

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EXERCISING ITS ADMIRALTY JURISDICTION
ADMIRALTY JUDGMENT

Case No: AC 11/2018

Name of vessel: MT "PALENQUE I"

In the matter between:

GMTC I LLC

APPLICANT

v

**THE FUND CONSTITUTED FROM THE SALE OF
THE MV "PALENQUE 1**

1ST RESPONDENT

**THE FUND CONSTITUTED FROM THE SALE OF
THE BUNKERS ON BOARD THE MV "PALENQUE 1"
JACK MARINE INTERNATIONAL LIMITED**

2ND RESPONDENT

3RD RESPONDENT

BUNKERNET LIMITED

4TH RESPONDENT

**ACTING DEPUTY SHERIFF FOR THE DISTRICT
OF WALVIS BAY**

5TH RESPONDENT

Neutral citation: *GMTC I LLC v THE MOTOR VESSEL "Palenque 1"* (AC 11/2018) [2019] NAHCMD 68 (28 March 2019)

CORAM: NDAUENDAPO J

Heard: 28 October 2018

Delivered: 28 March 2019

Flynote: Admiralty Practice – Whether to confirm Referee’s report – Priorities – Recommendation to rank mortgagee ahead of necessaries supplier – Priorities (ranking) – Whether mortgagee or necessaries supplier should have preference on proceeds of sale of vessel – Whether powerful reason existed to disturb established order of priorities- Referee’s report – Recommendation that existing order of priorities not to be altered – Referee’s report confirmed.

Summary: The applicant (the Lender) seeks an order confirming and implementing the report of the Referee. In that report, the Referee recommended that the Lender’s mortgage claim on the proceeds of the sale of the Vessel should rank above Bunkernet’s claim for necessaries supplied to the Vessel. Bunkernet is unhappy with that recommendation and argues that its necessaries claim should rank above the Lender’s claim because there are powerful reasons and special circumstances warranting its claim to rank above the Lender’s claim. The Lender lend money to the owner of MV Palenque I (the Vessel). The Lender registered a Panamanian mortgage bond over the Vessel as security for its money. The owner defaulted on the repayment and the Vessel was sold and the proceeds went into a fund. Two funds, the ship fund and bunker fund were created. Adv. Cooke was appointed as a Referee to receive, examine and determine the validity and quantum of those claims. The Lender lodged a mortgage claim in the total amount of USD4,205,607.28.

Bunkernet lodged 3 claims. Bunkernet claimed that its claim for necessaries (bunkers and lubricants) supplied to the Vessel should rank above the Lender’s claim because (1) the Lender was aware that the owner of the Vessel was insolvent at the time the loan agreement was concluded (2) the Lender was aware of the nature and extent of the expenditure incurred by Bunkernet (3) the bunkers and lubricants supplied to the Vessel was for the benefit of the lender. Bunkernet argued

that for the sake of equities and to prevent an obvious injustice, its claim should rank above the Lender. The Referee ruled that the established priorities of ranking in English admiralty law was that the mortgagee (Lender)'s claim should rank above the necessaries claims. The established order can only be altered if 'powerful reason' or exceptional circumstances exist to avoid an obvious justice. The Referee found that the Lender did not have knowledge that the owner was insolvent. The Referee also found that the Lender did not have advance knowledge of the nature and extent of the expenditure incurred by Bunkernet as the day to day management of the Vessel was in the hands of the owner or agent. The Referee also found that the bunkers and lubricants were supplied to the Vessel so that it could sail to Alang (India) and once there, the purchase price would be paid and the money could be used to pay all the creditors, and not only the Lender.

The Referee rejected the arguments of Bunkernet and found that there was no reason to alter the established priorities and therefore recommended that the Lender's mortgage claim should rank above Bunkernet's claim for necessaries.

The Lender applied to this court to confirm the report of the Referee. Bunkernet opposed the application. Bunkernet submitted that the Referee erred in recommending that the Lender's mortgage claim should rank above its claim for necessaries supplied. Bunkernet argued that there are powerful reasons and special circumstances to warrant that its claim should rank above the Lender because (1) the Lender knew about the insolvency of the borrower (2) the Lender knew about the nature and extent of the necessaries supplied to the Vessel (3) it was for the benefit of the Lender that the necessaries were supplied.

