriff could recover his expenses from either the owners or the arresting parties. The judge, in addition, advanced a number of reasons why an order in terms of s 5 (2) (b) of the Act affording

the sheriff security should not be made.

[10] The consequence of the judgment was to place the sheriff in an untenable position. Although an *incola* and officer of the Court, he has been obliged to incur liability for, or pay out, relatively large sums of money in order to preserve a foreign vessel while the parties who are all *peregrini* are able to litigate at their leisure. In most cases where security is not put up the vessel is for all intents and purposes abandoned by her owners and judgments are taken with reasonable promptitude. Admittedly there are often delays but these tend to occur in the execution process or as a result of disputes between competing creditors. In the present case the arresting parties and the owners have been litigating for nearly two years and we are informed by counsel that the end is not in sight.

[11] Neither the Act nor the Admiralty Rules contain express provisions protecting the sheriff in such a situation. The position is different

once judgment is taken and a fund is established. Claims participating in a fund (as provided for in s 3 (11)) are listed in s 11 (4). The order of their ranking is given in s 11 (5). The claim ranking first is dealt with in s 11 (4)(a). It is –

> "a claim in respect of costs and expenses incurred to preserve the property in question or to procure its sale and in respect of the distribution of the proceeds of the sale".

The claim of the sheriff for what may for convenience simply be referred to as "preservation expenses" falls within the ambit of s 11 (4) (a) and is therefore a first charge on the fund. Also of importance is s 11 (8). It reads:

> "Any person who has, at any time, paid any claim or any part thereof which, if not paid, would have ranked under this section, shall be entitled to all the rights, privileges and preferences to which the person paid would have been entitled if the claim had not been paid."

It follows that in the event of an arresting party paying the sheriff his preservation expenses, the former would acquire the latter's preference under s 11 (4).

[12] Against this background the remedies available to the sheriff *pendente lite* or prior to the establishment of a fund, must be considered. It is convenient to consider first his rights, if any, against the arresting parties. The question that immediately arises is whether English or the Roman-Dutch law is to be applied.

[13] Section 6 (1) of the Act provides:

> "Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall -
>
> (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;
>
> (b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic."

Prior to the commencement of the Act the several Divisions of the then Supreme Court of South Africa had continued to sit as Colonial Courts of Admiralty in terms of s 2 (1) of the Colonial Courts of Admiralty Act, 1890 notwithstanding the constitutional changes that had occurred since 1910. In terms of s 2 (2) of the 1890 Act the jurisdiction of a Colonial Court of Admiralty was "… over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any Statute or otherwise …" This was construed as a reference to the admiralty jurisdiction of the High Court in England as it existed in 1890 (See generally *Trivett & Co (Pty) Ltd and Others v WM Brandt's Sons & Co Ltd and Others* 1975 (3) SA 423 (A) at 432A – 432B; *Malilang and Others v MV Houda Pearl* 1986 (2) SA 714 (A) at 722 I – 723 C.) For the sake of completeness I should add that while the 1890 Act abolished the Vice Admiralty Courts which had been statutorily affirmed in 1863, it preserved

the Vice Admiralty Rules which were made 20 years later in 1883. These Rules remained in force in South Africa until November 1986.

[14] The effect of s 6 of the Act is therefore that with regard to "any matter" in respect of which the High Court in England exercising its admiralty jurisdiction in 1890 would have had jurisdiction, the law to be applied is that which the High Court of Justice of the United Kingdom would have applied in the exercise of its admiralty jurisdiction on 1 November 1983, being the date upon which the Act commenced. The reference to what may for convenience simply be called the English admiralty law as at 1983 is to be construed as a reference to that law including the relevant principles of private international law (*Marcard Stein & Co v Port Marine Contractors (Pty) Ltd and Others* 1995 (3) SA 663 (A) at 667 C).

[15] The liability of arresting parties for the costs or expenses incurred in the detention of a ship would clearly have been matters falling

within the jurisdiction of the High Court of Admiralty exercising its admiralty jurisdiction in 1890. (See for instance *The India* (1842) 1 W Rob 406 (Vol 14 British Maritime Cases); *The North American* (1859) SWA 466 (Vol 20 British Maritime Cases); *The Ironsides* (1862) Lush 458 (Vol 21 British Maritime Cases); *The Europa* (1863) Br & L 210 (Vol 22 British Maritime Cases.).) It is accordingly necessary to refer to the English admiralty law as at November 1983. But because the reference is to the law including the principles of private international law, the nature and effect of the rule sought to be applied must first be classified as one of substance or of procedure. If the former, the English law will apply; if the latter, the English private international rule will direct that the *lex fori* is to apply, in which event the appropriate law will be that of South Africa.

