

SOUTH AFRICA / JUDGMENT

Arrow Creek Investments 75 (Pty) Ltd v V&A Waterfront Holdings (Pty) Ltd (AC9/2023)

[2025] ZAWCHC 134 (20 March 2025)

[2025] ZAWCHC 134

COURT

Western Cape High Court, Cape Town

BEFORE

Wille

CASE / FILE NUMBER

AC9/2023

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THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

(Exercising its Admiralty Jurisdiction)

Case number: AC9 / 2023

NAME OF MOTOR VESSEL: MV “JACKIE O” aka MV “KIARA”

In the matter between:

ARROW CREEK INVESTMENTS 75 (PTY) LTD Applicant

and

V&A WATERFRONT HOLDINGS (PTY) LTD First Respondent

XOLILE ARON NGESI N.O.

(The Sheriff of High Court, Cape Town East) Second Respondent

Coram: Wille, J

Heard: 29 and 30 January 2025

Order: 10 February 2025

Reasons: 20 March 2025

REASONS

WILLE, J:

INTRODUCTION

- [1] In summary, the applicant sought urgent relief in the form of a rule nisi for an interim interdict in the following terms that:
- (a) the second respondent be replaced and an ad hoc sheriff be appointed to take possession and control of the subject motor vessel.
 - (b) the first (and presumably the replaced sheriff) return the motor vessel to a specific jetty (the jetty and berth at which the respondents arrested the vessel) in the precinct controlled by the first respondent.
 - (c) the respondents are interdicted and restrained from accessing and interfering with the motor vessel and equipment.
 - (d) the respondents be interdicted and restrained from interfering with the duties and functions of the replaced ad hoc sheriff.
 - (e) the respondents take all necessary steps to place the motor vessel in the possession and control of the replacement ad hoc sheriff and ensure that the ad hoc sheriff has access to the specific jetty demanded by the applicant.[1]
- [2] When the matter was first called many months ago, the first respondent took the position that it needed more time to file a complete answering affidavit. The first respondent initially filed a preliminary answering affidavit and reserved its right to file a further answering affidavit. Thus, the interim interdict portion of the application was postponed.[2]
- [3] This notwithstanding, I further ruled that it would be more appropriate to decide the issue of urgency, considering also having the benefit of the second respondent's answering affidavit once the second respondent had obtained legal representation.[3]
- [4] After that, the applicant maintained its initial position by advancing that the first respondent (after having filed its supplementary answering affidavit) was attempting to again re-argue its opposition to the urgency interim interdict portion of the application. This is why I must deal with the issue of urgency.[4]

URGENCY

- [5] The applicant initially advanced that some of the material and allegations featured in the first respondent's preliminary answering affidavit should be given very little probative weight because some allegations contained therein amounted to impermissible hearsay evidence. In response to this, the first respondent took the position that the employment of hearsay evidence in maritime matters is expressly permitted, and the applicant's reliance on the rules relating to hearsay in this court's parochial jurisdiction was, therefore,

misconceived.[5]

- [6] The core argument advanced by the applicant seemed only to be a technical argument. I say this because the deponent to the first respondent's answering affidavit was authorised to depose thereto and the applicant did not raise any facts which suggested otherwise. Because of this, the deponent required no specific discrete authorisation to depose to the affidavit.[6]
- [7] As the matter progressed and before the first scheduled hearing, the applicant sensibly proposed an arrangement in which it sought to postpone the hearing and suggested it would be able to receive substantial redress in due course.[7]
- [8] Another issue concerning me was that the relief sought in terms of the rule nisi regarding the appointment of the ad hoc sheriff did not directly affect the first respondent and could not be ordered against the first respondent.[8]
- [9] Under the rubric of urgent interim relief, the applicant also sought security in the sum of millions of rands from the first respondent and an indemnity against both respondents regarding possible environmental damage.[9]
- [10] The applicant's initial case was that the environment would suffer irreparable harm if the current jetty and berthing arrangement endured. The applicant also demanded that the motor vessel be re-connected to shore power. In addition, the applicant complained that it could not access the motor vessel where it was currently berthed. Finally, several complaints were chartered regarding the release of the motor vessel from the first respondent's arrest. [10]
- [11] Due to the passage of time (and other issues), the complaints about the possible environmental damage became moot. In addition, shore power had been restored to the motor vessel before the first scheduled hearing.[11]
- [12] I say this also because the report handed up by the second respondent at the first hearing concluded that the motor vessel was found safely afloat with minimal ingress of water into the bilge since the last onboard visit.[12]
- [13] Thus, the grounds of urgency (such as they may have existed) all but disappeared due to the passage of time. The parties were, therefore, given time to file extensive papers in opposition to the remaining portions of interim relief sought by the applicant.[13]