Bunkernet also filed a counter application seeking an order that its necessaries claim must be paid out of the fund before the Lender's claim. In the alternative Bunkernet prayed that the matter be referred to oral evidence and that full discovery be done by the Lender.

Held, that, the Colonial Court of admiralty Act 1890 is part of Namibia Law by virtue of s 1(i) of Proclamation 21 of 1990.

Held, further that in terms of the Colonial Court of Admiralty Act 1890, the Law to be applied is English Admiralty Law as at 1890 and subsequent decisions which clarify or expand on the Law as at 1890 also apply.

Held, further, that in terms of Admiralty Law, there is a *prima facie* established order of priorities and in terms of that, the mortgagee claim rank above the necessities' claim.

Held, further, that the established order of priorities should not be altered, unless powerful reason or exceptional reasons exist to avoid an obvious injustice.

Held, further, that Bunkernet had not shown that the Lender knew of the insolvency of the borrowers, nor that the Lender was aware in advance of the nature and extent of the expenditure incurred.

Held, further, that the necessities supplied was not only for the benefit of the Lender, but also for other creditors.

Held, further, that the Referee was correct in rejecting the argument of Bunkernet that its claim for necessities supplied should rank above the Lender's claim.

Held, further, that there is no dispute of fact on the paper before me to warrant the referral of the case to oral evidence.

Held, further, that the application for striking out has no merits as there is no prejudice to Bunkernet if such averments remain on the affidavit.

ORDER

1. The application to confirm and implement the Referee's report in terms of the order marked "X" is granted.

2. The fourth respondent is ordered to pay the costs of the applicant, such costs to include the costs of one instructing and two instructed counsel.
3. The counter application is dismissed.
4. The fourth respondent is ordered to pay the costs of the applicant, such costs to include the costs of one instructing and two instructed counsel.
5. The application in terms of Rule 17(4) is dismissed.
6. The fourth respondent is ordered to pay the costs of the applicant, such costs to include the costs of one instructing and two instructed counsel.

JUDGMENT

NDAUENDAPO, J

Introduction

[1] The applicant (“the Lender”) seeks an order confirming and implementing the Referee’s report marked “X” in terms of the draft order. The fourth respondent, to whom I shall refer as Bunkernet throughout the judgment, opposes the application. The central issue for determination is under what circumstances should the claim of Bunkernet for necessaries supplied to the Vessel rank above the claim of the Lender (mortgagee) on the proceeds of the sale of the Vessel. In other words, who should get precedence on the proceeds of sale of a Vessel? Secondly, was the Referee correct to recommend that the claim of the Lender, should rank above Bunkernet’s claim for necessaries?

The parties

[2] The applicant is GMTC 1 LLC (“the Lender”), a company incorporated in the United States of America, carrying on business at 15 River Road, Suite 320, Wilton, connection 06897, United States of America.

[3] The first respondent is the fund constituted by the proceeds of the sale of the motor vessel “PALENQUE” 1 (“the Vessel”) which took place on 20 April 2018

pursuant to a final order for the sale of the vessel granted by this Honourable Court on 17 April 2018 (“the Ship Fund”).

[4] The second respondent is the fund constituted by the proceeds from the sale of the bunkers on board the vessel (“the Bunker Fund”).

[5] The third respondent is JACK MARINE INTERNATIONAL LIMITED (:Jack Marine”), a company duly incorporated under the laws of Nigeria and having its registered office at 73A Marine Road, Apapa, Lagos, Nigeria. Jack Marine is represented by Simms showers LLP.

[6] The fourth respondent is Bunkernet Limited (“Bunkernet”), a company duly incorporated in Cyprus and which carries on business at Panteli Modestou 3A, 3090, Limassol, Cyprus.

[7] The fifth respondent is the Acting Deputy Sheriff for the district of Walvis Bay (“the Sheriff”), currently residing at 43 Moses Garoeb Street, Walvis Bay, Namibia.

[8] Tilman Enterprises Inc. (“the Owner”), the former owner of the vessel, is not cited as a respondent as it did not participate in the claims adjudication process and no longer has an interest in the matter.

