

SOUTH AFRICA / JUDGMENT

**Meihuizen Freight (Pty) Ltd v Transportes
Maritimos de Portugal Lda and Others
(150/2003) [2004] ZASCA 63; [2004] 3 All SA
289 (SCA); 2005 (1) SA 36 (SCA) (31 May 2004)
[2004] ZASCA 63**

COURT

Supreme Court of Appeal

BEFORE

Marais, Scott, Farlam, Jones, Ponnann

CASE / FILE NUMBER

150/2003

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IN THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 150/2003

In the matter between: MEIHUIZEN FREIGHT (PTY) LTD Appellant

and TRANSPORTES MARITIMOS DE PORTUGAL LDA First Respondent MAVIGA UK LIMITED
Second Respondent THE SHERIFF OF THE HIGH COURT, CAPE TOWN Third
Respondent NEDCOR BANK LTD Fourth Respondent

Coram: MARAIS, SCOTT, FARLAM JJA, JONES et PONNAN AJJA Heard: 10 MAY 2004 Delivered: 31
MAY 2004

Attachment of money in bank account of third party to found or confirm jurisdiction in maritime claim against party on whose behalf money received by third party as agent to receive payment – not permissible – only right to receive payment from third party attachable – s 3 (4) (b) and s 3 (5) (d) of Admiralty Jurisdiction Regulation Act, No 105 of 1983. Order in para 27 of judgment.

J U D G M E N T

MAR AIS JA/

MAR AIS JA:[1] The appellant is Meihuizen Freight (Pty) Ltd ('Meihuizen'). It acted as the ship and cargo agent in South Africa for Transportes Maritimos De Portugal Lda ('TMP'). Meihuizen is a South African company with its principal place of business in Cape Town. TMP is a Portuguese

company based in Lisbon. It is the owner of the vessel mv 'TMP Sagittarius' (the 'vessel').[2] Maviga UK Limited ('Maviga') is an English company which carries on business as a commodity trader in Maidstone, Kent, England. Maviga contracted in Cape Town with TMP for the carriage of its cargo of South African white maize from Durban, South Africa, to Lobito, Angola. The vessel departed from Durban to Lobito on 16 July 2002. On 17 July 2002 she developed a severe list. She was refused entry to East London as the port was closed. During the night the vessel lost power and drifted onto the rocks just south of East London in the vicinity of Leach Bay.[3] By 26 July 2002 the vessel had broken in two and the cargo had been saturated with water to such an extent that it was considered a total loss. Maviga contends that the loss of the cargo was traceable to the unseaworthy condition of the vessel and that TMP is liable in personam to it for the value of the cargo by reason of its breach of the contract of carriage to which the Hague-Visby Rules were applicable. Such a claim is a maritime claim within the meaning of the definition in s 1 of the Admiralty Jurisdiction Regulation Act, No 105 of 1983 ('the Act').[4] On 26 July 2002 Maviga applied ex parte to Nel J in the Cape High Court (exercising its admiralty jurisdiction) for various orders against TMP and Meihuizen. The object of the application was twofold: first, to attach, in terms of s 3 (2) (b) of the Act, property within the court's area of jurisdiction owned by TMP in order to found jurisdiction in the Cape Court in the action in personam to be instituted against TMP; secondly, to arrest, in terms of s 3 (4) (b) read with s 3 (5) (d) of the Act, that property for its claim against TMP, alternatively, to arrest it in terms of s 5 (3) (a) of the Act to provide security for the same claim in the event of the Cape Court declining to exercise jurisdiction and Maviga having to institute proceedings in Lisbon, Portugal.[5] Counsel for Maviga correctly conceded that an arrest in terms of s 3 (4) (b) read with s 3 (5) (d) of the Act was not possible because that which Maviga sought to arrest was not property 'in respect of which the claim lies'. The claim lay in respect of cargo and not freight. The property of TMP which Maviga sought to attach in terms of s 3 (2) (b) was described in the application as 'freight' or 'freight monies'. The fate of the application had to be determined by the Roman-Dutch law.[1] Ironically, the freight sought to be attached and arrested was payable to TMP by Maviga itself and it was contractually obliged to pay it notwithstanding the loss of the cargo. The contract of carriage required Maviga to pay the freight to a designated Meihuizen bank account as Meihuizen was TMP's agent to receive payment on its behalf. Maviga's shipping agent did so.[6] At the date of the ex parte application Maviga was unsure whether the freight paid by its shipping agent had actually been received in the relevant Meihuizen bank account at Nedbank. In its founding affidavit it said through its attorney that if the money had not already been received, its receipt was imminent. It added that Meihuizen had confirmed that the money had been received but that, in its (Maviga's) view, it remained possible that the money had 'not yet been deposited into (Meihuizen's) account'. However, it submitted that the depositing of that money into Meihuizen's Nedbank account was 'inevitable'.[7] What was then said is of importance because of the light it throws upon what the property was that Maviga sought to attach and arrest. I quote the paragraphs which are relevant. '10.14 It is for this reason that [Maviga] seeks an order that [Meihuizen] disclose to the sheriff the actual amounts due to [TMP] that are held in its account, and to provide the dates upon which any further amount, and in particular the freight moneys paid by [Maviga's] agents, will be paid and are paid into that account. 10.15 It is respectfully submitted that in the circumstances the

