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KIRKPATRICK, A.J.

DELIVERED ON: 1997.04.22

JUDGMENT

Application for summary judgment against Third Defendant, the Deputy Sheriff for Walvis Bay, for damages for alleged failure to attach a cargo of fish aboard a vessel in harbour in pursuance of an order of court in an urgent application. The Third Defendant in his return of service stating that he had attached the cargo. Until contrary proved this allegation must stand. Failure to make inventory of goods attached not fatal. Provisions of Rule 45 requiring inventory not applicable when specified goods ordered to be attached. When the Plaintiff in his application for an urgent order attaching goods pendente lite failed to apply for order restraining vessel from sailing, no obligation on Deputy Sheriff to do so. Although Third Defendant's opposing affidavit not as clear and explicit as it might have been, affidavits in summary judgment matters customarily treated with certain degree of indulgence. Summary judgment refused and leave to defend granted.

**IN THE HIGH COURT OF NAMIBIA**

**In the matter between:**

**NAMIBIA EXPORT SERVICES CC**

**and**

**OCEAN LINK CC**

**INTERNAM SHIPPING (PTY) LIMITED**

**SHERIFF OF THE COURT, WALVIS BAY,  
ADAM FRANS BARNARD**

**THE GOVERNMENT OF THE REPUBLIC OF  
NAMIBIA**

**CORAM: KIRKPATRICK, A.J.**

**Heard on:**

**Delivered on:**

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**JUDGMENT**

**KIRKPATRICK. A.J.: In this matter Plaintiff applied for summary judgment against Second and Third Defendants for certain sums of money in respect of damages, interest and costs. When the matter came before this court on 31st January, 1997, Frank, J. (as he then was, but who now appears for the Plaintiff), at the request of Plaintiffs Counsel at that time agreed to the removal from the roll of the application against Second Defendant, and ordered that the application against**

Third Defendant be postponed to a date to be arranged. It is that application which is now before the court.

Plaintiffs claim arises from the alleged negligence of the Third Defendant, the Deputy Sheriff for the district of Walvis Bay, in giving effect to an order made by Frank, J. on 25<sup>th</sup> May. 1996 that certain movable property be attached.

At the commencement of the proceedings I enquired Com Mr. Frank as to whether he had considered the propriety of his action in appearing in the proceedings in the light of the fact that the claim flows from an order made at the time by Mr. Frank (then Mr. Justice Frank) himself.

Mr Frank assured me that he had considered the matter, but that as the correctness of the order made by him was not in issue he saw no reason why he should now be precluded from acting for the Plaintiff in these proceedings. I accepted this assurance, and the matter proceeded.

Mr. Frank argued, and Miss Engelbrecht for the Third Defendant conceded, that the claim, although for damages, was for a liquidated amount in money, and that accordingly the application fell within the ambit of Rule 32. Miss Engelbrecht further stated that the *quantum* of Plaintiffs claim was not disputed.

This court, in a matter which came before it as a matter of urgency on 25<sup>th</sup> May, 1996 (a Saturday), issued a *rule nisi* authorising the Deputy Sheriff for the district of Walvis Bay to attach a certain quantity of fish (said to comprise 1 162.06 metric tons) in terms of an order reading as follows:-

"The Applicant having undertaken to:

1. Be liable for all costs necessary to offload the cargo from the 2<sup>nd</sup> Respondent which forms the subject matter of this application and the consequent costs pertaining to the attachment without prejudice to any of its rights to recoup these amounts from first Respondent in due course, and

2. Be liable for any damages caused to the first Respondent should it be held on the return day of this interim order or at the end of the intended action that applicant was not entitled to this order.

IT IS ORDERED

3. That the Applicant's non-compliance with the rules is condoned by virtue of the urgency of this matter;

4. That a rule nisi is hereby issued calling upon Respondents to show cause, if any, on Friday 21 June 1996 at 10h00 why an order set out hereunder should not be made final;

2.1 Authorising the Deputy Sheriff for the District of Walvis Bay, to attach the cargo as set out in annexure "NT1" attached to Applicant's affidavit, currently in possession of First Respondent and in the harbour of Walvis Bay to off-load the said cargo onto a vessel to be appointed by the Applicant and to be kept under the authority of the Deputy Sheriff in a safe place;

pending the outcome of an action to be instituted by the Applicant against First Respondent in terms whereof the Applicant will claim:

5. Cancellation of the agreement entered into between the Applicant and the Respondent, and
6. Delivery of the cargo as set out in Annexure "NT1" to the Applicant.
7. The First Respondent is ordered to pay the Applicant's costs.
8. The order as set out in paragraph 2.1 supra shall become operative with immediate effect.
9. The Applicant is ordered to institute the action as mentioned in paragraph 2.1 (a) and (b) within 14 days from this order having been served on the Respondents."