[16] Since the early nineteen sixties a warrant for the arrest of a ship in England will not be executed by the marshal until there has been lodged by

the solicitor or his clerk in the marshal's office a written undertaking in accordance with Order 75, rule 10 (3) to pay on demand the marshal's fees and all expenses incurred by him, or on his behalf, in respect of the arrest of the ship and the care and custody of it while under arrest. (See *The "World Star"* [1987] 1 Lloyd's Rep 453 QB (Adm Ct) at 454; see also McGuffie, Fugeman and Gray *British Shipping Laws* Vol 1 Admiralty Practice (1964) at para 262 *et seq.*) If the marshal requires payment on account of his expenses while the ship is under arrest he may look to the arresting party's solicitor in terms of the latter's undertaking. When the ship is sold the proceeds are used first to pay the marshal's charges and expenses. (See *The "Falcon"* [1981] 1 Lloyd's Rep 13 QB (Adm Ct) at 17.) In the event of the plaintiff's action not succeeding, the marshal would ordinarily look to the solicitor for payment of his expenses in terms of the undertaking. The marshal is therefore fully protected. The practice provided for in Order 75 rule 10 (3) has been

preserved in the Civil Procedure Rules which came into force in 1999 (Meeson *Admiralty Jurisdiction and Practice* 2ed at 140.) In passing it is interesting to observe that in the United States of America and in Australia an arresting party is obliged to pay the marshal in advance or to furnish him with an undertaking to pay his fees and preservation expenses on demand. The same is apparently the position in New Zealand. (See the judgment of Cleaver J at 1071 E – 1072 B where the relevant provisions are referred to in more detail.)

[17] Mr Wragge, who appeared for the owners in both appeals, readily conceded that the practice laid down in Order 75, rule 10 (3) was a matter of procedure and therefore, applying the English rule of private international law, was not to be applied in South Africa. He submitted, however, that the practice reflected an underlying rule of substance that prior to judgment and the establishment of a fund an arresting party was liable to

the marshal for the latter's fees and expenses incurred in the preservation of the ship. In other words, so he argued, there was a clear distinction between the rule of substantive law imposing liability and the prescribed manner in which that liability was to be enforced. (Cf North and Fawcett *Cheshire and North's Private International Law* 13 ed at 80 – 81.) There is, I think, much to be said for counsel's contention. However, the dividing line between substantive and procedural or adjectival law is not always an easy one to draw. (See *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754 I.) The issue of classification in the present case was not fully argued before us and as I think the end result will be the same regardless of whether one applies the Roman-Dutch law or what is contended to be the substantive rule of English law, I shall refrain from finally deciding the point.

[18] This brings me to the Roman-Dutch law. The old writers deal

with preservation expenses at some length in relation to arrested persons. Admittedly the analogy between arrested persons and arrested ships is one which is not entirely correct, but nonetheless the principles adopted in relation to the party responsible for the maintenance of an arrested person can in certain important respects be applied to ships. In the case of a "schuldenaer" or "debitor", i e a person against whom judgment had been taken, the general view prevailing at the time of Peckius was that on being imprisoned the debtor was obliged to provide for his own support but, if too poor to do so, the duty fell upon the creditor. (See Peckius *Tractatus de Jure Sistendi* 42.5.) A creditor was furthermore obliged to agree in advance on payment for the support of the debtor and to provide security to the "deurwaerder" (sheriff) or the "cippier" (gaoler) for such payment (Bort *Tractaet Handelende van Arresten* 6.3). The deurwaerder was afforded the further protection of being entitled to refuse to release the debtor until he had been paid his expenses in

maintaining the debtor. (Peckius 50.2.) These rules were in the main applied in South Africa in relation to civil imprisonment for debt (which, of course, has since been abolished). (See Van Zyl *The Judicial Practice of South Africa* Vol 1, 4 ed at 296 – 299.)