Background facts¹

[9] On 9 November 2017, the Lender concluded a loan agreement (“the loan agreement”) with the Owner, Bondi Shipholding S.A (“Bondi”) and Nodol Trading S.A (“Nodol”) as joint and several borrowers (collectively “the Borrowers”). The loan facility was up to USD12,500,000.00 (“the loan”) and it was to assist the Borrowers to refinance their existing indebtedness in respect of the Vessel, the mt “Sea Pioneer” and the mt “Huascar”. The loan was secured by a First Preferred Panamanian Ship Mortgage (“the mortgage”) over the vessel executed preliminary on 14 November 2017 and permanently registered on 11 December 2017.

¹ Mr. Craig Neil Cunningham deposed to the founding affidavit.

[10] The Borrowers breached the agreement by *inter alia*, failing to pay one third of the repayment instalment plus interest as per clause 17.4 of the Loan Agreement by 13 December 2017 and by failing to pay an amount equal to the shortfall in the earnings account due to be transferred to the retention accounts in accordance with clause 17.5 of the Loan Agreement.

[11] On 10 January 2018 a notice of default and acceleration was communicated to the Borrowers drawing their attention to Events of Default and declaring that all sums under the Loan Agreement was due and payable with immediate effect. The Accelerated amount due and payable was USD13,494,778.68 plus interest accrued and accruing thereon.

[12] On 28 February 2018, the Lender, as the plaintiff, instituted proceedings against the Vessel *in rem* and arrested the Vessel under case no AC 11/2018. On 14 March 2018 the Lender filed an urgent application for the sale of the Vessel. On 20 March 2018 a *rule nisi* was issued with the return date of 17 April 2018. On 10 April 2018, Bunkernet filed an application to intervene and thereafter an amended order was granted by agreement between the Lender and Bunkernet.

[13] In terms of the final sale order granted, two funds, the **Ship Fund** and the **Bunker Fund**, were established. After the right procedures were followed, the Vessel was sold by judicial private treaty to NKD Maritime Company SA (“the purchaser”) for the sum of USD2,250,000.00 (USD,164,400.00 in respect of the Vessel and US85 600.80 for the bunkers). She was delivered to the owner on 20 April 2018.

[14] Adv Darryl Cooke of the Cape Bar was appointed as a Referee in respect of the Funds to receive, examine and report to this Court on the validity, quantum and ranking of claims against the Funds.

The Lender lodged claims against the Funds claiming:

14.1 payment of the sum of USD5,779,401.98 (**the mortgage claim**);

- 14.2 Payment of the sum of USD737,075.98 (expenses claim) for additional costs and expenses incurred by the Lender in connection with the enforcement and preservation of its rights under the loan agreement and mortgage.
- 14.3 Payment in the sum of USD168,244.80 for costs and expenses incurred by the Lender to preserve the Vessel from the arrest at Walvis Bay until conclusion of the sale.
- 14.4 legal costs incurred by the Lender to procure the sale of the Vessel and the distribution of the proceeds of the sale.
- 14.5 Interest on the claim amounts.

[15] The Lender also lodged a claim of USD67,466.17 against the Bunker Fund for MGO (Marine Gas Oil) supplied to the Vessel at Luanda on 6 February 2018 and at Walvis Bay after the Vessel was arrested. The Lender's claim was later amended so that a portion of such claim in the sum of USD60 968.52 was against the Ship Fund and only USD6,497.65 be claimed from the Bunker Fund. Jack Marine and Bunkernet objected to the ranking of the Lender's mortgage claim against the ship fund. Bunkernet also objected to the Lender's claim against bunker fund.

The Sheriff

[16] The **Sheriff** claimed a sum of N\$23 952.25 plus interest in respect of supervision expenses whilst the Vessel was under arrest and costs of assessment, collation and submission of his claim against the fund. The sheriff argues that his claim should rank as a first charge against the ship fund.

[17] **Jack Marine** claimed a sum of USD170 133 in respect of goods and services supplied to the Vessel. The referee rejected the argument of Jack Marine that its claim should rank above the Lender and argued that 'Jack Marine had not 'discharged' the heavy burden of the proof which rests upon it.'

Bunkernet's claims

[18] Three (3) claims were lodged: (1) A preferential ranking for the costs of intervening in the sale application (2) USD90 347.31 in respect of bunkers and lubricants consumed by the Vessel whilst under arrest in Walvis Bay plus interest.

