

SOUTH AFRICA / JUDGMENT

Cameron-Dow v The MFV "Julietter", Laubscher and Another v The MFV "Julietter" and Others (AC 70/2010, AC 85/2010) [2010] ZAWCHC 653 (18 November 2010)

[2010] ZAWCHC 653

COURT

Western Cape High Court, Cape Town

BEFORE

Cleaver

CASE / FILE NUMBER

AC 70/2010, AC 85/2010

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IN THE

HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

NAME OF

VESSEL: MFV "JULIETTE"

In the

matters between:

AC
70/2010
MICHAEL
CHRISTOPHER CAMERON-DOW Applicant and
THE MFV
"JULIETTE" First
Respondent
C-CRAFT
CC Second
Respondent
RAYMOND
COOPER Third
Respondent
PIERRE
JAN LAUBSCHER Fourth
Respondent
BASIC
BLUE TRADING 232 CC Fifth
Respondent
AC 85/2010
PIERRE JAN

LAUBSCHER First
ApplicantIn his capacity as sole proprietor ofWICKED
LADY FISHING
BASIC BLUE
TRADING 232 CC Second
Applicantv
THE
MFV "JULIETTE" First
Respondent
MICHAEL
CHRISTOPHER CAMERON DOW Second
Respondent
C-CRAFT
CC Third
Respondent
RAYMOND
COOPER Fourth
Respondent

JUDGMENT

HANDED DOWN THIS THURSDAY, 18 NOVEMBER 2010

CLEAVER J

- [1] All the cases referred to in this judgment are before this court in the exercise of its admiralty jurisdiction.
- [2] In August 2009 under case no AC 75/2009 Mr Michael Christopher Cameron-Dow ("Cameron-Dow") caused the fishing vessel MFV "Juliette" to be arrested and thereby instituted an action in rem against the vessel and an action in personam against Petrus Jan Laubscher ("Laubscher") who is cited as the second defendant. The first defendant is cited as the en commandite partnership between Cameron-Dow and Laubscher. The action concerns the ownership of 'Juliette' a fishing vessel which Cameron-Dow says was acquired by the partnership between him and Laubscher. The fourth defendant is a close corporation owned by Laubscher which had been utilised to conduct fishing operations off the 'Juliette'. In the action Cameron-Dow claims an order directing Laubscher to render to him an account of the partnership transactions; debatement of that account; for payment by the partnership and the 'Juliette' of some R1,7 million and finally, as against the partnership Laubscher and the 'Juliette', payment of any amount found to be owing to the plaintiff. The action is defended by Laubscher and the 'Juliette'. Laubscher denies that he was a member of the partnership and contends that he is the owner of the 'Juliette'. The pleadings in the action have been closed.

[3] In June of 2009, case no AC 70/2010, Laubscher applied to this court for an order in terms of section 9 of the Admiralty Jurisdiction Regulation Act No 105 of 1983 ("the Admiralty Act") for an order that the 'Juliette' be sold by public auction. The order sought provided for the fund which was to be established from the proceeds of the sale to be dealt with in the following manner. A referee (a member of the local Bar was suggested) was to be appointed to receive, examine and report on the validity and ranking of all claims described in section 11(4)(a) of the Admiralty Act (i.e. all claims relating to the maintenance and preservation of the vessel whilst it had been under arrest and all costs in relation to the sale). After payment of the claims described in section 11(4)(a) as admitted by the referee, the balance of the fund was to be held by the Registrar of this court as this court "shall otherwise order" i.e. as determined by the High Court in the action in rem.

[4] In August 2009 in case no AC85/2010 Cameron-Dow lodged a similar application for an order that the ship be sold. The terms sought in the order in respect of the sale and distribution of the fund resulting from the sale differ from that in the application brought

by Laubscher in that Cameron-Dow seeks an order directing that not only his claim for preservation costs be paid first out of the fund, but that the following amounts also be paid out of the fund before the balance is paid over to the Registrar: -

Secondly payment of the auctioneer's charges;

Thirdly in settlement of advertising expenses incurred by the auctioneer, an amount not exceeding R30 000;

Fourthly an amount of R70 000 to cover the applicant's costs of arresting the vessel and the costs of the application;

That the balance up to an amount of R1 750 000 be distributed to Cameron-Dow as to 85% thereof and 15% thereof to C-Craft CC, the

builder of the 'Juliette' who is cited as the second respondent.