[19] In the case of an arrest to found jurisdiction, ie before judgment, the person concerned was to be maintained in the first instance, not at this own expense, but at the expense of the plaintiff, ie the arresting party. Voet 2.4.27, in the context of arrests or attachments to found jurisdiction, simply assumes this to be the position both in relation to persons and property and points out that the extent of the security for such expenses which a plaintiff would have to provide was not uniform but depended on a number of factors. The same applied to a *suspectus de fuga* (a person suspected of flight). Van der Linden's commentary on the section is instructive. He says that a person so arrested is to be taken to a lodging house called "the Castellany of the

Court" until the arrest is set aside or confirmed. He adds – (Gane's translation):

> "But since expenses in this place of lodging are wont in a short time to grow to a huge sum, and whether ordinary or extraordinary have to be supplied by the plaintiff who petitioned for the arrest …, practice brought in the change that after the lapse of some days, there being no payment from the defendant, a petition is presented to the Court to have the defendant transferred to the ordinary prison of the Court, …"

Van Zyl, *supra*, when dealing with arrests to found jurisdiction or of a debtor who is *suspectus de fuga*, points out at 208 that once such a person is in gaol "he is to be maintained there, in the first instance, at the expense of the plaintiff". The reason for the liability being that of the plaintiff "in the first instance" is that the defendant would be entitled to his immediate discharge from custody prior to judgment in the event of his paying the amount of the writ with costs as well as "the costs of caption incurred thereon" (at 209).

[20] Whether in our modern law an arrest of a person, as opposed to the attachment of property, to found or confirm jurisdiction would still be

upheld, need not be considered. The point is that the arresting party, *ie* the plaintiff, would have been obliged to maintain a person so arrested, and *a fortiori* would be obliged to pay the costs of preserving any property attached for that purpose.

[21] In *MV Avalon: Curnow Shipping Ltd v Brooks NO and Another (supra)* Thirion J found it necessary to determine whether the arresting party was liable to reimburse the sheriff for expenses which the latter had incurred in preserving a vessel arrested in terms of the Act. Although the vessel had been sold and a fund established the question in issue related to the period prior to the sale. After referring to Peckius, Bort and other authorities the learned judge concluded at 1003 B – C:

> "It would appear to me from what has been said on the subject of arrest that it is the duty of the sheriff, after he has arrested a vessel, to keep it in safe custody and to take all reasonable steps necessary for the preservation of the vessel so as to prevent a deterioration in its condition. He may incur such expenses as are reasonably necessary for

> that purpose and may hold the person who has procured the arrest responsible for reimbursing him those expenses."

I respectfully agree.

[22] It follows that in my view the sheriff was entitled to be reimbursed for his expenses regardless of whether the Roman-Dutch or English Admiralty law as at 1983 is to be applied.

[23] The appellants sought an order against the arresting parties (ie the second to the fifth respondents) *inter alia* declaring them jointly and severally liable for a specified sum in respect of past expenditure and for all expenditure reasonably incurred in the future. (The precise terms of the relief sought appear in Cleaver J's judgment at 1064J – 1066C.) The correctness of the amount claimed was put in issue, but given the circumstances of the case that ought not to have been a bar to the sheriff being granted relief. Furthermore, where there is more than one arresting party there would seem to be no reason why in principle their liability should not be joint and several.

In my judgment, therefore, the sheriff was entitled to an order declaring each arresting party to be jointly and severally liable, in respect of the period during which the vessel was under arrest at the instance of that party, with other arresting parties, to the extent that the vessel was under arrest at their instance during the said period, for all the sheriff's expenditure reasonably incurred in the preservation of the vessel as contemplated in Admiralty Rule 21 (1).

[24] The Rules contain no provision similar to the English Order 75, rule 10 (3) which would have served to protect the sheriff against the situation in which he now finds himself. Section 5 (2) (c) of the Act, however, affords the court a wide discretion to order any arrest to be subject to such conditions as to expenses as appears to the court to be just. The section reads –

> "(2) A court may in the exercise of its admiralty jurisdiction –
>
> (a) ……
>
> (b)……

> (c) order that any arrest or attachment made or to be made or that anything done or to be done in terms of this Act or any order of the court be subject to such conditions as to the court appears just, whether as to the furnishing of security or the liability for costs, expenses, loss or damage caused or likely to be caused, or otherwise;"

Cleaver J (at 1072 para 26) considered whether in terms of s 5 (2) (b) he should order that the sheriff be given security for his claim. For the reasons advanced in that paragraph the judge decided against such an order. However, nowhere in the judgment does it appear that consideration was given to making the arrests subject to the condition that the arresting parties pay the sheriff's reasonable preservation expenses. The relief sought was clearly wide enough to make the arrest at the instance of each plaintiff subject to such a condition.