(3) the sum of USD151 837.95 in respect of bunkers and lubricants supplied by it to the Vessel at Lomé, Togo on 16 November 2017, less the value of the bunkers and lubricants on board the Vessel at the time of her first arrest. It also claimed the costs of preparing and lodging of the claims with the Referee.

[19] Bunkernet argued that claim 2 should rank as preservation claim. As far as claim 3 is concerned, Bunkernet argued that its claim should rank as a statutory claim in *rem* and rank **above** the Lender's claim (mortgage claim). The Lender on the other hand, objected to the quantum of claim 2 as well as the ranking Bunkernet sought in respect of claim 3.

The Referee's report

[20] On 27 July 2018 the Referee's final report was published in which he made recommendations concerning the validity, quantum and ranking of claims lodged against the funds. The Referee submitted his report with the following recommendations: (a) that the claim of the Sheriff in the amount of N\$23 952.25 plus interest be paid from the ship fund as a first charge; (b) Bunkernet's claim for the price of bunkers used to preserve the Vessel while under arrest be accepted in the amount of USD81 684.55 and paid out of ship fund; (c) the Lender's claim of USD4,205,607.28 be approved for payment, with the result that the Lender be paid the balance of the Ship Fund remaining after payment of the Sheriff, the Referee, Infology (a document storage website used by the Referee) and Bunkernet's claim in the amount of USD81 684.55 (d) The balance of Bunkernet's claim for payment out of the Ship Fund being USD166 998.36 plus interest be accepted, but that this claim rank after applicant's claim, with the result that no part of it would be paid out of the Ship Fund.

[21] The Referee in his report rejected the ranking sought by Bunkernet and ruled that the Lender's mortgage claim must rank above Bunkernet's claim.

[22] The Referee ruled that in terms of the Admiralty Court Act, 1890 the law to be applied is the English Admiralty law as at 1890 including English Admiralty law decisions that clarified or expanded on the law as at 1890. In terms of English

Admiralty law and therefore Namibian Admiralty law the ranking is based on the scheme of priorities based on consideration of equity. According to the learned author *Nigel Messon*² English law recognizes a *prima facie* ranking as follows:

1. Charges and expenses of the admiralty Marshall (i.e. the sheriff)
2. Costs of the producer of the Fund
3. Maritime liens
4. Mortgages
5. Statutory rights action in rem.

[23] The main issue for determination before the Referee was: **when and in what circumstances a court will permit a departure from the recognized order of priorities so that necessaries claims take precedence over mortgage claims?** Bunkernet argued that the equities required its necessaries claim being given priority over the mortgage's claim for the following reasons: (1) the Lender must have been aware that the owner was in financial difficulties, (2) At the time of registration of the preliminary mortgage, the Lender must have known that the Vessel would require bunkers and lubricants, (3) the bunkers and lubricants were supplied before permanent registration of the Lender's mortgage on 11 December 2017, (4) It was for the benefit of the Lender that the Vessel was bunkered in that it initially allowed the Vessel to be delivered to a buyer, and the payment of the loan facility would have been made from the proceeds of the sale, but in the result allowed the Vessel to be directed to Walvis Bay for the purpose of execution in a favourable jurisdiction to the mortgagee.

[24] Bunkernet relied on a case of *The Posidon*,³ a judgment of the Singapore High Court, in arguing that its claim should rank above the Lender's mortgage claim. In *The Posidon* the court applied the same English law principle as applied in Namibia.

In *The Posidon* the court held that:

'The established order of priorities might be altered if the equities demanded, but only if there was a 'powerful reason' to do so. There had to be truly exceptional or special

² Nigel Messon Admiralty Jurisdiction and Practice (2ed) 2000.

³ The 'Posidon' and another matter, High court of Singapore Lloyd's Law Reports 2017 vol. 2 at 390.

circumstances, and the departure had to be essential to prevent an obvious injustice. Three main factors went to the equities of the particular case to warrant a departure from the established order of priorities. First, it had to be shown that the mortgagee knew the mortgagor was insolvent. Secondly, it had to be shown that the mortgagee was fully aware, in advance, of the nature and extent of the expenditure incurred by the competing claimant. Thirdly, it had to be shown that such expenditure brought about some benefit to the mortgagee.' The court further held that the burden of proof (onus) is on the party seeking departure from the established order of priorities and will have to adduce cogent evidence of the special circumstances.

