REPUBLIC OF SOUTH AFRICA

Case no 24/98

REPORTABLE

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

OWNERS OF CARGO LATELY LADEN ON BOARD THE mt "CAPE SPIRIT" Appellants

and

mt "CAPE SPIRIT" [previously known as "STAINLESS MARINER"] First Respondent

UK MUTUAL STEAMSHIP ASSURANCE ASSOCIATION [BERMUDA] LIMITED Second Respondent

CHUBB GROUP OF INSURANCE COMPANIES Third Respondent

Coram : Van Heerden, DCJ, Vivier, Howie , Olivier JJA *et* FarlamAJA
Heard : 11 May 1999
Delivered : 9 June 1999

Maritime law - Interpretation of s 3(10) of the Admiralty Jurisdiction Regulation Act 105 of 1983

J U D G M E N T

FARLAM AJA

FARLAM AJA/...

[1] The question which arises for decision in this matter is whether property which was arrested is deemed to be released and discharged from arrest in terms of section 3 (10) (a) (ii) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (to which I shall hereinafter refer as "the Act") if no further steps are taken in the proceedings by the plaintiff within a year of the giving of security or an undertaking in terms of section 3 (10) (a) (i) of the Act to obtain the release of the property from arrest.

[2] The case is an appeal, with the leave of the court *a quo*, from a judgment of Levinsohn J sitting in the Durban and Coast Local Division, exercising its admiralty jurisdiction in terms of the Act.

[3] In the order made in the court *a quo* it was declared that security furnished by the defendants [the respondents in this Court] to the plaintiffs [the

appellants in this Court] by way of letters of undertaking in case no A 38/95 had lapsed in terms of section 3 (10) (a) (ii) of the Act and that the action instituted by the appellants against the first respondent under case no A 38/95 had lapsed and ceased to be of force and effect. The appellants were directed to return to the respondents' attorneys the original letters of undertaking and to pay the respondents' costs of suit in the action brought under case no A 38/95 and their costs in the application.

[4] The judgment delivered in the court *a quo* has been reported: see *Owners of the Cargo Lately Laden on Board the MT Cape Spirit v M T Cape Spirit (previously known as the M T Stainless Mariner) and Others* 1998 (2) SA 952 (D).

[5] The action brought under case no A 38/95 was an action *in rem* instituted on 18 January 1995 by the issue of a summons in which the appellants

claimed R 1 570 000, interest and costs against the first respondent, the m t "Cape Spirit". A warrant of arrest for the arrest of the first respondent was issued and served on the same day.

[6] At about the same time as the institution of case no A 38/95 two other actions were instituted against the first respondent under case no A 39/95 and case no A 42/95.

[7] During the period 7 February 1995 to 21 February 1995 security was established to procure the release of the first respondent from arrest. A letter of undertaking was issued on 7 February 1995 on behalf of third respondent to enable the vessel to sail to Richards Bay and lift a cargo. Subsequently two further letters of undertaking were furnished to the appellants for the purpose of procuring the release of the first respondent from arrest: a letter dated 15 February 1995 issued on behalf of the third respondent and a letter dated 21 February 1995 issued on

behalf of the second respondent. The letters of undertaking issued on 15 February 1995 and 21 February 1995, the originals of which were in the possession of the appellants' attorneys, were the letters of undertaking referred to in the court *a quo*'s order.

[8] The first respondent was released from arrest on 15 February 1995.

On 19 January 1995, the day after the first respondent was arrested, the appellants served a notice, in terms of Rule 12 (2) (a) (i) of the Admiralty Proceedings Rules then in force, calling upon the first respondent to attend a conference and requiring the first respondent to provide certain documents and information.

[9] Although further steps were taken in case nos A 39/95 and A 42/95, no further steps were taken in case no A 38/95 after the letters of undertaking to which I have referred were furnished until the respondents launched the

application which forms the subject matter of the present appeal on 24 February 1997.

In that application the respondents sought the relief which the court *a quo* granted on 28 November 1997.

[10] The application was based upon the provisions of section 3 (10) (a) of the Act, which is in the following terms:

> "(i) Property shall be deemed to have been arrested or attached and to be under arrest or attachment at the instance of a person if at any time, whether before or after the arrest or attachment, security or an undertaking has been given to him to prevent the arrest or attachment of the property or to obtain the release thereof from arrest or attachment.
>
> (ii) Any property deemed in terms of subparagraph (i) to have been arrested or attached, shall be deemed to be released and discharged therefrom if no further step in the proceedings, with regard to a claim by the person concerned, is taken within one year of the giving of any such security or undertaking."