[25] It is apparent from what has been said above that already by 30 July 1999 when the first application was launched the sheriff was in an invidious position. The owners were disputing the claims in pursuance of

which the arrests were made but at the same time taking no steps to attend to the preservation of the vessel. By mid-August when the application was heard nothing had been done to alleviate his predicament. As frequently stressed, it is a serious business to arrest a ship and interrupt its voyage with commercially damaging consequences to the owners or charterers. (See *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 581 G – H.) In the present case the owners proclaimed their innocence; yet the arresting parties insisted that their arrests stand so as to enable them to litigate, apparently with little sense of urgency, while at the same time leaving it up to the sheriff to pay, or incur liability, for the upkeep of the ship.

[26] It follows that in my view the continued arrest at the instance of each arresting party ought to have been made conditional upon that party reimbursing the sheriff within 10 days of demand for the latter's reasonable expenses for the preservation of the vessel as contemplated in Rule 21 (1)

incurred during the period the vessel was under arrest at the instance of that arresting party.

[27] As far as the claim against the arresting parties is concerned, the first appeal must therefore succeed.

[28] The next question that arises is whether the sheriff was entitled to recover his expenses and fees from the owners prior to the sale of the vessel, or for that matter prior to the remaining arrests being withdrawn or set aside. It was common cause between counsel that in the latter event the expenses would be recoverable from the owners who would be obliged to pay the outstanding amount in order to procure the release of the vessel, but that is not an issue which requires to be determined in the present appeal.

[29] By reason of the practice in England (to which I have previously referred) of requiring an undertaking to be given to the marshal, the question of the owners' liability does not arise. If the marshal requires

payment he looks to the arresting party's solicitor in terms of the undertaking. In South Africa, as I have found, the sheriff may apply to court for an order entitling him to recover his disbursements and fees from the arresting party on pain of the arrest ceasing to have effect. I know of no case, whether in England or South Africa, in which it has been held that *pendente lite* and while the vessel is still detained under arrest the owners can be compelled to pay the sheriff's disbursements and fees relating to the preservation of the vessel.

[30] Both in this Court and in the Court below counsel for the sheriff advanced various grounds on which such a liability could be justified. The first was that the owners were being unjustifiably enriched at the expense of the sheriff. In my view there is no merit in this contention. A ship is arrested and kept in the custody of the sheriff not for the benefit of the owners but for the benefit of the arresting parties. The arrest, like an attachment to found

jurisdiction, has a twofold purpose: it confers jurisdiction on the court to enable the plaintiff to prosecute his claim and, secondly, it provides an asset in respect of which execution can be levied in the event of a judgment being granted in the plaintiff's favour. (See *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 697 E – F; The *"Falcon"*, *supra* at 17.) Significantly, Rule 21 (2) requires the sheriff to consult with the arresting parties regarding the carrying out of his duties in terms of Rule 21 (1), not with the owners. Moreover, while under arrest and lying idle in port the ship is precluded from earning any income. The owners are not enriched; the converse is true. Nor can it be said that they would in any event have had to incur the expenditure claimed. The major item of expenditure by far would ordinarily be berth and port dues. But these are incurred only because the vessel is detained in port and unable to continue on her voyage. The other expenses too, or certainly most of them, would either

not have been incurred at all e g the expense of repatriating the crew, sheriff's fees and the like, or they would have been incurred for a totally different purpose, e g the purchase of bunkers. It follows that quite apart from any other considerations the sheriff cannot succeed on this ground.

[31] It was further argued that in preserving the vessel the sheriff was acting as a *negotiorum gestor*. It is unnecessary to consider all the issues raised in this regard. The simple answer is that it is apparent from what has already been said that in preserving the vessel while under arrest, the sheriff was in fact managing the affairs of the arresting parties by preserving their security; he was not managing the affairs of the owners. Yet another ground advanced for holding the owners liable was the existence of a tacit agreement between the sheriff and the owners in terms of which the former was to preserve the ship for and on behalf of the latter. I cannot agree. The owners

did not choose to have their ship lying idle in port; the ship remained there against their will and because of the arrest.

[32] It follows therefore that as far as the claim against the owners is concerned, the first appeal must fail.

[33] Subsequent to the judgment in the first application and on 24 February 2000 the sheriff, together with Victoria and Alfred Waterfront Company (Pty) Ltd (the second appellant in the second appeal) caused the vessel to be arrested in pursuance of an action *in rem* to recover their unpaid preservation expenses and charges. The owners entered an appearance to defend. On 28 March 2000 the second application was launched.