The Plaintiff alleges that the Third Defendant negligently failed to give effect to the order in that he did not attach the cargo and did not procure its discharge from the MV BOSCO REEFER upon which it was presumably situated at the time the order was granted, and that the vessel, with the cargo on board, sailed for Ghana on 28<sup>th</sup> May, 1996.

The amounts which the Plaintiff claims were expenses incurred in procuring the resale of the cargo. The crux of Plaintiff's claim against the Third Defendant is set out in paragraph 28 of the Particulars of Claim, which reads as follows :-



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(OFFICE)"

He further states that the question of transshipment or off-loading of the cargo into cold store was discussed, and Malherbe stated that Taylor would make the necessary arrangements for the transshipment or off-loading of the cargo, and advise him. This Taylor failed to do, and the vessel sailed. According to the particulars of claim, this occurred on the 28<sup>th</sup> May, 1996.

Mr. Frank argued that the Deputy Sheriff had two distinct and separate duties to perform, viz., he had (a) to serve the order of court; and (b) to attach the cargo. He argued that service of the order was defective as it was not served on all the parties, and referred to the return of service where it is stated that a copy of the order was, *inter alia*, served on Mr. Dos Santos "represented by Owners." This, of course, does not make any sense, and Mr. Frank conceded that what the Deputy Sheriff intended to state was that service was effected on Mr. Dos Santos "representing the Owners". However, he referred to the provisions of Rule 4 (!) (a) (vi) which provides that service may be effected on any agent who is duly authorised in writing to accept service, and argued that there was no proof that Mr. Dos Santos had been authorised by the owners to accept service. He further argued, and Miss Engelbrecht conceded, that he did not serve on the Master. I shall deal with this aspect later.

Insofar as the attachment itself is concerned, Mr. Frank argued that there were two elements of the order of court. Firstly he had to attach the cargo, and secondly, having done so, he had to off-load the cargo onto a vessel to be appointed by the

Plaintiff and to be kept in a safe place. It is common cause that the Plaintiff (the Applicant referred to in the order), never nominated a vessel onto which the cargo had to be off-loaded. He argued that all the Third Defendant had to do was to attach the Bills of Lading to effect a valid attachment, and referred the court to *Bamford, The Law of Shipping and Carriage in South Africa 3<sup>rd</sup> edition* at p. 30 and 32, and to *Lendalea.se Finance Ltd. v.s Corp de Mercadeo Agricola, 1976 (4) 464 (AD)* at p. 491A - 492E. However, Third Defendant never did so, nor did he take an inventory of the cargo, and, argues Mr. Frank, from the return of service and the opposing affidavit it is clear that Third Defendant never boarded the vessel.

**M**r. Frank further argued that Third Defendant should have put someone on board the vessel to protect the cargo, and should have applied to court for an order to prevent the vessel from sailing. In support of this latter proposition he referred to the decision in *Deputy-Sheriff, Cape Town v South African Railways and Harbours and Others 1976 (2) SA 391 (C)*.

Miss Engelbrecht, for the Third Defendant, argued that service of the order and attachment of the cargo must be viewed separately, and with this contention I agree. In any event, there is nowhere on record an allegation that Third Defendant failed to serve the order, and the grounds alleged for his negligence are set out in paragraph 25 of the Particulars of Claim as follows -

"25. The Sheriff negligently failed to give effect to the order in that he did not attach the cargo and did not procure its discharge from the MV 'BOSCO REEFER'".



Insofar as the sailing of the vessel is concerned, Miss Engelbrecht argued that even if the order had been served on the Master personally this would not have prevented the vessel from sailing in the absence of an order of court to that effect. The case of *Deputy-Sheriff, Cape Town, supra* did not place any duty on the Third Defendant to obtain an order of court restraining the vessel from sailing before the cargo was discharged; it merely confirms his right to do so had he reason to believe that this would happen. It was the duty of Plaintiff, she argued, to have applied for the necessary restraining order at the time it applied for the attachment, and it cannot hold the Third Defendant liable for the consequences of the ineffective order it sought and obtained.