[11] That part of the order which declared that the action instituted by the

appellants against the first respondent under case no A38/95 had lapsed and ceased to be of force and effect was based upon section 1 (2) (b) (iv) of the Act.

Section 1 (2) of the Act is in the following terms:

"(2)(a) An admiralty action shall for any relevant purpose commence -

(i) by the service of any process by which that action is instituted;

(ii) by the making of an application for the attachment of property to found jurisdiction;

(iii) by the issue of any process for the institution of an action *in rem*;

(iv) by the giving of security or an undertaking as contemplated in section 3 (10) (a).

(b) An action commenced as contemplated in paragraph (a) shall lapse and be of no force and effect if -

(i) an application contemplated in paragraph (a) (ii) is not granted or is discharged or not confirmed;

(ii) no attachment is effected within twelve months of the grant of an order pursuant to such an application or the final decision of the application;

(iii) a process contemplated in paragraph (a) (iii) is not served within twelve months of the issue thereof;

(iv) the property concerned is deemed in terms of section 3 (10) (a) (ii) to have been released and discharged."

Section 1(2) and section 3(10)(a) of the Act were substituted by, respectively, sections 1 (e) and 2 (e) of Act 87 of 1992.

[12] Section 4 (c) of that Act inserted a new paragraph, paragraph (d A), in section 5 (2) of the Act. This paragraph reads as follows:

> "(2) A court may in the exercise of its admiralty jurisdiction -
>
> ...
>
> (dA) on application made before the expiry of any period contemplated in section 1 (2) (b) or 3 (10) (a) (ii), or any extension thereof, from time to time grant an extension of any such period;"

[13] As this case concerns an arrest of property and undertakings given to obtain the release of such property from arrest, I shall refer in what follows to arrests, without repeating each time that what I say applies to attachments also.

[14] Mr *Shaw*, who appeared for the appellant both in this Court and in the court *a quo*, contended that only property whose arrest has been prevented by the giving of security or an undertaking can be subject to a deemed release and

discharge under section 3 (10) (a) (ii).

[15] In cases where security or an undertaking has been given to secure the release of property which has been arrested section 3 (10) (a) (ii) does not, so Mr *Shaw* submitted, apply because the property concerned, having actually been arrested, cannot appropriately be said to be "deemed ... to have been arrested", to use the language of section 3 (10) (a) (ii). In this regard he referred to the line of authority stemming from the well known (and much cited) *dictum* of Cave J in *R v County Council of Norfolk* (1891) 65 L T NS 222 at 224, *viz*:

> "... when it is said that a thing is to be deemed to be something, it is not meant to say that it is that which it is to be deemed to be. It is rather an admission that it is not that which it is deemed to be, and that notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act it is deemed to be that thing."

[16] The coming into operation of Act 87 of 1992 rendered the decision of this Court in *M V Jute Express v Owners of the Cargo lately laden on Board the*

MV Jute Express 1992 (3) SA 9 (A) no longer applicable. In that case this Court held that an action *in rem* commences with the issue of summons with the result that an action was held to be out of time where security was given in terms of section 3 (10) of the Act, as it then stood, (so that the vessel in question was deemed to have been arrested and to be under arrest) within the period of one year provided for in article 3 (6) of the Hague Rules but the summons was issued after that period had elapsed.

[17] In his judgment in the *MV Jute Express* case *supra* (at 18 C - G) Howie AJA discussed the provisions of section 3 (10) (a) of the Act in its unamended form, which read as follows:

> "(a) Property shall be deemed to have been arrested or attached and to be under arrest or attachment if at any time, whether before or after the arrest or attachment, security or an undertaking has been given to prevent the arrest or attachment of the property or to obtain the release thereof from arrest or attachment."

[18] The passage in Howie AJA's judgment in which the provisions of the unamended section 3 (10) (a) of the Act were discussed reads as follows:

> "If the plaintiff is given security then, by reason of the terms of s 3(10)(a), he is relieved of the need to secure an arrest and the property concerned is deemed to have been arrested. As to the meaning of s 3(10)(a), the functions of a deeming provision are various and the function intended in any particular legislation must be ascertained from an examination of the aim, scope and object of that enactment: *S v Rosenthal* 1980 (1) SA 65 (A) at 75G - 77B. In the light of the purpose of an arrest in an action *in rem* it seems to me that the Legislature's intention in s 3(10)(a) was not merely to relieve the plaintiff of the need, and the defendant of the inconvenience, of an arrest. Had the intention been as narrow as that the subsection could simply have stated that an arrest would be unnecessary if security were given. The Legislature's intention in going further and deeming the property involved to be, and to remain, under arrest, was, in my view, to emphasise that substantially the same legal consequences relative to execution would pertain to the security as would have pertained to the property had it remained under arrest. (I say 'substantially' because if security were given there would obviously be no need, for example, to resort to a sale in terms of s 9.) Furthermore, the subsection contains no implication that the deemed arrest brought about by the giving of security is to be regarded as the commencement of the action."