CONSIDERATION

THE FIRST RESPONDENT

- [14] The first respondent explained in detail why it was impossible to return the motor vessel to the berth at the jetty specified and demanded by the applicant. This was so because a large portion of the jetty had been leased for the berthing of other motor vessels, and the remainder had to remain vacant for the routine handling of large motor vessels. This operational and safety requirement formed part and parcel of a contractual obligation

imposed on the first respondent in terms of a contractual arrangement concluded between the first respondent and a bona fide third party.[14]

- [15] The applicant contended that (according to it) part of the subject jetty was unoccupied. Accordingly, no impediment existed to the motor vessel's return to the berth at this jetty pending the outcome of the remainder of the second part of the relief sought.[15]
- [16] The applicant's position was that after the (albeit disputed) upliftment of the arrest at the instance of the first respondent, the applicant had a 'right' to claim that the vessel be returned to the location where the arrest occurred.[16]
- [17] This bears scrutiny. I say this because there was no lease agreement between the applicant and the first respondent when the arrest initially occurred. The first respondent made a jetty and berth available to the applicant to accommodate the motor vessel.[17]
- [18] From my reading of the papers, the applicant refused to sign a lease with the first respondent. The motor vessel was accommodated because it was under arrest, and the sheriff had to find a jetty and berth to secure it.[18]
- [19] The applicant argues that because it paid for one month after (or during) the arrest of the vessel by the first respondent, it had (because of this payment) concluded a tacit lease with the first respondent.[19]
- [20] The simple point is that the applicant had no contractual right to restore the 'status quo ante' that subsisted before the first respondent arrested the vessel.[20]
- [21] As far as I am aware, there is no legal right for an owner to claim that its motor vessel be returned to the place of arrest post upliftment.[21]
- [22] The applicable maritime rule records, among other things, the following:
- '...Any property arrested or attached 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...[22]
- [23] It seems to me that for so long as the vessel was under arrest, it remained in the custody of the second respondent, who may then make any arrangements he or she sees fit as to the motor vessel's berthing.[23]
- [24] The applicant launched this application more than fourteen (14) months after the motor vessel was last berthed at the preferred jetty and berth and five (5) months after the motor vessel had left the precinct controlled by the first respondent.[24]
- [25] Now, I turn to the issue of the motor vessel being arrested by the first respondent. The applicant alleged that because the first respondent arrested the motor vessel for unpaid berthing and mooring fees, its arrest was made for an ulterior purpose.[25]
- [26] An arresting party may proceed with an arrest in rem if it either:

- (a) has a maritime lien over the property to be arrested or
- (b) if the owner of the property to be arrested would be liable to the arresting party in an action in personam in respect of the cause of action concerned.[26]
- [27] The first respondent arrested (in rem) the motor vessel because the applicant was liable for berthing and mooring dues of the motor vessel on the first respondent's property.[27]
- [28] The first respondent averred that in addition to the above, there were other outstanding claims concerning unpaid berthing fees when the motor vessel was in the possession of a third-party bareboat charter company.[28]
- [29] Initially, the first respondent also sought the applicant's payment of these outstanding berthing dues. This notwithstanding, the claim on which the first respondent's arrest of the motor vessel was based excluded the liability concerning berthing fees for this earlier period.[29]
- [30] Thus, because, among other things, there was no written lease, the first respondent was within its rights to arrest the motor vessel and, in so doing, remove it from the jetty and its berth, which berth could then earn an income for the first respondent by the letting thereof to a paying ship owner.[30]
- [31] Part of the case on behalf of the applicant was the argument that the release of the motor vessel from the arrest by the first respondent was inadequate and defective. This averment was not made in the applicant's initial papers.[31]
- [32] Initially, the defective service argument was based on the contention that the release warrant was faulty because it was served on the incorrect attorneys of record.[32]
- [33] The second complaint was that the service of the release warrant was served electronically and thus inadequate. The applicable maritime rule caters for the service of the release warrant by way of facsimile transmission. To the extent that the argument is made that service by email is insufficient because it is not service by facsimile transmission, such argument is challenging to understand.[33]
- [34] The factual position was that the release warrant was served by email, and the applicant became aware of it and obtained a copy of the release warrant via email. The release warrant was also served on an employee of the harbour master, and thus, the arrest of the motor vessel was lawfully uplifted.[34]
- [35] Now, I turn briefly to the issue of the security contended for by the applicant as much as it relates to the first respondent's position. The motor vessel remained berthed in the controlled environment and presented minimal (if any) environmental risk. I say this also because some time has passed, and the applicant has not demonstrated a genuine and reasonable need for security.[35]