[25] The Referee found that: 'No evidence was adduced to show that at the time the necessaries were supplied to the Vessel the owner was insolvent nor have they shown that the Lender knew of the owner's insolvency. Also a temporary lack of liquidity does not amount to insolvency. The Referee also found that the Event of Default only occurred on 13 December 2017 after Bunkernet supplied necessaries to the Vessel. At the time the Bunkers were supplied to the Vessel in Lomé, the 'Sea Pioneer' was held up and the "Huascar" and the Vessel had been sold for almost USD3 million. Upon delivery of the two Vessels in Alang, USD4.5 million was to be repaid to the Lender. The balance of loan was to be repaid by quarterly payments of USD250 000 and final balloon payment of USD3 million and from the purchase price of the two Vessels, about USD1.8 million was available to pay creditors other than the Lender. The Referee concluded that he does not agree with the assertion by Bunkernet that at the time that the bunkers and lubricants were supplied to the Vessel at Lomé, the Lender was aware that the owner and other borrowers could not settle their indebtedness and were insolvent.'

Full knowledge of the nature and extent of the expenditure

[26] The Referee also found that Bunkernet have not shown that the Lender knew in advance of the full nature and extent of expenditure incurred by it. There must be full awareness in advance.

Benefit to the Lender

[27] The Referee also found that no evidence that the expenditure brought some benefits for the Lender. 'At the time of the supply of necessaries by Bunkernet, a fortnight earlier, the owner had sold the Vessel to NKD and in terms of the sale agreement the owner had to deliver that Vessel to NKD in Alang, Bangladesh. The

sale agreement was only cancelled on 16 February 2018, so by the time Bunkernet supplied the fuel in Lomé, it was contemplated by the owner that the Vessel will be sailing to Alang. At Alang the owner would have received the balance of the purchase payment from NKD (USD2 457 019.10) of this amount USD2 million was due to be repaid to the Lender, the repayment of Drawing C. It would seem then that the balance of USD457,019.10 would be available to pay the owners other creditors, so the supply of bunkers was therefore made for the benefit of all creditors of the Vessel, not only the Lender.' No evidence that the Lender knowingly accepted benefits at the expense of Bunkernet or Jack Marine.

[28] The Referee stated that: 'Bunkernet complains that if the ranking order is not disturbed, the Lender will recover its expenditure on bunkers, while Bunkernet will not. This is a consequence of the Lender having secured its claims by way of a mortgage. Bunkernet, on the other hand, chose to supply bunkers on credit without obtaining security for its claims save for the retention of ownership. The arrangement is typical of bunker suppliers. Bunkernet's choice amounts to a commercial risk which is mitigated, to a degree, by the application of a very high rate of interest of 3% per month. I therefore do not think it is particularly inequitable that the Lender should outrank Bunkernet.' The timing of registration is immaterial as the necessities were provided after registration of the mortgage.

[29] In the result the Referee ruled that an alteration of the usual order of priorities was not required to prevent an obvious injustice.

[30] After the report, the Lender applied to this Court to have the report confirmed and the recommendations implemented. Bunkernet opposed the application and filed a counter application.

Counter application

[31] In the counter application, Bunkernet filed one affidavit as an answering affidavit to the application of the Lender and the same affidavit as the founding affidavit to the counter application and sought an order in the following terms:

