

SOUTH AFRICA / JUDGMENT

Hilane Limited v MV Silver Star and Others (A2282/2013) [2013] ZAECPHC 61; 2014 (2) SA 392 (ECP) (3 December 2013)

[2013] ZAECPHC 61

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

J W Eksteen

CASE / FILE NUMBER

A2282/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE, PORT ELIZABETH

Case No.: A2282/2013

Date Heard: 14 November 2013

Date Delivered: 3 December 2013

In

the matter between:

HILANE

LIMITED.....Applicant

And

MV

“SILVER

STAR”.....First

Respondent

ACTION

PARTNER

LIMITED.....Second

Respondent

THE

SHERIFF OF THE HIGH COURT

PORT

ELIZABETH

SOUTH.....Third

Respondent

EMIRATES

NBD BANK (PJSC) First Intervening Party

OLDENDORFF

CARRIERS GMBH CO. KG.....Second
Intervening Party

JUDGMENT

EKSTEEN J:

[1] This is an application in terms of the provisions of section 9 of the Admiralty Jurisdiction Regulation Act, 105 of 1983 (herein referred to as “the Act”) for an order authorising the sale, pendente lite, of the first respondent (herein referred to as “the vessel”).

[2] The vessel is a bulk carrier with a Panamanian flag and the second respondent is the registered owner thereof. (I have, however,

previously held that the true ownership of the vessel vests in Stellar Shipping LLC (herein referred to as “Stellar Shipping”).) The applicant issued a summons in rem against the vessel as an associated ship to the “Sheng Mu” following an arbitration award in London in favour of the applicant. The applicant’s claim, it is alleged, arises in respect of the charter of the Sheng Mu by Phiniqia International Shipping LLC (herein referred to as “Phiniqia”) and the breach by Phiniqia of its obligations, inter alia, in terms of certain letters of indemnity issued by Phiniqia to the applicant in respect of certain bills of lading. This dispute was referred to arbitration in London which resulted in a final award in favour of the applicant in an amount of USD3 843 927,10. In these circumstances the first respondent was arrested pursuant to the provisions of section 3(6) and (7) of the Act as an associated ship to the Sheng Mu, in the port of Port Elizabeth by order of this Court. She remains under arrest.

[3] The order for the arrest of the vessel was obtained ex parte. This was followed by an application by the first respondent for the release of the vessel from arrest. The first respondent contended that the provisions of section 3(6) and (7) of the Act can find no application to the facts of the present matter and, even if they could, the first respondent denied, on the facts, that it was an associated ship to the Sheng Mu. The first argument is a legal one whilst the second concerns a factual dispute relating to the ownership of the vessel. The application for the release of the ship was dismissed. This was followed by an application for leave to appeal which was similarly dismissed. I have been advised from the Bar by Mr Gordon SC, who appears on behalf of the first and second respondents, that the first respondent intends to petition the Supreme Court of Appeal for leave to appeal against the dismissal of the application for the release of the vessel. The petition has not yet been delivered and the time for the delivery thereof had not expired at the time of argument. Nothing turns on this issue and it is accepted by the parties that a petition for leave to appeal is pending

[4] After the application for the release of the vessel was dismissed the third respondent (herein referred to as “the Sheriff”)

who is charged with the custody and care of the vessel in terms of the provisions of Rule 21 of the Rules Regulating the Conduct of the Admiralty Proceedings (herein referred to as “the Rules”) advised that the vessel was running short of water and that its agent was no longer instructed to attend to the husbandry matters of the ship. The crew had at that stage not been paid their wages for August 2013. On enquiry, Attorneys Edward Nathan Sonnenbergs (ENS), representing the first and second respondents, advised that on their advice the owners have effectively ceased all payments in respect of the vessel, it being the responsibility of the Sheriff to preserve and maintain the ship while she is under arrest. This prompted the present application.