Any balance remaining is to be paid to the Registrar pending determination of the main action.

[5] In January 2010 and under case no AC 08/2010 C-Craft CC and Another instituted an action in persona against Cameron-Dow in which payment of the sum of R497 860 is claimed which is said to be the balance owing in respect of the purchase price for the construction of the 'Juliette' which was effected by the plaintiffs for Cameron-Dow. The pleadings in that matter are not yet closed.

[6] The parties are agreed that both the applications for the sale of the 'Juliette' should be heard together.

[7] The case for Laubscher is, as is usual in applications of this nature, relatively simple. It is brought on the basis that he is the owner of the 'Juliette' which is under arrest and moored in the Hout Bay harbour, having been detained there since its arrest in August 2009. The

vessel is said to be in extremely poor condition and to continue to deteriorate. It is pointed out that since the vessel has been under arrest it has been in the custody of the sheriff of Wynberg North who has been paying harbour dues and incurring other expenses related to the maintenance on and preservation of the vessel whilst under arrest. It is said that these expenses will continue to mount with the resultant decrease in the size of fund available to the parties in these actions which have been instituted. Laubscher submits that as usual it would be appropriate for the vessel to be sold by public auction and that the sheriff of Wynberg who has been approached about the matter is prepared to conduct the sale in respect of which he will levy a commission of 5% on the sale price. I have already in para [4] referred to the terms of the order sought relating to the appointment of a referee to deal with the preservation costs.

- [8] Both applicants are in agreement that the vessel should be sold.
- [9] In his founding affidavit Laubscher, in sketching the background to his application, records the arrest of the 'Juliette' by Cameron-Dow in August 2009 and encloses a copy of the writ of summons as well as a copy of his plea in the action. He states that is evident from the pleadings that there are significant disputes of fact between Cameron-Dow and himself particularly regarding the ownership and operation of the vessel. His contention is that he is the owner of the vessel and refers to the Local General Safety certificate issued by the Department of Transport in which he, under his trading style "Wicked Lady Fishing" is recorded as being the owner. He denies that he was ever a member of a partnership as alleged by Cameron-Dow and that he has any duty to render an account to him and to debate that account. He also denies that he or the vessel are indebted to Cameron-Dow in any amount. He records that as the dispute between Cameron-Dow and himself will be fully ventilated at the trial, he has been advised that it is not necessary to furnish further details of his defence to the claim against him, but will do so when it becomes necessary.
- [10] Cameron-Dow takes up a different attitude. Both in his answering affidavit to Laubscher's application and in his founding and replying affidavits in his application, he makes out a case to show that Laubscher is not the owner of the 'Juliette' and that the true owner is a partnership between himself and Laubscher. He also avers that Laubscher has unlawfully appropriated monies due to the partnership, the amounts of which are accordingly to be deducted from any claim which Laubscher may have for repayment of his capital contribution to the partnership, with the result that having regard to his capital contribution he will end up being the only creditor entitled to claim against the fund. Counsel for Cameron-Dow invited me to make a finding on the papers that Laubscher's version should be rejected as being untrue and that I should make a positive finding that Cameron-Dow is the owner and that he is entitled to be paid the amount claimed in the summons. On the basis it was submitted that Cameron-Dow's view as to the manner in which the vessel was to be sold should prevail.