[34] The relief sought, as I have indicated, was an order for the sale of the vessel. Section 9 of the Act affords the court a wide discretion to order "at any time" that property arrested in terms of the Act be sold. Nonetheless, that discretion will be sparingly exercised *pendente lite* and where a claim is

contested the court will be reluctant to order the sale of the arrested property if there is a reasonable prospect that the owner will be able to show that the ground for the arrest is not a good cause of action. Indeed, an order in such circumstances has rightly been described as "Draconian" . (See *The MT Tigr v Bouygues Offshore and Another* 1998 (4) SA 206 (C) at 209 A – H, 212 A – B; see also *Unicorn Lines (Pty) Ltd v MV Michalis S* 1990 (3) SA 817 (D).)

[35] The appellants based their application essentially on two grounds. The first was that the owners had no defence to their claim and had entered an appearance merely for the purpose of delay. The second was that as a result of the decision in the first application the appellants found themselves in an intolerable position financially and were without any other remedy.

[36] As far as the first ground is concerned, the appellants relied primarily on the alleged causes of action considered in paragraphs

30 and 31 above. For the reasons set out therein, Erasmus AJ, in my view, correctly found them to be without substance. Reliance was also sought to be placed on certain statements made on behalf of the owners at a stage subsequent to the judgment in the first application which, it was contended, amounted to an undertaking to reimburse the sheriff for his expenses. By this time it had been established that the vessel was owned by GRF. Sometime before the second application was launched Mr Balakanov, an official at the GRF's Consulate-General's office in Cape Town, advised the sheriff that owing to a variety of inter-departmental difficulties in Russia the GRF had been unable to raise funds and requested the sheriff to delay the application. In his answering affidavit in the second application Mr Balakanov explained that while the GRF had hoped at the time to be able to play a more active role in the protection and preservation of the vessel, he denied that there was anything more than a moral obligation on its part to do so while the vessel

remained under arrest. Reference was also made to a statement made by Mr Balakanov in his answering affidavit to the effect that since the sheriff had the security of the ship he would ultimately be paid. Counsel for the appellants submitted that these statements established a cause of action in contract rendering the owners liable *pendente lite* to reimburse the sheriff for his expenses. I am unpersuaded that they can be construed as going that far.

[37] In coming to the conclusion he did Erasmus AJ proceeded on the assumption, based on the judgment of Cleaver J, that the appellants would have been without a remedy pending the finalisation of the litigation against the vessel and her owners. After holding that the appellants had failed to establish a good cause of action the judge analysed the evidence concerning the value of the vessel and found that it was such that the appellant's claim would remain adequately secured for a considerable time.

[38] Whether in these circumstances the refusal to order the sale of

the vessel was justified need not be considered. Once it is found, as I have, that the appellants were not without a remedy and that the relief sought against the arresting creditors was wrongly refused, it follows that there can be no basis for holding that Erasmus AJ's decision not to order the sale was incorrect. The second appeal must accordingly fail.

[39] What is clear, I think, is that but for the refusal of the relief sought against the arresting parties in the first application, the appellants would not have arrested the vessel to recover their expenses. In these circumstances the appellants themselves ought not to be liable for any contribution towards those expenses.

[40] In the result the following order is made.

The first appeal

(1) In so far as the appeal relates to the first respondent, it is dismissed with costs.

(2) In so far as the appeal relates to the second, third, fourth and fifth respondents,

(a) the appeal is upheld;

(b) the second, third, fourth and fifth respondents are to pay the costs of appeal of the appellant (the Sheriff of Cape Town) jointly and severally to the extent that such costs relate to the appeal against the finding of the Court *a quo* in favour of those respondents;

(c) the order of the Court *a quo* is set aside and the following order is substituted:

(i) the second, third, fourth and fifth respondents are each declared to be jointly and severally liable, in respect of the period during which the *Argun* was under arrest at the instance of that respondent with such of the other respondents to the extent that the vessel was under the arrest at their instance during the said period, for all the applicant's expenses reasonably incurred in the preservation of the vessel as contemplated in Admiralty Rule 21 (1) as well as his reasonable remuneration in relation to such expenses,

(ii) he continued arrest of the vessel at the instance of

each of the respondents is made conditional upon that respondent reimbursing the applicant within 10 days of demand for the latter's reasonable expenses for the preservation of the vessel as contemplated in Admiralty Rule 21 (1) incurred during the period the vessel was under arrest at the instance of that arresting party as well as for the applicant's reasonable remuneration in relation to such expenses.

The second appeal

The appeal is dismissed with costs.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

SMALBERGER ADCJ
STREICHER JA
NAVSA JA
MTHIYANE JA