- [36] In addition, the first respondent possesses significant immovable assets against which the applicant would be able to execute if the first respondent neglects to satisfy any damages award that may be granted against it.[36]
- [37] In any event, the applicant did not make out a case for the return of the motor vessel to the berth demanded pending the finalisation of the remainder of the relief sought in the second part of the application.[37]
- [38] The (final) relief sought here concerns a claim for damages and thus contemplates the institution of action proceedings. I say this because the applicant has not demonstrated a clear right that the motor vessel is to be berthed at the jetty that it demands. The existence of a right is a question of substantive law, and whether that right is 'clear' is a matter of evidence.[38]

THE SECOND RESPONDENT

- [39] The applicant sought interim relief against the second respondent for, among other things, the following:
- (a) that an ad hoc sheriff be appointed to take possession of the motor vessel.
 - (b) that the second respondent be interdicted and restrained from accessing or interfering with the motor vessel and the duties of the ad hoc sheriff.
 - (c) that access be facilitated to the ad hoc sheriff to the motor vessel.
 - (d) that the second respondent provides an indemnity against any claims that may arise regarding any environmental damage consequent to the second arrest.
 - (e) that the ad hoc sheriff returns the motor vessel to a specific berth.[39]
- [40] The relief sought by the applicant that an ad hoc sheriff be appointed to replace the second respondent and take possession of the motor vessel was challenging to understand.[40]
- [41] Put another way, the applicant failed to exhaust any of the prescribed internal statutory remedies. Thus, in these circumstances, this court does not have the power to appoint or remove sheriffs or acting sheriffs.[41]
- [42] Only in the clearest of cases will a court interfere with the performance of the statutory duties of the second respondent. Also, in these rare cases, the substantive and procedural requirements that justify the second respondent's removal must be complied with.[42]
- [43] In addition, the failure of the applicant to join all the relevant parties with vested interests in the appointment of the ad hoc sheriff and the removal of the second respondent amounts to a non-joinder.[43]

- [44] Most significantly, the second respondent takes the position that the order sought by the applicant that the second respondent should be directed to return the motor vessel to the specified and demanded jetty and berth was impossible because a berthing position at this jetty was and remains unavailable.[44]
- [45] About three (3) years ago, the second respondent was provided with a warrant of arrest that was issued according to an application brought by the first respondent.[45]
- [46] About a year later, the second respondent attended to the motor vessel to inspect the motor vessel. Upon his arrival, he noted numerous undocumented individuals on the motor vessel.[46]
- [47] As part of his duties to preserve the motor vessel, he requested these individuals to leave. Following his inspections, he advised the applicant's attorneys that the applicant's engineer could return to the motor vessel.[47]
- [48] After a short while, the second respondent moved the motor vessel to a different berth for operational reasons.[48]
- [49] About six (6) months later, the first respondent's attorneys wrote to the second respondent and requested him to move the motor vessel to a different jetty and berth because:
- (a) the first respondent was concerned about the safety of the motor vessel as it was easily accessible at its location.
 - (b) the first respondent required certain berthing facilities for operational reasons.
 - (c) the first respondent was in the process of redeveloping the entire area, and there was a crane in the vicinity of the current berth which posed a substantial risk to the motor vessel due to the likelihood of parts of the crane breaking off the main structure and landing on the motor vessel.[49]
- [50] During this time, the second respondent commissioned a survey of the motor vessel and was provided with a survey report which concluded that:
- '...the yacht was found to be safely and securely moored on the day of my inspection. Fendering was good alongside the vessel...'[50]
- [51] After that, the second respondent informed the applicant's attorneys of the request from the first respondent to move the motor vessel and advised that, in the absence of alternatives from their client (the applicant), he would be persuaded to accede to the request.[51]
- [52] This is when the applicant raised several objections to the proposed moving of the motor vessel. The second respondent replied that he was guided by what was in the best interests of safeguarding the motor vessel. He then made the necessary arrangements to provide shore power and to ensure that the shore power was connected.[52]