inevitable payment into [Meihuizen's] bank account should be immediately attached and arrested in terms of the order granted. 11.1 [TMP] is not a company of which I have any personal knowledge, but I understand from Mr Pheiffer that [Maviga] has shipped cargo to Angola in December 2001 and there must be a reasonable prospect that other freight monies due to [TMP] are held in [TMP's] agent's account. 12.2 I respectfully submit that there is no prejudice to [Meihuizen] as the only moneys which [Maviga] seeks to attach are those freight moneys of [TMP].'[8] The founding affidavit culminated in the following paragraph:'1.4 It is respectfully submitted that [Maviga] has made out sufficient grounds to be entitled to attach [TMP's] freight moneys, held in [Meihuizen's] account, and that it has established that it has:

- (a) a prima facie case against [TMP];
- (b) that [TMP] is a peregrini (sic) of the above Honourable Court;
- (c) that [TMP] has property which it owns, or in which it has an interest, within the jurisdiction of the above Honourable Court.'

[9] The order sought was granted by Nel J. I recite only such parts of it as have a bearing on the issues to be resolved.

'It is ordered:

1. . . .
2. That the sheriff of this Honourable Court be and is hereby authorised and directed to attach and arrest [TMP's] right, title and interest in and to the freight moneys held by [Meihuizen's] bank, Nedcor Bank Limited, at the branch situated at 85 St George's Street Mall, Cape Town, which freight moneys are held for and on behalf of [TMP], as identified in the attached document 'First National Bank' bank details, marked B.
3. That [Meihuizen] is directed to advise the sheriff, at the time of service of this order upon it, of any amounts which are currently due to [TMP] in the said bank account and the account number, and of all amounts which it anticipates will become payable by it in the future to [TMP], and the date upon which such amounts will become payable.
4. [Meihuizen] shall advise the sheriff immediately if freight monies are received on behalf of [TMP] and the sheriff shall then forthwith arrest or attach such freight monies. [Meihuizen] is interdicted from taking any steps to transfer the freight money from its account, unless a release warrant therefore has been issued, or by further order of Court.
5. That the said attachment is to found and confirm this Court's jurisdiction over [TMP] for claims which [Maviga] intends bringing against [TMP] in this Honourable Court. [Maviga] is granted leave to sue [TMP] by way of edictal citation, a copy of which is attached to this order marked "A"; the said edict being served by courier on [TMP], in English only, at its business address, Avienda 24 de Julho 126-2 Lisbon Estremadura, Portugal, [TMP] being given THIRTY (30) days from the date of service within which to enter an appearance to defend.

6. That the arrest stand as security for [Maviga's] claim against [TMP] to be brought in in Lisbon, Portugal for damages suffered by [Maviga] as a consequence of breaches by [TMP] of the terms and conditions of a contract for the carriage of a cargo of maize from Durban, South Africa to Lobito, Angola, which cargo has been lost following the wreck of [TMP's] ship, the mv "TMP SAGITTARIUS", together with interest and costs as follows:
 - (a) Euro 806 130.00;
 - (b) interest on the said amount at 15,5% per annum for 3 years;
 - (c) costs of R150 000.00
 7. . . .
 8. That any such security shall be held pending the final outcome of the proceedings referred to in paragraphs 5 and 6 above.'
- [10] The order evoked no reaction from TMP but Meihuizen launched proceedings in which it sought to have certain of the orders made by Nel J set aside and to have reversed certain steps which Nedbank had taken upon being served with the order. The steps were these. The freight payable (US \$ 124 020.00) was received on 17 July 2002 from Maviga's shipping agent by Meihuizen when it was paid into a separate dollar account which Meihuizen maintained at Nedbank. Both that account and Meihuizen's ordinary business bank account were in credit before the receipt of the payment. Meihuizen converted the dollars into rands and transferred the money to its ordinary business bank account. On 29 July 2002 Nedbank transferred from Meihuizen's account R1 258 803.00 (the rand equivalent on 26 July 2002 of US \$ 124 020.00) to an account opened for, and under the control of, the sheriff. It did so without Meihuizen's consent believing that the order of Nel J empowered it to do so.
- [11] Meihuizen's application came before Davis J. The relief claimed was
- '2. That the arrest order for the arrest and/or attachment obtained (and to the extent that it has been effected) by (Maviga) in this application . . . in terms of, and the relief as provided for in, paragraph 4 of the said order be discharged and/or set aside;
3. that (Maviga) and/or the sheriff . . . and/or (Nedcor Bank) be authorised and directed to take all such steps as may be necessary, forthwith to:
- 3.1 release the monies (in the amount of R1 258 803 . . .) to the extent that it (sic) might have been arrested and/or attached in and/or transferred from (Meihuizen's) account held with Nedcor bank Ltd, Cape Town with number 100935339 ('the account') by or at the behest or with the co-operation of the sheriff and/or (Maviga) and/or Nedbank on or about 29 July 2002, from arrest and/or attachment;
- 3.2 restore the monies to the account;