- [11] There are two reasons why, in my view, the approach adopted by Cameron-Dow cannot be entertained. To start with, there are clearly serious disputes of fact which would best be resolved by the hearing of oral evidence at the trial. This was recognised at the outset by Laubscher who has taken up the attitude that the disputes must be dealt with at the trial and has therefore refrained from answering various allegations and averments on which Cameron-Dow seeks to rely. Cameron-Dow also asks me to adopt a robust approach and to find on the strength of certain correspondence and unsigned financial statements that Laubscher's version that he is the owner of the 'Juliette' cannot possibly be true. While on the face of it certain of the correspondence referred to by Cameron-Dow supports his view, Laubscher contends that the arrangements which had previously existed were terminated in July 2007 and were replaced by another arrangement which resulted in him becoming the owner. The order sought is for the sale of the 'Juliette' pendent lite and we are thus at an interlocutory stage of the action. The purpose of the order is simply to convert the deteriorating asset into a money fund which will be utilised to satisfy the claims of the creditors once the court has pronounced on the validity of those claims. Cameron-Dow wants me to go much further for he is asking me to make a finding in motion proceedings on the very issues which are to be determined in the pending action. I am asked to do so by deciding the issue on the probabilities having regard to certain correspondence and documentation put up by him. The unwillingness of a court to embark on the exercise proposed by counsel for Cameron-Dow is well known. Although the judgment in one of the 7/gr1 matters is not directly on point, the issue in that matter being the importance of the agreement of the owner of the attached vessel when deciding an application in terms of section 9 of the Admiralty Act, the court remarked on its inability at the interlocutory stage to assess even *prima facie* the merits of the contending cases before it. In my view there is no reason in the matters before me to depart from this view.
- [12] The second reason is that strictly speaking I do not need to decide that which Cameron-Dow wishes me to decide in order to arrive at a decision as to which of the applicants should be granted an order authorising the sale of the 'Juliette'. Without having regard to the issues in dispute in the main action, I can, merely by assessing the content of the two applications, make a decision. The fact that Laubscher's application was lodged some two months before that of Cameron-Dow can also be taken into account, for even on Cameron-Dow's version, the vessel must be sold. At the conclusion of argument, I asked counsel for Cameron-Dow to indicate why I should have to make a finding on the disputed issues if I could decide which of the two applications I should grant without reference to the disputes. His answer that I should do so because "you can" brought to mind the approach of a well-known North American political figure, but was not persuasive in law. He also submitted that I should make the findings because it would be for the benefit of the parties inasmuch as their dispute would be resolved sooner at a reduced cost. Disposing of the matter now would also be in the interest of the court, he submitted. These are not persuasive legal arguments, particularly if one bears in mind that the opposing party wishes the issues to be properly ventilated during the course of a trial.

[13] The only difference between the two applications is the auctioneer chosen by the applicants and the method of sale which is proposed. Laubscher's application is for the vessel to be sold by public auction and for the sale to be conducted by the sheriff for the district of Wynberg North who currently has custody of the 'Juliette'. The sheriff is an officer of this court and has experience in judicial sales of this nature. The proposal is that the sale should take place according to conditions of sale which are frequently used in judicial sale for vessels of all sizes and types including fishing vessels. I have already referred to the proposed method of distributing the proceeds of the fund which is to be created. It is clear from the answering affidavit filed by Cameron-Dow that he misunderstood the nature of the relief sought in the draft order in that he construed the order as having the effect of giving the referee the authority to distribute the whole of the fund comprising the proceeds of the sale. His counsel has conceded that the function of the referee proposed by Laubscher was simply to deal with the claims filed in accordance with

section 11(4) of the Admiralty Act.