1. That the fourth respondent's claim as described in the report of the Referee dated 26 July 2018 at lines 6 to 9 be paid out of the first respondent fund;
2. That after payment of the fourth respondent's claim, the costs of the preparation and submission thereof, and the costs of the application and this counter-application, the balance of the first respondent fund be paid to the applicant;
3. That the applicant be directed to pay the costs of this application.
4. In the alternative to paragraphs 1, 2 and 3 above:
 - 4.1 That the applicant be directed to make available for examination and cross-examination Mr. Dimitri Andonatos and Mr. Nicholas Dracolis or, failing them other witnesses who are competent to give oral evidence on the following issues:
 - 4.1.1 The financial circumstances of Tillman Enterprises Inc.; the erstwhile owner of the MV "Palenque 1" ("the Vessel") at the time that the bunkers and lubricants were supplied to the vessel at Lomé on or about 14 and 15 November 2017;
 - 4.1.2 The applicant's knowledge relating to the supply of the bunkers and lubricants to the Vessel.
 - 4.1.3 The benefit accruing to the applicant arising from the supply of the bunkers and lubricants to the vessel at Lomé; and
 - 4.1.4 All other issues relevant to the equities of subordinating the applicant's claim to that of the fourth respondent.
 - 4.2 That the applicant be directed to discover, in terms of High Court Rule 28, all documents relevant to the determination of the above issues one calendar month of this order being made.
 - 4.3 That the hearing of the oral evidence be conducted according to the High Court Rules and Namibian law of evidence and on a date allocated by the Registrar of this court.
 - 4.4 That the costs of this counter-application stand over for later determination.
 - 4.5 That, after the hearing of oral evidence as described above, the first respondent fund be dealt with in the manner that this honourable court shall order.
5. Further and/alternative relief.'

Background facts to the counter application

[32] The facts, as per the answering and founding affidavit of Mr. Pfeiffer, may be summarized as follows:

On 29 September 2016 GMTCC (“the lender”) lent an amount of USD15,500,000.00 to 4 entities, including Tillman Enterprises Inc., the owner of the Vessel. As at 9 November 2017 there was an amount of USD8,268,424,86, plus interest outstanding and ‘back end fee’. On 30 October 2017 Tillman Enterprises sold the Vessel to NKD Maritime Limited for USD3,264,000.00. Delivery was to take place in Alang, India. On 9 November 2017 the lender entered into a Loan Agreement with Tillman and two other entities pursuant to which it lent these entities a total of USD12 500,000,00. Of that amount, USD2,000,000.00, was allocated to Tillman as ‘Drawing C’. On 9 November 2017 Tillman and the two other borrowers requested the Lender to advance the full loan amount, being USD12 500,000.00. Of that amount USD1,916,041.00 was paid to the credit of Tillman. As security for the loan amount of USD12,500,000.00 plus interest a Panamanian provisional mortgage bond was registered over the vessel on 14 November 2017 and permanently registered on 11 December 2017.

[33] On or about 14 November 2017 Tillman or the vessel’s manager acting on behalf of the Tillman placed an order with Bunkernet for the supply of approximately 480 mt of marine fuel oil (IFO) and 60 mt of marine gas oil (MGO) to be delivered to the Vessel at Lomé, Togo. Bunkernet accepted the offer. On 16 November 2017 Tillman or the vessel’s manager acting on behalf of Tillman, placed an order with Bunkernet for the supply of 92 drums of lubricants, to be delivered at the vessel at Lomé, Togo. Bunkernet accepted this offer.

[34] A quantity of 450.04 mt of IFO and 60 044 mt of MGO was dully pumped on board the Vessel at Lomé on 15 November 2017 and on 16 November 2017 the 92 drums of Lubricants were delivered to the Vessel. Tilman was accordingly indebted to Bunkernet in a total amount of USD327 786.06. The amount was due on 14 and 15 January 2018, but Tilman did not pay any amounts. Part of the invoice value of the bunkers and lubricants had been paid out of the ship fund and the Bunker fund. The Vessel arrived at Walvis Bay on 21 February 2018 and was arrested on 23 February 2018 by Jack Marine and on 28 February 2018 by the Lender to enforce its claim under the mortgage for payment of USD13,494,779.65 plus interest. On 17 April 2018 the Vessel was sold by order of this Court. The Funds, the Ship and

Bunker Funds were created and Adv. Cooke was appointed as a Referee and made recommendations as to how the proceeds should be paid out. Most importantly, the Referee recommended that the Lender's claim should rank above Bunkernet's claim.

[35] Bunkernet is unhappy with that recommendation and argues that its claim should rank for payment before the Lender's claim. Bunkernet argued that, the Referee **erred** in ranking the claim of the Lender above Bunkernet, by having regard to only the three factors as stated in *The Posidon* judgment. Bunkernet argued that there are 'powerful reason' for subordinating the Lender's claim to that of Bunkernet and for those reasons the recommendation of the Referee that the generally accepted scheme of priorities should apply, should not be followed and implemented. Bunkernet contended that general consideration of equity, commercial expediency and justice have application. The Lender relied on the repayment of that part of the debt allocated to Tillman on the Vessel completing its voyage to Alang and when it became evident to the Lender that the Vessel might not complete its voyage without an arrest, it caused the Vessel to be diverted to Walvis Bay so as to take advantage of the rules of the *lex fori* which afford a favourable priority to the claims of mortgagees.