3.3 alternatively to the foregoing and only in the event of the . . . court finding that moneys in Meihuizens's account equal to the amount found to be due by (Meihuizen) to (TMP) ('the credit') as at the time of service of the order on (Meihuizen), and/or transfer as set out in paragraph 3.1 above, that the difference between the amount of the moneys so transferred and the amount of the credit, be released and restored as set out in paragraphs 3.1 and 3.3 above.'

[12] In the result Davis J made the following order:

'1 The arrest and attachment obtained by (Maviga) on 26 July 2002 in terms of and the relief as provided in paragraph 4 of that order is confirmed subject to the provisions of paragraph 2 of this order.

2. (Maviga) and/or the sheriff . . . and/or (Nedcor Bank) are authorised and directed.

2.1 to take all such steps as may be necessary, forthwith to release the amount of R508 745 from Meihuizen's account held with Nedcor Limited Cape Town with number 1009365339 by or at the behest of or with the co-operation of the sheriff and/or (Maviga) and/or (Nedcor Bank) on or about 29 July 2002 from arrest and/or attachment;

3. There is no order as to costs.'

[13] The reason why Meihuizen was granted the partial relief provided for in paragraph 2 of the order of Davis J was because the learned judge held that Meihuizen was entitled to pay itself from the money received on TMP's behalf a sum of R508 745 which was owed to it by TMP. The reason why no order as to costs was made was because both Meihuizen and Maviga had achieved a substantial measure of success in the application: Meihuizen in having R508 745 restored to it and Maviga in resisting Meihuizen's claim to set aside the attachment of all the money received by it on TMP's behalf. Neither of these orders was the subject of any cross-appeal by Maviga or any of the other respondents.

[14] At the hearing of the appeal it appeared that there might have been some misapprehension on the part of both the court a quo and counsel as to precisely what aspects of the order of Nel J were being attacked. The answer to that question must be found in Meihuizen's application and in the submissions made on its behalf in the court a quo.

[15] Before Meihuizen's application was launched there was a flurry of correspondence between the attorneys acting for Meihuizen and Maviga respectively. The correspondence formed part of the application. It emerges reasonably clearly from the correspondence alone, and the affidavits accompanying the application place it beyond doubt, that Meihuizen had no axe to grind with the order in so far as it purported to found jurisdiction in the claim which Maviga wished to institute against TMP. That was not really its concern. However, to the extent that its own interests were adversely affected by the particular manner in which Maviga and the court sought to found jurisdiction, the order was of concern to Meihuizen.