- [53] The first respondent then provided the second respondent with a release warrant regarding the motor vessel. Thus, the second arrest was uplifted, and only the first arrest, initiated by the applicant, was still of application. It was also for this reason that the second respondent limited and controlled access to the motor vessel as he was obliged to do to ensure the safety of the motor vessel.[53]
- [54] As alluded to earlier, the applicant failed to join the necessary parties to the application in connection with the relief that it sought. The applicant omitted to join the proposed ad hoc sheriff to replace the second respondent and take possession and control of the motor vessel. [54]
- [55] All the applicant says is that it approached the ad hoc sheriff, who indicated he was willing to be the ad hoc sheriff.[55]
- [56] All sheriffs are appointed according to a statutory process. This is so because there is a vested official interest in who is appointed as a sheriff.[56]
- [57] Before a sheriff is appointed, numerous factors must be taken into consideration. Also, one must consider the issue of enhancing and improving the standard of functions performed by sheriffs.[57]
- [58] The second respondent acted following his overall duties and concerning the best interests of the motor vessel.[58]
- [59] I say this because, from the date of the second arrest, the applicant and the first respondent were co-arresting parties. Thus, both parties were responsible for the preservation of the motor vessel. The documentary evidence attached to the papers confirmed this billing process. This is precisely why both parties were invoiced for the berthing fees until the release of the second arrest.[59]
- [60] The applicant made various serious and unfounded allegations of improper conduct against the second respondent, disregarding the proper procedure to circumvent the statutory process. Instead of following the prescribed statutory administrative process to complain about the alleged improper conduct of the second respondent, the applicant elected to bring an application to effectively have the second respondent removed as sheriff regarding the motor vessel. Failing to exhaust these internal prescribed remedies was fatal to the applicant's case against the second respondent.[60]
- [61] Thus, the relief sought by the applicant to remove the second respondent as the sheriff concerning the motor vessel and replacing him with an ad hoc sheriff is legally impermissible. I say this because I do not have the power to appoint or remove sheriffs except in exceptional circumstances where the designated appointing authorities have violated the law.[61]

[62] In seeking the relief that it seeks regarding the removal of the second respondent and the appointment of an ad hoc sheriff, the applicant is effectively asking me to indulge in judicial overreach by encroaching on the exclusive statutory powers entrusted to a statutory body.
[62]

[63] Most importantly, only a suitably qualified sheriff can be appointed as an ad hoc sheriff in a particular jurisdiction, especially in jurisdictions that require unique expertise. The applicant did not place any

facts

before me concerning the proposed replacement sheriff regarding his experience and knowledge of maritime cases.[63]

CONCLUSION

[64] The motor vessel is currently berthed at a safe berth within the second respondent's jurisdiction. Thus, the order sought by the applicant that the second respondent be directed to return the motor vessel to the specified jetty and berth would have no practical effect and was thus stillborn. To an extent, the relief sought was also moot.[64]

[65] The applicant also sought an order directing the first and second respondents to provide the applicant with an indemnity against any claims that may arise regarding any environmental damage because of the second arrest. The second respondent arrested the motor vessel for the second time because of a court order directing him to do so.[65]

[66] After that, the second respondent was provided with a release warrant. The second arrest was uplifted, and only the first arrest, initiated by the applicant, remained. Thus, there was no basis for the relief sought by the applicant that the second respondent indemnify the applicant from liability for damages.[66]

[67] In addition, there was no basis for the applicant to allege any environmental damage caused by the second arrest or that the second respondent contributed to these damages.[67]

[68] In the circumstances, the applicant failed to make out a case for any relief it sought, so I dismissed the application for interim relief. Before me was also an application for condonation for the late filing of papers by the second respondent. These issues were resolved (alternatively not pursued), and the parties argued the matter based on the papers presented before me. It is so that the respondents caused some lengthy delays in connection with the ultimate hearing of the application, and that is why I formulated the costs order to cater for some of the delays, which I deemed unnecessary. These are then my reasons for the order being granted.[68]

E. D. WILLE

(Cape Town)