[19] The learned judge in the court *a quo* cited part of the passage quoted

above as authority against a proposition urged upon him by Mr *Shaw* and repeated in argument before us that a distinction is to be drawn between security put up to prevent arrest (to which I shall refer in what follows as "pre-arrest security") and security put up to procure release from arrest (to which I shall refer as "post-arrest security").

[20] Apart from the fact that the *Jute Express* case concerned pre-arrest security and not post-arrest security, which is relevant here, I do not agree that the passage relied on by the court *a quo* can be cited as authority for the proposition that there is no distinction between pre- and post-arrest security. As is clear from his judgment Howie AJA was talking about "the same legal consequences relative to execution" and pointing out that the legislature intended the same consequences to follow, as far as execution was concerned, whether the vessel concerned remained under arrest or security was given, either before or after arrest.

[21] The main basis on which the court *a quo* rested its decision appears from the following extracts from its judgment (at 957 F - G and I - J).

> "I am of the opinion that the subsection is clear. Once security has been given to prevent the arrest of the property or to obtain the release of the property, that property is deemed to have been arrested and to be under arrest at the instance of a person. The security can be given at any time before or after the arrest. I emphasise that whether security is given to prevent the arrest or to obtain the release of the property from arrest, this subsection states that in both instances property is deemed to have been arrested and to be under arrest. ... The deeming provision applies equally to both sets of circumstances.
>
> Section 3(10)(a)(ii) makes it clear that such property which is deemed to have been arrested in terms of subpara (i) will be deemed to be released from arrest if no further step in the proceedings is taken within one year of the giving of the security."

[22] Mr *Shaw* contended that the drafters of section 3 (10) (a) (i) had two deemings in mind: (a) a deemed arrest (where there was no actual arrest and pre-arrest security was given) and (b) a deemed continuation of arrest (which would occur both where pre-arrest and post-arrest security was given, the deemed arrest

being followed by the deemed continuation of arrest, and, where post-arrest security was given and the arrested property was then released from arrest, the actual arrest being followed by the deemed continuation of arrest).

[23] Mr *Shaw* argued that when the drafters of section 3 (10) (a) (ii) used the expression "any property deemed in terms of subpara (i) to have been arrested or attached" they were referring only to property which was subject to a deemed arrest : if they had intended actually arrested property to be covered as well they would rather have used the expression "property deemed in terms of subpara (i) to be under arrest or attachment", which would clearly have referred both to property never arrested because pre-arrest security was given and property which was arrested but which was released after post-arrest security was given.

[24] Support for Mr *Shaw*'s submission that deemed arrests are to be distinguished from deemed continuations of arrest is to be found in section 1 (2),

which, as has been seen, deals with the commencement and lapsing of actions, one instance of lapsing being a deemed release and discharge under section 3 (10) (a) (ii).

[25] Section 1 (2), as presently worded, begins with the words:

"(a) An admiralty action shall for any relevant purpose commence".

Before it was amended by Act 87 of 1992 it read as follows:

"(2) For the purposes of any law, whether of the Republic or not, relating to the prescription of or the limitation of time for the commencement of any action, suit, claim or proceedings, an admiralty action shall be deemed to have commenced -

(a) by the making of an application for the attachment of property to found jurisdiction if the application is granted and the attachment carried into effect;

(b) by the issue of any process for the institution of an action *in rem* if that process is thereafter served;

(c) by the service of any process by which that action is instituted."

[26] The relevant purposes referred to in the present subsection clearly

include prescription and statutory time limitations. A deemed release and discharge in terms of section 3 (10) (a) (ii) causes the action to lapse and be of no force and effect with the result, *inter alia*, that prescription and the limitation time periods are regarded as having continued to run during the pendency of the lapsed action. In cases covered by, e.g., article 3 (6) of the Hague Rules (which requires that suit be brought within one year after delivery of the goods or the date when the goods should have been delivered) the action will be time barred if section 3 (10) (a) (ii) applies to it.

[27] There is a certain symmetry between some of the paragraphs of section 1 (2) (a) and those of section 1 (2) (b). It is true that section 1 (2) (a) (i) has no counterpart in section 1 (2) (b) but that is presumably because service of a summons is normally enough to interrupt prescription (cf *Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) S A 544 (A) and *MV Jute Express* case at 16 J - 17 B).