[14] Cameron-Dow did not give any reason as to why the sheriff might not be suitable to act as auctioneer, but indicated that he would ask for an auctioneer of his choice to be appointed. Filed with Laubscher's replying affidavit is a valuation of the 'Juliette' foreshadowed in his founding papers by a marine surveyor. He values the vessel at R1,55 million excluding VAT, fuel and lubes, but warns that a forced sale of the vessel may realise only between R300 000 and R400 000 excluding VAT, fuel and lubes. Cameron-Dow proposes that the sale be conducted by an auctioneer of his choice, namely one Ian William Small. Cameron-Dow says that Small is a semi-retired "vastly experienced senior auctioneer" who ran the Cape Province arm of Aucor Auctioneers for approximately 20 years. He is said to have extensive knowledge of boating and fishing, but has no experience in selling maritime vessels. Small and Cameron-Dow propose a different method of sale from that proposed by Laubscher. In short, the intention is that Small will conduct an extensive advertising campaign amongst prospective purchasers in order to ensure a good price. The conditions of sale contained in a document entitled 'Proposal for Judicial Sale' provide for advertising costs which are not expected to exceed R30 000 and for Small to be authorised to conclude a sale by private treaty for not less than the reserve price of R1 200 000, for each bidder to pay a deposit of R20 000 to be held in the trust account of Cameron-Dow's attorneys. Cameron-Dow is in fact an attorney of this court and a director of the firm which represents him. The balance of the purchase price is to be paid within such further period not exceeding 90 days as may be agreed with Small. The method of sale proposed by Cameron-Dow is to be found in the "Proposal of Judicial Sale" to which I have referred and a draft deed of sale which contains the provisions relating to the payment of the deposit and the possible

extension of time within which to pay the purchase price to which I have referred. It is by no means clear how these two documents hang together and they have been justifiably criticised by Laubscher in his answering affidavit in the following manner:

* I have the following comments to make in regard to the sale proposal:

Paragraph A3.3.1 of the draft order provides that the sale be conducted by the auctioneer 'on the basis of the proposal'. It is not evident from the order whether the auctioneer is required to comply strictly with the terms of the sale proposal, whether he may depart from its terms and, if so, in what respect he may depart from the terms of the proposal.

No indication is given in the papers as to how the cost of advertising of R30 000,00 is arrived at.

Paragraph B of the proposal provides that bidders shall be required 'to offer a deposit or guarantee' to Mr Cameron-Dow's attorneys of record (Mr Cameron-Dow is a partner in the practice in question) of R50 000,00 24 hours prior to the sale.

There is no provision in the proposal or conditions of sale as to what will be done with the deposits paid by unsuccessful bidders.

The deposit appears to be the same as that referred to in paragraph 7.1 of the conditions of sale, save that the amount of the deposit provided for in the conditions of sale is R20 000,00. No provision is made in the conditions of sale as to what will be done with the deposits paid by unsuccessful bidders. I respectfully submit that it is entirely inappropriate that any amounts be paid to Mr Cameron-Dow's firm. Any amount paid should be held by the Registrar as a fund held in court as described in section 9(2) of the Admiralty Act. I have been advised that it is not the practice in sales concluded in terms of section 9 of the Admiralty Act to require bidders to pay a deposit before bidding as this will simply discourage bidders. The fact that the proposal includes such a provision provides an indication that Mr Small has no experience in selling fishing vessels such as the 'Juliette'. In terms of clause C of the proposal the successful bidder is required to pay the sum of R127 118,94 in addition to the purchase price. This amount, being the total of the expenses listed on Annexure 'C' to the draft order, is not vouched and includes amounts which appear to be unrelated to the preservation of the 'Juliette' and other amounts which are clearly approximations. Depending upon the terms of the insurance policy, this may not constitute a preservation cost either. These amounts are not dealt with in Mr Cameron-Dow's affidavit and no grounds exist for obliging a successful bidder to pay the sum of R127 118,94 in addition to the purchase price. It is not clear what the difference is (if any) between 'sale price' and the 'purchase price' in clause C, and whether the auctioneer's

commission is payable on the amount bid inclusive or exclusive of the preservation costs. Clause E provides for payment of the 'balance of the funds after payment of preservation costs, advertising costs and commission' to Mr Cameron-Dow's firm. I have dealt with the amount claimed as preservation costs above. I respectfully submit that it is entirely inappropriate that Mr Cameron-Dow's firm be left with the sole discretion to decide what amount should be paid to Mr Cameron-Dow and to the auctioneer, a friend of Mr Cameron-Dow. The order sought in the first sale application places the distribution of the fund wholly within the power of this honourable court. There is no indication in Mr Cameron-Dow's affidavit as to how the reserve price in clause F is arrived at. In clause 19 of the conditions of sale forming part of the order sought in the first sale application the reserve is described as being 75% of the appraisal value. The auctioneer is