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- [1] This was the primary interim relief sought by the applicant. I will deal with the other relief in these reasons.
- [2] Further time was given for the filing of opposing papers by the respondents.
- [3] The second respondent indicated that he wanted to be legally represented.
- [4] Although some time had since passed urgency remained a live issue.
- [5] *Cargo Laden on Board the Thalassini Avgi v The Dimitris* 1989 (3) SA 820 (A) at 841 C to 843 D.
- [6] *Ganes & Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at para 19.
- [7] This reasonable attitude I considered when making the order in connection with costs.
- [8] This relief was sought as against the second respondent.
- [9] This could not have been considered as urgent relief on its own.
- [10] These were technical arguments about service.
- [11] On 10 June 2024.
- [12] In late October 2023.
- [13] Thus, the matter could be properly ventilated.
- [14] The Port of Cape Town (TPNA).
- [15] This was disputed by the first respondent.
- [16] I could find no authority for this contention by the applicant.
- [17] From November 2022 to February 2023.
- [18] The applicant omitted to pay berthing fees from November 2020 until October 2022.
- [19] The first respondent arrested the vessel because of “historical” debt due by the applicant.
- [20] No authority was advanced to demonstrate the converse position.
- [21] Not even in our common law.
- [22] Admiralty Rule 21 (1).
- [23] *The Avalon* 1996 (4) SA 989 (D) at 1000H.
- [24] The vessel moved from Jetty 2 to Quay 7 on 14 April 2023 and to the “TPNA” on 2 February 2024.
- [25] This was challenging to understand.
- [26] In terms of section 3(4) of the AJRA.
- [27] From 25 November 2020 to 7 October 2022.
-

- [28] For the period 5 October 2017 to 25 November 2020.
- [29] For the period 5 October 2017 to 25 November 2020.
- [30] The first respondent would be able to earn an income from the leasing of this berth and Jetty 2.
- [31] This technical argument surfaced at a later stage.
- [32] It was released in May 2024, and the applicant's attorneys were on record from April 2024.
- [33] Admiralty Rule 22(1)(f) authorises service of a release warrant by facsimile transmission/ copy.
- [34] On 14 May 2024.
- [35] The Rizcun Trader 1999 (3) SA 966 (C) at 977 E to G.
- [36] Thus, there was no need for security to be posted.
- [37] The relief sought that the motor vessel be returned to Jetty 2 was, in any event, in the form of final relief.
- [38] Minister of Law & Order, Bophuthatswana v Committee of the Church Submit of Bophuthatswana 1994 (2) SA 89 (BG) at 97 to 98.
- [39] At Jetty 2.
- [40] No allegation was made that the "Board of Sheriffs" failed to exercise its statutory power to appoint a sheriff.
- [41] This vests with the Minister of Justice and Constitutional Development and the South African Board of Sheriffs.
- [42] The order seeks to override the application of the principle of exclusive jurisdiction and is incompetent.
- [43] The Board of Sheriffs, the Minister and the ad hoc sheriff all have a direct and substantial interest.
- [44] The berthing spot at Jetty 2 is not available.
- [45] During March 2022.
- [46] This was on or about 6 April 2023.
- [47] At that stage, he was unaware as to the identity of the applicant's engineer.
- [48] The motor vessel was moved to Quay 7 due to the Two Oceans Race.
- [49] This was on 8 September 2023.

[50] Another “expert” report was filed on behalf of the applicant. This report concentrated on issues of contractors' access to the motor vessel as opposed to the secure mooring of the motor vessel. This dispute of fact could not be resolved on paper. Most importantly, I was not furnished with any details about any alleged urgent work that needed to be performed by the applicant’s

contractors on the motor vessel.

[51] Thus, the applicant was informed of the intended move.

[52] The second respondent acted in accordance with his duties as the arresting sheriff.

[53] The applicant attached the motor vessel because of its dispute with the third-party charter company.

[54] The sheriff for Cape Town West.

[55] There is no confirmatory affidavit by the proposed ad hoc sheriff.

[56] By the Minister of Justice and Constitutional Development.

[57] The Board of Sheriffs has this function. They were also not joined in this application.

[58] MV Avalon: Curnow Shipping Ltd v Brooks NO and Another 1996 (4) SA 989 (D).

[59] By the TNPA.

[60] The applicant failed to even prefer a complaint against the second respondent with the Board of Sheriffs.

[61] Section 2(1) of the Sheriff’s Act, 90 of 1986.

[62] This violates the principle of the separation of powers.

[63] No information in this connection was put up by the applicant.

[64] The relief sought would have no practical effect.

[65] The second respondent was carrying out his duties as the arresting sheriff.

[66] The motor vessel remained under arrest at the instance of the applicant.

[67] The second arrest had been uplifted, and any environmental damage alleged by the applicant was speculative

[68] Signed on 10 February 2025 and handed down on 11 February 2025.

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