- [5] A rule nisi was issued on 11 September 2013 calling upon interested persons to show cause why an order in terms of the provisions of section 9 of the Act should not be made in respect of the vessel. The rule has in the interim been extended.
- [6] On 11 September 2013 the first intervening party (herein referred to as “the Bank”) was granted leave to intervene. The vessel is mortgaged in favour of the Bank as security for a loan extended to Stellar Shipping and an amount of USD43 183 444,33 is currently owing to the Bank while interest is accumulating at a rate of USD7 944,33 per day. In an affidavit filed on behalf of the Bank it contends that Stellar Shipping and the second respondent defaulted on their commitments under the bond on 19 November
- 2012. The second respondent acknowledges the default and states that due to the poor market conditions it has not been possible to manage the first respondent profitably. For these reasons it was unable to pay the instalment due on 19 November 2012. During March 2013 it was able to pay an amount of USD500 000,00, but it remains in default of its obligations under the mortgage. The estimated value of the vessel on a judicial sale is estimated by the parties at varying amounts between USD22million and USD24million.
- [7] At the time of its intervention the Bank did not actively oppose the order for the sale of the vessel but raised opposition to the form of the order. In a subsequent affidavit filed shortly before the matter was argued they remained equivocal about their stance on the proposed sale. I shall revert to the attitude of the Bank below.
- [8] On 20 September 2013 the second intervening party (herein referred to as “Oldendorff”) was granted leave to intervene.

Oldendorff was the time charterer operator of the vessel at the time of the arrest. Its intervention too was not aimed at opposing the sale of the vessel but rather at protecting its own interests in respect of the cargo which was on the vessel at the time. More recently, however, at the eleventh hour, a further affidavit was filed on behalf of Oldendorff. Oldendorff now contends that it has suffered damages as a result of the second respondent’s breach of the charterparty in consequence of the arrest of the vessel which include, but are not limited, to the costs of the transshipment operation in respect of the cargo and the additional costs of having to charter two substitute vessels to carry the cargo which ought to have been carried on the vessel. Oldendorff contends that it is still calculating the extent of its losses and can only give an indication thereof at this stage. It estimates its total loss would ultimately run to somewhere in the region of

USD1million. It contends that in the view of the admitted inability of the second respondent to secure the claim of the applicant, despite its relative modesty, to settle the USD43million owed to the Bank, to preserve the vessel or even to pay its crew, it is clear that the second respondent is insolvent and will be unable to pay the damages for which it is liable to Oldendorff. In these circumstances Oldendorff supports the applicant's claim for the sale of the vessel. Neither Oldendorff nor the Bank have proceeded to arrest the vessel nor has either of them taken any steps to enforce their claims against the vessel or the second respondent.

[9] On the papers and in argument the first and second respondents have sought to challenge the constitutional validity of section 9 of the Act. By virtue of the conclusion to which I have come on the facts of the matter it is not necessary to decide this issue.

[10] Section 9 of the Act confers upon the Court a wide and largely unfettered discretion to order the sale of the vessel at any time in circumstances where such a step is justified. The discretion is, of course, to be exercised judicially. Given the breadth of the discretion conferred on the Court by section 9 of the Act, it is not possible to list all the factors which may be relevant to the judicial exercise of the discretion. A number of the considerations which should ordinarily be considered emerge from the judgment in *MT Tigr v Bouygues Offshore and Another* 1998 (4) SA 206 (C). I shall revert to these later herein. The weight which is to be attached to each of these considerations will depend on the peculiar facts of each case.

[11] In the matter of *Sheriff of Cape Town v MT Argun, Her Owners and All Persons Interested in Her and Others; Sheriff of Cape Town and Another v MT Argun, Her Owners and All Persons interested in Her and Another* 2001 (3) SA 1230 (SCA) at 1245 para [34] Scott JA stated:

"[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'."

[12] The reasons for this view are obvious and they were aptly described by King J in *MT Tigr* supra at 208F-H where he stated:

"We are dealing here with the sale of a property pendente lite, a so-called interlocutory sale, despite the opposition of the owner

thereto. In the words of Hugo J in *Unicorn Lines (Pty) Ltd v MV Michalis S* 1990 (3) SA 817 (D) at 822B,

'... a Court must have due regard to the fact that it is depriving an owner of its property before any judgment has been given against it'.

There is general recognition of the principle which this dictum enunciates; it is apparent that the Courts will more readily grant an order for a pendente lite sale where the owner is either agreeable thereto or is in default of appearance.”