- [16] The effect of the order was to disable Meihuizen from utilising its own bank accounts as it saw fit and to prevent it from drawing upon the funds standing to its credit whenever the credit balance had been reduced to R1 258 803.00. To make matters worse for Meihuizen, the bank, acting on the advice of its lawyers and with at least the blessing, if not the connivance, of Maviga, had transferred R1 255 803.00 from Meihuizen's account and by doing so had imperilled Meihuizen's ability to trade within the limits of its overdraft facility at the bank and to meet its budgetary obligations.
- [17] I have no doubt that Maviga's application targeted the money which Meihuizen had received from Maviga as freight payable to TMP and that the order granted by Nel J resulted in that target being hit. It is so that there is reference in the papers and in para 1 of the order of Nel J to TMP's 'right, title and interest, in and to the freight moneys' and that, if these words had stood alone, they would have meant TMP's contractual right against Maviga to be paid freight. But they cannot be read in isolation. They relate to the money already paid by Maviga to TMP and held by Meihuizen in its bank account. The payment to Meihuizen which was TMP's authorised agent to receive payment plainly discharged Maviga's debt to TMP and there was no longer freight in that amount payable by Maviga to TMP. That is obviously why no attempt was made to attach that debt; it had been discharged.
- [18] Instead, Maviga sought to attach the money so paid as if it were TMP's money. It did not appreciate that, once paid to Meihuizen, the money was no longer freight payable by it to TMP but simply money owed by Meihuizen to its principal, TMP. As a fungible, it had no identity separate and distinct from that of any other money belonging to Meihuizen. It was not sequestered in any way, from Meihuizen's other money. The historical origin (freight) of the payment would serve of course to identify the source of and the causa for the payment into Meihuizen's account but it would not attach, limpet like, as an identifying label to the money paid over to Meihuizen so as to enable it to be isolated from any other money in its account, and to be attached as if it were a non-fungible res.[2]
- [19] Paragraphs 3 and 4 of the order granted by Nel J confirm that to be so. Paragraph 3 per se does not require the sheriff to attach the amounts to which it refers. It only requires Meihuizen to advise the sheriff of any amounts due to TMP in Meihuizen's bank account and of all amounts which will become payable in the future by Meihuizen to TMP. Paragraph 2 is the part of the order which required the sheriff to 'attach and arrest' the money already in Meihuizen's bank account. Paragraph 4 requires him to 'arrest or attach' any further money received in future by Meihuizen on behalf of TMP. In both instances the arrest or attachment was to take place after payment of the money to Meihuizen. In other words, and for the reasons given in para [17], it was not TMP's right to be paid freight by Maviga which was to be attached or arrested. Nor was it TMP's right to be paid by Meihuizen after freight had been paid by Maviga to Meihuizen. It was the money so paid to Meihuizen. The accompanying interdict in para 4 of the order makes that quite clear.

- [20] In law the money which had been paid to Meihuizen and deposited in its bank account did not remain its money. It became the bank's money and Meihuizen became vested with no more than a personal right to claim an equivalent sum from the bank which was pro tanto its debtor.[3] But even if it were still to be regarded as Meihuizen's money, there could be no justification for attaching it to found jurisdiction in a claim against TMP. TMP had no right to any of the money in Meihuizen's bank account. The only right it had which was capable of attachment as property within the jurisdiction of the court was its personal right to be paid by Meihuizen a sum of money equivalent to the freight received by Meihuizen on TMP's behalf.[4] That was an incorporeal right which had a value and it was therefore plainly 'property' within the meaning of s 3 (2)
- (b) of the Admiralty Jurisdiction Regulation Act, No 105 of 1983 ('the Act'). That provision authorises the institution of a maritime claim by an action in personam against a person 'whose property within the court's area of jurisdiction has been attached . . . to found or confirm jurisdiction'. Attachment of that right would mean of course that Meihuizen would no longer be able to discharge its debt to TMP by paying TMP. It could only do so by paying the debt to the sheriff. But neither the existence of that debt nor its attachment or arrest would preclude Meihuizen from using the money standing to its credit in its own bank account as it pleased. Nor would it entitle Maviga to have sequestered for its benefit an equivalent sum of money in Meihuizen's bank account. The debt was an unsecured debt due by Meihuizen to TMP. Maviga could not convert it into a secured debt by having the court attach or arrest an equivalent sum of money in Meihuizen's bank account. There was no such entitlement in law.
- [22] Attachments to found jurisdiction should not be confused with the kind of application which may be made where a debtor can be shown to be intent upon disposing of or secreting assets to frustrate the claims of creditors. In such circumstances a court may grant what has been referred to (not entirely accurately) as an anti-dissipation interdict.[5] But even the grant of such an order does not have the effect of converting an unsecured debt which is owed to the applicant for the order into a secured debt. It simply preserves for the benefit of all the creditors such assets as the debtor may have.
- [23] The bank plainly had no power to transfer funds from Meihuizen's bank account to the sheriff's bank account without the former's consent. Neither the common law nor the court's order entitled it to do so. All the money transferred should have been ordered to be restored to Meihuizen's bank account. The order granted by Nel J should also have been set aside by the court a quo. However, it does not follow that Maviga should have been denied any relief whatsoever. Its misunderstanding of the true nature of the property of TMP which was available to be attached, namely, the debt owed by Meihuizen to TMP, should not have debarred it from having that property attached under its claim for alternative relief. That is all the more so where, as is the case here, TMP did not oppose the attachment of even the money itself. It can hardly complain if its right to be paid the money by Meihuizen is attached or arrested in its stead.