The counterparts of section 1 (2) (a) (ii) are section 1 (2) (b) (i) and (ii) (dealing with the situations where applications for attachment to found jurisdiction either are not successful (in which case the action lapses when the application fails (1(2) (b) (i)) or are successful (in which case the action lapses if no attachment is effected within 12 months of the grant of the order or final order pursuant to the application). (Section 1 (2) (a) (ii) and (b) (i) and (ii) cover the ground previously covered by section 1 (2) (a) in its unamended form.) Section 1 (2) (a) (iii) is clearly linked to section 1 (2) (b) (iii). (The ground covered by this sub-paragraph is similar to that previously covered by the unamended section 1 (2) (b) save that it is now necessary for the process not just to be served but served within 12 months.) Section 1 (2) (a) (iv) and section 1 (2) (b) (iv) had no counterpart in the unamended section 1 (2). If they are linked, then this would be a powerful indication that the interpretation of section 3 (10) (a) (ii) contended for by Mr

Shaw may well be correct. This is because section 1 (2) (a) (iv) can only refer to pre-arrest security (where post-arrest security is given in an action *in rem* the action has already commenced, in terms of section 1 (2) (a) (iii), when the process was issued for the institution of the action).

[28] If section 1 (2) (a) (iv), which only refers to pre-arrest security, is linked to section 1 (2) (b) (iv), then it follows that the action which lapses and becomes of no force and effect by virtue of section 1 (2) (b) (iv), is an action commenced by the giving of pre-arrest security.

[29] This interpretation gains plausibility from the fact that if the opposing interpretation were to be upheld a claim might well be held to be prescribed or time barred even though the claimant's summons was served well within the prescription or limitation period. The extinction of a claim by prescription or limitation, despite the fact that a summons has been issued and served in good

time, is a very heavy penalty to pay for the failure to take a further step within a 12 month period : a penalty which may well be out of all proportion to the "fault" of the party which led to the incurrence of the penalty : *cf Manyasha v Minister of Law and Order* 1999 (2) SA 179 (SCA) at 190 H - I. It is unlikely that the legislature could have intended such a result.

[30] To sum up so far: there are weighty reasons for holding that section 1 (2) (b) (iv) was probably only intended to apply to the failure on the part of a "plaintiff" to take a further step in the proceedings after pre-arrest security was given.

[31] That being so, the use by the drafters of section 3 (10) (a) (ii) of only the first half of the phrase used by them in section 3 (10) (a) (i), "deemed to have been arrested" (which points to a pre-arrest security situation only and not a post-arrest security situation as well), and their failure (if, as appears to be the case,

they were loth to repeat the whole phrase used in section 3 (10) (a) (i)) to use instead the second half of the phrase, "deemed to be under arrest" (which would have indicated that both plaintiffs who had been given pre-arrest security and those who had been given post-arrest security were intended to be covered), clearly provide further support for Mr *Shaw*'s submission and are consistent with an intention not to introduce the new principle, which would have radical consequences in the sphere of prescription and limitation, which is the necessary consequence of upholding the interpretation of section 3 (10) (a) (ii) which found favour with the court *a quo*.

[32] In endeavouring to support that interpretation and to defend the judgment of the court *a quo,* Mr *Wallis,* who appeared for the respondent, stressed that the need to take a further step in the proceedings did not impose a heavy burden on a plaintiff who had arrested property and then been given security for

its release. He also pointed to the fact that Act 87 of 1992 also made provision (by the insertion of section 5 (2) (d A)) for applications for the extension of the periods contemplated in section 1 (2) (b) and 3 (10) (a) (ii). This must be a neutral factor because, on Mr *Shaw*'s argument, a potential plaintiff who had been given pre-arrest security and had not served the process instituting the action would need an extension under section 5 (2) (d A) to prevent the commencement of his "action" under section 1 (2) (a) (iv) from lapsing.

[33] Mr *Wallis* also contended that there is no rationale for a distinction between plaintiffs who have failed to take further steps after being given pre-arrest security and those who so failed after being given post-arrest security. In both cases security, which costs money to keep in place and is expensive, has been given and no steps have been taken thereafter.

[34] Mr *Wallis* also submitted that the distinction contended for by Mr

Shaw could not be supported by contrasting the position of the defendants who gave security after arrest with defendants who gave security before arrest. In both cases the defendant who wanted to get the litigation going, as he put it, could approach the court under Rule 23 (1) of the Admiralty Rules which were in force when Act 87 of 1992 was passed and ask for directions for the disposal of the matter and there is thus no material difference between them.