[13] Leaving aside the constitutional issue to which I have referred earlier, it is settled that the sale of a vessel may be ordered

pendente lite (see *The Argun* supra). The point of departure must be that court will exercise its discretion to order a sale pendente lite sparingly, unless the owner consents to the sale or is in default of appearance. In the present instance the registered owner, who claims to be the true owner, is vehemently opposed to the sale. It has sought to set aside the arrest and has indicated its firm intention to seek leave to appeal from the Supreme Court of Appeal against the dismissal of the application for the release of the vessel.

[14] On behalf of the applicant it is argued that the respondents have no bona fide defence to the merits of the claim nor do they have reasonable prospects of success in an appeal against the dismissal of the application for the release of the vessel from arrest. I am reminded by Mr Fitzgerald SC, on behalf of the applicant, that I have previously declined an application for leave to appeal precisely because I held the view that the first respondent did not have reasonable prospects of success.

[15] I have also previously recognised that it is neither unprecedented nor uncommon for leave to appeal to be granted on petition. I think that the conduct of this matter has illustrated clearly that the defences raised by the first and second respondents against the arrest are seriously made. Moreover, in this instance it is the ownership of the ship itself which is in issue in the proposed

appeal. This, I think is a consideration which militates against the sale of the ship at this stage. (See *Gys Hofmeyr: Admiralty*

Jurisdiction Law and Practice, (2006) p. 172 fn 19.) I think that it would be wrong for me to fall back on my own earlier finding as authority for the proposition that the defences hold no reasonable prospect of success and thereby to close the door on the second respondent to endeavour to establish that it is in fact the true owner of the vessel. The filing of a petition for leave to appeal suspends my earlier finding and it must accordingly be recognised that the issue has not been finally decided.

[16] The object of an arrest of a vessel is, inter alia, to give to a maritime claimant a form of security in advance of the adjudication

of his claim. It is for this reason that a Court will in appropriate cases authorise the sale of the vessel pendente lite in order to preserve the security where the prolonged arrest serves to deplete such security. (See *Unicorn Lines (Pty) Ltd v M V Michalis* S 1990

(3) SA 817 (D) at 821G-H. See also *Admiralty Jurisdiction Law and Practice* supra p. 171.)

[17] In the MT Tigr supra at 210E-F King J considered that the continuing deterioration of the vessel and, accordingly, of the plaintiff's

security, was a factor which would weigh heavily with the Court. The applicant contends that the vessel is a wasting asset and continues to diminish in value. It states that neither the second respondent nor any of the other parties who have an interest in the vessel intend maintaining the vessel whilst it is under arrest and have left it to the Sheriff to conduct this function. It emphasises too that both Stellar Shipping and the second respondent have defaulted on their obligations under the mortgage and are unable to cure their default. For this reason the applicant recognises that the Bank will at some time in the future obtain the legal right to proceed against the vessel and to sell her. To wait for the Bank to exercise its rights, so it is contended, will mean that:

1. Substantial claims against the vessel will arise in relation to her maintenance and preservation;
2. the vessel may be placed at risk as the result of there being insufficient stores, bunkers, supplies etc on board;
3. the crew will incur further claims against the vessel thereby depreciating the ultimate value of the proceeds of the sale;
4. the crew, not having any certainty in relation to their wages will become disgruntled and their performance on board the vessel may be impaired.

[18] I shall consider these particular expenses below in weighing up the costs of maintaining the vessel in the context of the anticipated

duration of the arrest. Reverting to the alleged deterioration of the vessel it is argued that whilst the Sheriff is compelled to preserve the vessel no maintenance is done in respect of the vessel and accordingly the inevitable consequence is that the vessel will deteriorate significantly in value.

[19] I do not think that the distinction between preservation and maintenance is justified. In *The MV Avalon: Curnow Shipping Limited v Brooks NO and Another* 1996 (4) SA 989 (D) Thirion J had occasion to consider the provisions of Rule 19(1) of the Rules, as they then were. Rule 19 published in 1986 read in virtually identical terms to the current Rule 21. It is true that the Rule is cast in permissive terms and that it authorises the Sheriff to take such step as he deems appropriate for the "custody and preservation" of the property. It makes no reference to maintenance. Thirion J held at p. 1000G-I, in respect of the then Rule 19:

"However, here the power is conferred on a public official, the sheriff, for the purpose of being exercised for the benefit of those persons who have an interest in the preservation of the arrested vessel. In my view the word 'may' in Rule 19(1) connotes the conferment of a right on the sheriff, coupled with a duty to exercise that right whenever it appears to him to be appropriate to do so. ..."