Insofar as the attachment is concerned, Miss Engelbrecht argued that Third Defendant in his return of service stated that he had attached the cargo, and until the contrary is proved this allegation must stand. I agree with this submission.

She further argued that in terms of the order of court the off-loading of the cargo was an integral part of the attachment, and until the cargo was off-loaded the process of attachment was not complete. Plaintiff did not comply with the obligations imposed upon him to ensure the off-loading and safe-keeping of the cargo.

Mr. Frank argued that the Third Defendant had failed to attach the cargo in that he failed to make an inventory of what he had attached, and referred to Rule 45 and to various decisions dealing therewith. The requirements of Rule 45 relating to the making of an inventory relate to the issuing of a writ where!;} the deputy sheriff is required to levy and raise a sum of money upon the goods of any person, and are not relevant to this case. In my view, the reason for requiring an inventory is to establish precisely what goods have been attached. In the instant case it is

common cause that the cargo requiring to be attached in pursuance of the order, and which Third Defendant stated that he had attached, was approximate!)' 16000 metric tons of horse mackerel. The case of *Barclays Western Bank Ltd vs Dekker and Another 1984 (3) SA 220 (D)* quoted by Mr. Frank takes the matter no further - this dealt with an attachment under section 19 (1) of the Insolvency Act, 1936. and that act specifically requires the deputy sheriff to make an inventor}' of goods attached by him.

If indeed the Third Defendant was negligent in effecting the attachment, which I cannot decide without evidence as to precisely how the attachment was effected, such negligence appears to have been largely due to the instructions given to the Third Defendant by the Plaintiffs attorney as set out in annexure "B" to the opposing affidavit. This clearly states "Masters and Owners represented by J dos Santos of Internam", and Third Defendant can hardly be faulted for acting on those instructions in serving the order. Furthermore, the note states "transshipment only to commence Monday". I cannot accept that there was any obligation upon Third Defendant to "timeously discharge the cargo" as alleged in paragraph 28 of the Particulars of Claim *supra* in view of the failure of the Plaintiff, as required by the order, to nominate the vessel onto which the cargo was to have been loaded.

Nor do I consider that there was any obligation on Third Defendant to apply to court for an order restraining the 'BOSCO REEFER' from sailing, as contended by Mr. Frank.

In terms of Rule 32 (3) (b) the Third Defendant must satisfy the court that he has a *bona fide* defence to the action in order to be granted leave to defend the action.

A great deal of Mr. Frank's argument was based upon speculation as to what Third Defendant did or did not do, and in the case of a procedure as drastic and far-reaching as a summary judgment I am not prepared to find that Third Defendant has not established a *bona fide* defence purely on speculation and without having before me evidence which clearly shows that he was indeed negligent as alleged by the Plaintiff.

It is true that the opposing affidavit is not as clear and explicit in setting out details of the attachment as it might have been, but as was said by Grosskopf, A. J. (as he then was) in the case of *Koomklip Beleggings (Edms) Bpk v. Allied Minerals Lid 1970 (I) SA 674 (C J* at p. 678 E, affidavits in summary judgment matters are customarily treated with a certain degree of indulgence.

In the event, I am satisfied that Third Defendant has *prima facie* established a *bona fide* defence to the action.

I turn now to the question of costs. Miss Engelbrecht argued, and quoted the *Koomklip* case *supra* and other cases in support thereof, that in cases of this nature where the Defendant has been successful, he is entitled to be awarded costs. She also argued that such costs should be awarded as between attorney and client where, after becoming aware of Defendant's defence, Plaintiff nevertheless proceeded with his application. Miss Engelbrecht, wisely I think, did not press this latter argument. I see no reason why the usual order that costs be decided by the Judge trying the main action should be departed from.

I accordingly make the following order -

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10. Summary judgment against the Third Defendant is refused.
  11. Third Defendant is granted leave to defend Plaintiffs claim.
  12. The costs of this application and of this hearing shall stand over for decision of the

A handwritten signature in cursive script, appearing to read "Kirkpatrick".

**KIRKPATRICK, ACTING JUDGE**

ON BEHALF OF THIRD DEFENDANT:

Instructed by:

MISS A. ENGELBRECHT

Diekmair Associates