authorised to obtain a valuation of the vessel in paragraph 1.2.2(b) of the draft order. In clause D the auctioneer is authorised to conclude a sale by private treaty before or after the auction date for no less than the reserve price with the agreement of Mr Cameron-Dow and Mr Cooper. I am advised that this provision is highly unusual, if not unique, in a sale order made in terms of section 9 of the Admiralty Act. It entitles the auctioneer to sell the vessel for R1,2 million before the auction takes place without my consent as a registered owner. I respectfully submit that it is entirely inappropriate that the auctioneer be given this power."

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[15] After hearing argument counsel for Cameron-Dow asked to be permitted to submit a revised draft order in order to deal with what he perceived to be technical objections to the form of the order which he proposed. An improved order was thereafter submitted, but the basis of it remains that a major portion of the sale proceeds (this time R1 million) is to be paid out as to 85% thereof to Cameron-Dow and 15% thereof to Laubscher. In light of the view which I take of the matter it is not necessary to deal further with the amended proposed order.

[16] In terms of Admiralty Rule 21(4) the court has an unfettered discretion as to the appointment of the person who is to conduct a sale.

[17] There are two reasons why I am of the view that the successful applicant should be Laubscher. Having regard to the fact that the reward which will flow to the auctioneer appointed to attend to the sale will be influenced by the amount fetched on the sale, there is no reason to expect that the sheriff will not actively advertise the sale. He records in the Laubscher application that

1. He is better placed to be the auctioneer as he is based in Cape Town and is the custodian of the vessel. 2. He has a website on which vessels are advertised and in addition is in a position to scan the internet for buyers. 3. He is able to obtain special advertising rates from the local newspapers due to the longstanding relationship with them.
4. He is available 24 hours per day in Cape Town and can facilitate ad hoc inspections of the vessel at short notice.
5. He has an excellent infrastructure in Cape Town which will assist in all aspects of the sale and auctioneering of the vessel. 6. The sheriff's office has auctioned various vessels in the past, the most recent being MFV "Omadino Star", MT "Argun",

MFV "Highlander" and the Yacht "Betelgeuse" which he says achieved excellent sale prices, being more than was expected. I am also influenced by the fact that Cameron-Dow's application, while brought in the form that it was for an order authorising the sale of the ship, was palpably brought with the motive of having the principal disputes determined on motion.

- [18] This brings me to the question of costs. Both parties asked that a punitive costs award be made against the other. Counsel for Laubscher submitted that Cameron-Dow and his legal advisor knew full well the risk they were taking in seeking to have the dispute with Laubscher settled in motion proceedings rather than in the action and on behalf of Cameron-Dow it was submitted that Laubscher's conduct justified such an order. Neither party gave notice in the papers of its intention to seek a punitive costs order and while this is not necessarily fatal, I have decided not to make such an order. The order which I will make will however provide for Cameron-Dow to pay the costs brought about by his opposition to Laubscher's application.
- [19] In the result, the following orders will issue:
1. In case no AC 70/2010
 - i) An order is granted in terms of the draft order marked "X" attached to the notice of motion, incorporating the conditions of sale marked "Annexure A" and the abbreviated order marked "Annexure B". ii) The costs referred to in B of the order exclude all costs incurred by opposition to the application, including the hearing thereof, which shall be paid by Cameron-Dow.
 2. In case no AC 85/2010 the application is dismissed with costs. R B CLEAVER
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4. He is available 24 hours per day in Cape Town and can facilitate ad hoc inspections of the vessel at short notice.
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 - ii) The costs referred to in B of the order exclude all costs incurred by opposition to the application, including the hearing thereof, which shall be paid by Cameron-Dow.
2. In case no AC 85/2010 the application is dismissed with costs.

R B CLEAVER

1 M/T Tigr v Bouygues Offshore and Another 1998

- (4) SA 206 (C) at 210D (Full Bench).

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