It does not appear to me that Rule 19 was intended to state exhaustively the powers and duties of the sheriff in relation to property which he has arrested. The Rule should be interpreted against the background of the powers and duties of the sheriff which are derived from the common law and which the Rule was not intended to abrogate.”

[20] Thirion J then proceeded to analyse the common law with reference to numerous authorities. At p. 1003B-C he concluded as follows:

“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.”

[21] On a consideration of authorities considered by Thirion J, I think that it is correct that it is the duty of the Sheriff to prevent a deterioration in the condition of the vessel. This is, of course, not always possible. There will, of necessity, always be a measure of deterioration due to ordinary wear and tear which occurs with the passage of time and there may be deterioration due to the vagaries of the elements, particularly where the vessel lies on outer anchorage, as is the case in this instance. No evidence has, however, been placed before Court to demonstrate a probability of any extraordinary deterioration whether in nature or extent. In these circumstances the prospect of material deterioration must be considered to be slight.

[22] I turn to the preservation of the applicant’s security. What emerges from the factual background which I have set out above is that the applicant has a claim arising from an arbitration award in the amount of USD3 843 927.10. The vessel is bonded in favour of the Bank. There is an amount of USD43 183 444.33 owing in respect of the bond and Oldendorff contends that it has a claim against the vessel in the amount of approximately USD1million. Neither of these parties have arrested the vessel nor has either of them taken legal steps to enforce their claim against the first or second respondents. The vessel is valued in the current market, which is plagued by unfavourable trading conditions, at approximately USD22million to USD24million. The vessel was, however, purchased from a shipyard in China and delivered during June 2011 at a purchase price of USD49 800 000,00.

[23] I have recorded earlier that the purpose of a sale pendente lite is to preserve the security which the applicant holds. Sometimes,

however, a plaintiff may seek to preserve his judgment security not only for himself but also for the benefit of other creditors. In the MT Tigr supra at 208I-J King J referred with approval to the passage in Roscoe as follows:

“So, too, Roscoe in his great work The Admiralty Jurisdiction and Practice of the High Court of Justice 5th ed (1931, 1987 reprint) comments (at

351) that under the appropriate rule

'the Court will order the sale of a vessel which remains under arrest . . . if in the interests of all parties a speedy sale would appear to be desirable'."

[24] In *Unicorn Lines supra* Hugo J set out the approach to this issue where he stated at 821H-822A:

"If therefore the claims are equal to, or in excess of the value of the ship and the costs of maintaining the ship under arrest, and the deterioration caused by the arrest are such as to materially reduce the security held by the claimants, that would be a valid and indeed weighty consideration in favour of a sale. In such a case the wishes of the owner may well have to yield to the policy underlying the Act.

On the other hand, where the claims are materially less than the value of the ship, and the costs and deterioration are not such as to materially diminish the value of the security, then the views of the owners must, it seems to me, be given greater weight. What would then happen is that such costs and deterioration would reduce the owner's equity in the ship while not detrimentally affecting the position of the claimants. If the owners therefore are prepared to take that risk, one must assume that they are the best judges of their own position and one must afford their wishes great, if not overriding, weight."

[25] At present the only claim which has been made against the vessel is that of the applicant. It is a relatively modest claim as compared to the value of the vessel. Even if the preservation costs are substantial and the arrest were to persist for a considerable period the applicant's claim, standing alone, remains firmly secured by virtue of its modesty as compared to the value of the vessel. Even if Oldendorff's claim is added to that of the applicant, the position of the claimants would not be detrimentally affected if the vessel were not sold.

[26] If, on the other hand, I am to have regard to the claim of the Bank the total claims would then far exceed the estimated current value of the vessel. If all these claims are taken into account for purposes of the present debate, then it seems to me that the applicant, in any event enjoys no security whatsoever in respect of its claim. This, I think, is so for the following reasons:

- (i) In terms of the provisions of section 11 of the Act the preservation and maintenance costs of the vessel would rank first against the fund created upon the sale of the vessel. Those are not determinable at present, although I revert to the known extent of these costs below. (ii) When regard is had to the ranking of the claim of Oldendorff, which had possession of the vessel at the time of the arrest, and that of the Bank, which is secured by a mortgage, both rank above the claim of the applicant. If these claims are to be considered, as argued on behalf of the applicant, then, on the overwhelming probability, Oldendorff would be paid in full and the remainder of any fund which could result from the sale of the vessel would be absorbed in full by the claim of the Bank. The sale of the vessel will accordingly not serve to preserve anything to the benefit of the applicant.