[35] I do not agree that there is no material difference between defendants who gave pre-arrest security and those who gave post-arrest security where no further steps have been taken by the plaintiff. (In what follows I shall call a "defendant" who gave pre-arrest security after which no further steps have been taken a "pre-arrest 'defendant'" and a defendant who gave post-arrest security a "post-arrest defendant". I shall also refer to the Admiralty Rules which were in force when Act 87 of 1992 were passed.)

[36] Arrests in actions *in rem* are effected by the service of a warrant issued by the registrar in the form corresponding to Form 2 of the First Schedule (Rule 3 (1) and (2) (a)). Save where the court has ordered the arrest of the property the registrar issues a warrant only if summons in the action has been issued (rule 3 (3)). Summonses have to be in a form corresponding to Form 1 of the First Schedule and must contain a statement of the nature of the claim and of the relief or remedy required and of the amount claimed, if any (rule 2 (1)). The form set forth in the First Schedule provides for an address in terms of Rule 17 (3) of the Uniform Rules for service of all documents in the suit.

[37] Where summons has been issued in an action *in rem*, any person having an interest in the property concerned may at any time before the expiry of 10 days from the service of the summons give notice of intention to defend (rule 6 (2)) and even if the summons has not been served notice of intention to defend

may be given when a summons has been issued (rule 6 (4)).

In every action in which notice of intention to defend has been delivered, the plaintiff must within 10 days thereafter deliver particulars of claim (Rule 7 (2) (a)).

[38] Rule 18 (2), which dealt with irregular proceedings, read as follows:

> "(2) If it appears to the Court on application that there [has] been ... a non-compliance with the rules ..., the Court may make such order as appears to it to be just with regard to the said ... non-compliance including an order that any such party be deemed to be in default or that judgment be given against any such party."

[39] In my view a post-arrest defendant must from the nature of things be in a stronger position *vis-à-vis* an inactive plaintiff than a pre-arrest "defendant" would be against an inactive "plaintiff". The post-arrest defendant will not merely have acted to ward off a threatened arrest. He will have a summons which sets out the nature of the claim and the relief or remedy required and the amount claimed,

if any. He will have an address for service of all documents in the suit and will be able to approach the Court for appropriate relief if the plaintiff fails to deliver particulars of claim within 10 days after notice of intention to defend has been delivered. The pre-arrest "defendant" on the other hand, while he will have the right to approach the Court for directions, will not necessarily know the precise nature of the claim, the relief or remedy sought on the amount claimed, if any, nor will he be able to point to a definite time limit with which the "plaintiff" has not complied.

In my view a post-arrest defendant will be able far more easily than his pre-arrest counterpart to get the litigation going, to use Mr *Wallis*'s phrase.

[40] The position of a pre-arrest "defendant" differs in another, not insignificant, respect from that of a post-arrest defendant. The action in the case of the latter is closer to finality than in the case of the former. That is because in

the case of the latter the summons has already been issued. If Mr *Wallis*'s contention is correct it would mean that an action *in rem* will not be able to lapse under section 1 (2) (b) (iv) in the case where pre-arrest security has been given if the plaintiff then issues his summons, while, in a case where post-arrest security has been given and the action has already reached the stage which in the pre-arrest security case prevented the action from lapsing, a further step has to taken by the plaintiff.

[41] The point may be illustrated by a hypothetical example. An attorney is instructed to arrest two vessels, A and B. He informs the owners of his intention and prepares the necessary process. Before he goes to court, the owner of A contacts him and gives him an undertaking which he accepts. He goes to court, issues the necessary process against B and she is arrested an hour later. When he returns to his office he receives a message from the owner of B, who gives him an

acceptable undertaking and the vessel is released. If he then issues the summons which had been prepared in the case of A, the action will not lapse and the undertaking will not be released and discharged. But to protect his client against lapsing of the action and the release and discharge of the undertaking he has, so it is argued, to take a further step and bring the action against B closer to finality than is required in the action against A. This extraordinary consequence is necessitated, so it is said, because of a desire to protect the owner of B from having to keep his undertaking in place, at some expense, for a year, although he could very easily get the litigation going by bringing a simple application under Rule 18 (2).

[42] I do not think that the factors to which Mr *Wallis* referred are sufficiently cogent to counteract the factors pointing in favour of interpretation of section 3 (10) (a) (ii) for which Mr *Shaw* contended.

[43] For these reasons I am of the opinion that on a proper interpretation of section 3 (10) (a) (ii) of the Act the deemed release and discharge brought about by that sub-paragraph only apply to property whose arrest was prevented by the giving of what I have called pre-arrest security. It follows that, in my view, the appeal should succeed.

I G FARLAM
ACTING JUDGE OF APPEAL