- [24] The remaining issue is whether the attachment of that debt should also stand as security for Maviga's claim against TMP if it should become necessary for it to sue in Lisbon, Portugal because of a refusal by the South African Court to exercise jurisdiction. S 5 (3) (a) of the Act confers a discretion upon the court to grant such an order. No reason for believing that such an eventuality is likely to occur is given in the papers and no reason for confirming Nel J's granting of that particular order was given by Davis J, presumably because it was not the subject of a specific attack. However, such an order should not have been granted merely for the asking and in the absence of any reason to suppose that it was necessary. It too should not be allowed to stand.
- [25] Paragraphs 3 and 4 of the order of Nel J and paragraph 1 of the order granted by Davis J are couched in terms so wide as to cover freight monies received by Meihuizen on behalf of TMP from any source in future. However, it seems clear that only freight monies payable by Maviga were sought to be attached and that the reference to future payments was included only because Maviga was not certain when it launched its application that the payment of freight it had made had actually reached Meihuizen's bank account. It became clear that it had and that there was no further amount due by Maviga. The need for an order dealing with payments of freight which had not yet been made, but would be made in the future, therefore fell away. Consequently, I shall make no order in that respect.
- [26] Had the orders which I intend making now in substitution for the orders made by Nel J and Davis J been made in the court a quo Meihuizen would have succeeded in its application and been entitled to its costs. Such an order should now be made.
- [27] It is ordered:
- 27.1 that the appeal be and is hereby allowed with costs.
- 27.2 that the orders granted by Nel J and Davis J be and are hereby set aside and replaced by the following order:
- 27.2.1 that the sheriff of the court be and is hereby authorised and directed to attach the right, title and interest which Transportes Marítimos De Portugal LDA (TMP) has in the indebtedness to it of Meihuizen Freight (Pty) Ltd (Meihuizen) in the sum of R750 058,00 arising out of the receipt by Meihuizen on behalf of TMP of money paid to it by Maviga UK Limited (Maviga) in discharge of its obligation to pay freight to TMP;
- 27.2.2 The said attachment shall found or confirm the court's jurisdiction over TMP in respect of maritime claims relating to the loss of cargo while aboard the vessel mv 'TMP Sagittarius' and such attachment shall not be lifted unless Maviga consents thereto, or there is deposited with the registrar of this court security for Maviga's claim in an amount equivalent to the value of the debt attached.
- 27.2.3 The debt so attached or security deposited in lieu thereof shall be held pending the final outcome of the maritime claims referred to in paragraph 27.2.2 hereof;

27.2.4 Maviga is granted leave to sue TMP by way of edictal citation, a copy whereof is attached to this order marked 'A', the edict to be served by courier on TMP in English only at its business address, Avienda 24 de Julho 126-2, Lisbon, Estremadura, Portugal. TMP is given thirty (30) days from the date of service within which to enter an appearance to defend.

27.2.5 Maviga and/or the sheriff of this court and/or Nedcor Bank Limited are authorised and directed to restore to Meihuizen's bank account with number 1009365339 all amounts of money which were transferred in purported pursuance of the order of Nel J dated

26 July 2002 from that account to an account controlled by the sheriff.

27.2.6 Maviga is ordered to pay the costs incurred by Meihuizen in procuring the discharge of the order granted by Nel J in so far as it purported to attach money in the bank account of Meihuizen. The costs of the application before Nel J shall be costs in the cause of the proceedings referred to in paragraph 27.2.2 hereof.'

_____ R M MARAIS JUDGE OF APPEAL

SCOTT JA)

FARLAM JA)

JONES AJA)

PONNAN AJA) CONCUR

[1] Shipping Corporation of India Ltd v Evdomon Corporation and Another [1993] ZASCA 167; 1994 (1) SA 550 (A) at 562H. [2] Dantex Investment Holdings v National Explosives 1990 (1) SA 736 (A) at 747C-D; 748A-B; G-J; 749I; 750J-751A:[3] Ormerod v Deputy Sheriff, Durban 1965 (4) SA 670 (D) at 673C-H, cited with approval in Burg Trailers SA (Pty) Ltd v ABSA Bank Ltd 2004 (1) SA 284 (SCA) at 288G-289B.[4] Cf Burg Trailers SA (Pty) Ltd v ABSA Bank Ltd, supra at 288F-G.[5] Knox D'Arcy Ltd and others v Jamieson and others 1994 (3) SA 700 (W) at 706D-E. See the comment of E M Grosskopf JA in the judgment of the Appellate Division in the same case [1996] ZASCA 58; (1996 (4) SA 348 (A) at 372A-C).

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