[27] Thus, if only the claim of applicant is considered, or both its claim and that of Oldendorff, then the aggregate of the claims constitute less than 25% of the likely proceeds of the sale. Adopting the approach set out in Unicorn Lines to which I have referred above, the views of the owners must in these circumstances be afforded greater weight in such circumstances.

[28] If, however, the claim of the Bank is considered then it seems to me that it is immaterial to the applicant whether the vessel is sold or not. It would by virtue of section 11 of the Act receive nothing from the sale of the vessel which could serve as security for its claim.

[29] Oldendorff, as I have indicated earlier, support the sale of the vessel. By virtue of that which I have set out above, I think that the attitude of the Bank is of decisive importance. Mr Fitzgerald argues that the Bank supports the sale. Indeed there are passages in some of the affidavits filed on behalf of the Bank which do create that impression. In the final analysis, however, I do not think that is the attitude of the Bank. The Bank has, throughout, been equivocal in its stance. In the final affidavit filed the deponent Wood states:

“It will be appreciated that, being owed in excess of US\$43million, secured by a first preferred mortgage over the vessel, the question

as to how best to secure its position and whether a forced judicial sale in the current market is ultimately in its interests, is a matter which is not easily answered. Heretofore the First Intervening Party has not taken a firm stand one way or the other

with regard to the judicial sale of the vessel. However, if the court is otherwise persuaded the sale should proceed, ...”

[30] Later in the affidavit after recording the default on the bond obligations by Stellar Shipping and the second respondent, the

deponent proceeds to state:

“... the First Intervening Party has been investigating various alternative options of enforcing its security in terms of the powers afforded to it in terms of the mortgage to both maximise the return from a disposal of the vessel, itself possibly entering into possession and trading the ship, or allowing the vessel to be sold by order of this Honourable Court by public auction.”

[31] The affidavit then concludes as follows:

“I therefore respectfully pray for an order that, should this Honourable Court confirm the Rule Nisi issued on 11 September 2013, it does so with the above variations to the terms of the order for the sale.”

[32] What emerges from this affidavit, as I understand it, is that the Bank does not actively support the sale of the vessel but takes the position, in the event that I am persuaded to grant an order for the sale of the vessel that the terms of the order should be varied as proposed by the Bank. At the hearing Mr Mullins SC appeared on behalf of the Bank. His address accords with my understanding of the affidavit. He recorded that the Bank was most concerned about the possibility of a forced sale in the current economic climate but urged,

in the event that the Court should order the sale of the vessel that regard should be had to the amended proposed terms as set out in the affidavit. Their concern about the prospect of a judicial sale accounts for the fact that the Bank has taken no legal steps to seek to enforce its claim pursuant to the default under the mortgage. In summary the Bank's position is that it does not support the judicial sale of the vessel, however, in the event of it being ordered that the vessel be sold it intends to make a claim against the fund. That, as alluded to earlier, would entirely eradicate the applicant's security. The Bank retains the right to proceed to secure an arrest of the vessel if it so chooses. I think that the Bank, like the owners, are the best judges of how to protect their own security. In these circumstances I think that the claim of the Bank should be disregarded for purposes of this application.

[33] The costs of maintaining the vessel whilst under arrest are clearly substantial. A prior application was made by the applicant for security for the costs of the preservation of the vessel which it is required to reimburse to the Sheriff pendente lite. It emerges from the application that the wages of the crew, if the Sheriff should retain the full compliment, amount to USD2040 per day. In addition, in an affidavit deposed to approximately five weeks after the arrest of the vessel Attorney Downes of the firm Bowman Gilfillan Incorporated declared that on the information conveyed to her the following costs have or may need to be incurred as soon as possible to ensure the preservation of the vessel:

1. R108 350,00 for provisions and supplies;
2. R6 440,00 for 280 MT fresh water; and
3. USD225 000,00 for 360 MT bunkers to last approximately three months.

[34] Whilst there is no clearer indication of the likely costs of the preservation of the vessel it is apparent from these consideration

that the costs will be substantial. This is particularly so if the vessel were to be retained under arrest for an extended period. In the event that the applicant is successful in its action against the first respondent these costs would be for the first and second respondents. In view of the value of the ship as it appears from the papers before me these costs are fully secured. In the event of the applicant not being successful in its claim it would in any event be required to bear these costs as costs in the litigation. In view of my earlier finding that any claim by Oldendorff would comfortably be covered by the value of the vessel, that the Bank has remained non-committal and that, on the facts of the matter, the applicant would derive no security at all in respect of its claim from the sale of the vessel, I think that the costs of the preservation of the vessel should be considered to be a neutral factor in the present case.

[35] Mr Fitzgerald places reliance on the judgment in the Supreme Court of Appeal in *MV Spirit of Namibia: Big Red One Inc and Another v Marco Fishing (Pty) Ltd* 2006 (6) SA 309 (SCA) at 316D-F where Scott JA stated:

“Nonetheless, the length of time a vessel is likely to be detained and the costs involved in maintaining the vessel are often decisive in determining whether a sale pendente lite should be ordered. Thus in The Myrto

[1977] 2 Lloyd's Rep 243 (QB Adm Ct) Brandon J at 260 considered that an anticipated delay of a further 18 months (the vessel had already been under arrest for three months) and the costs involved in maintaining the vessel during that period justified a sale pendente lite. The learned Judge characterised an argument resisting the sale in such circumstances as lacking reality. A similar approach was adopted in *The Gulf Venture* [1985] 1 Lloyd's Rep 131 (QB Adm Ct).”

[36] In *The Myrto* at p. 260 Brandon J stated:

“I accept that the Court should not make an order for the appraisalment and sale of a ship pendente lite except for good reason, and this whether the action is defended or not. I accept further that, where the action is defended and the defendants oppose the making of such an order, the Court should examine more critically than it would normally do in a default action the question whether good reason for the making of an order exists or not. I do not accept, however, the contention put forward for the owners, that the circumstance that, unless a sale is ordered, heavy and continuing costs of maintaining the arrest will be incurred over a long period, with consequence substantial diminution in the value of the plaintiff's security for their claim, cannot, as a matter of law, constitute a good reason for ordering a sale. On the contrary, I am of the opinion that it can and often will do so.”

[37] I do not think that Scott JA in *MV Spirit of Namibia* supra, reliant on this dictum by Brandon J, intended to state that every lengthy delay coupled with considerable costs of preservation would necessarily justify the sale of the vessel. In *MV Spirit of Namibia* supra the delay had persisted for years and the costs had exceeded the value of the vessel. In *The Myrto*, to which reference is made above, what weighed heavily with Brandon J was the consequent substantial diminution in the value of the plaintiff's security for their claim. This issue I have considered earlier herein. On the facts of the present matter I think that it does not arise.

[38] The potential prejudice to the owner of the vessel is a factor. The second respondent is a special purpose vehicle owning only a single vessel which was commissioned to be built in what was no doubt better commercial trading conditions. It was delivered in June 2011 and, as earlier recorded, at a cost of USD49 800 000,00. The vessel is virtually brand new. Currently, in prevailing commercial conditions, it is estimated that it may reach between USD22million and USD24million if sold at auction. In the event that the petition for leave to appeal to which I have referred earlier should be granted and the appeal should succeed the second respondent, as the alleged owner of the ship, would suffer enormous and irrecoverable prejudice from the premature and untimely sale of the vessel. This is also the basis for the Banks non-committal attitude. This feature, I think, militates strongly against the authorisation of the sale of the ship at this stage.

[39] In all the circumstances I do not consider that sufficient reason for the pendente lite sale of the “Silver Star” has been shown to exist.

[40] In the result I make the following order:

1. The rule nisi is discharged.
2. The application is dismissed with costs such costs to include the costs of two counsel.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv M J Fitzgerald SC instructed by Bowman Gilfillan Inc c/o Chris Baker Attorneys, Port Elizabeth

For Respondent: Adv D A Gordon SC and Adv S F Pudifin-Jones instructed by Edward Nathan Sonnenbergs c/o Pagdens Attorneys, Port Elizabeth

For 1st Intervening Party: Adv Mullins SC instructed by Shepstone & Wylie c/o Van Wyk Attorneys, Port Elizabeth

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