[36] Bunkernet argued that by the time the Loan Agreement was concluded, the Lender was aware that Tillman was insolvent. Furthermore the mortgage on which the Lender relies on was registered on 11 December 2017, one month after the Bunkers and Lubricants supplied by Bunkernet had been delivered to the Vessel.

[37] Bunkernet submitted that the Lender must have known that Tillman would not have been able to repay its loan from the time that loan agreement was concluded, the mortgage was 'provisionally registered' and the bunkers and lubricants were supplied.

[38] Bunkernet further submitted that the supply of bunkers and lubricants were for the benefit of the Lender because they were to be used to sail the Vessel to Alang for delivery to NKD, then the Lender was going to benefit from the payment of the purchase price as third repayment of Tillman's debt. The Vessel was directed to

Walvis Bay where she was sold. The use of bunkers and lubricants owned by Bunkernet to sail the Vessel to Walvis Bay was for the benefit of the mortgagee and with the intention of depriving unpaid necessary such as Bunkernet of any prospect of effecting a recovery from the Ship Fund. Bunkernet submitted that consideration of justice and equity dictate that its claim for payment of the unsatisfied balance be given priority over the Lender's claim of mortgagee.

Did the Referee err by recommending that the Lender's claim (mortgage claim) should rank above Bunkernet's claim for necessities supplied to the Vessel?

Submissions on behalf of the Lender (applicant)

[39] Counsel argued that no 'powerful reason' exist to disturb the priorities of ranking and to rank Bunkernet's claim ahead of the lender's claim. Counsel further argued that the lender's claim arises in consequence of the breach by Tillman of its obligation under a loan agreement which was secured by registration of a mortgage bond. Although there was a preliminary registration of the bond, such preliminary registration becomes complete if all the required formalities are complied within 6 months period, if so, final registration occurs immediately and the security offered by such registration thus operates *ex tunc* (from the outset). Counsel further argued that the Lender was not aware that Tillman was insolvent at the time the bunkers were supplied to the vessel, as contended by Bunkernet. Nor was the lender aware of the nature and extent of the expenditure incurred in the purchase of the bunkers supplied by Bunkernet. At all material times the management and operation of the vessel was attended to by the owner or its agent.'

[40] Counsel argued that 'given therefore the fact of the security offered to the Lender by means of the registration of the mortgage bond, the existence of which is not disputed by Bunkernet and the indisputable fact that Tillman was in breach thereof, coupled with the lack of any knowledge on the part of the Lender that there was any hint of insolvency on the part of Tillman read also with the fact that the bunkers were supplied in the ordinary course of business at the request of the owner and or management of the vessel and not the Lender, it was submitted that no

'powerful reasons' exist to depart from the order of priorities ordinarily applied by this Court, sitting as a court of admiralty.'

Submissions by Bunkernet (fourth respondent)

[41] Counsel argued that 'Bunkernet accepts that, in ordinary circumstances, the claim of a mortgage should rank for payment before the claim of a supplier of necessaries such as Bunkernet's two claims. However, in this matter there are strong indications that special circumstances exist which warrant this court departing from the scheme of priorities that would ordinarily be applicable and that its third claim should rank for payment ahead of the Lender's claim. This is necessary to prevent an obvious justice.

[42] Counsel further argued that the discretion of a court to depart from the usual scheme of priorities is an unfettered discretion. There is no *numerus clausus* of requirements that must be satisfied before this court can conclude that justice demands that the usual scheme of priorities should not be applied. Counsel argued that the Referee erred in fettering his discretion as regards the ranking of Bunkernet's and the Lender's claims by having regard to only 3 factors.

As regard the 3 factors identified in *The Posidon*:

(1) Knowledge of insolvency:

Counsel submitted that there was no reason for the Referee to have required Bunkernet to demonstrate that Tillman was in fact insolvent at the time that the necessaries were supplied. Counsel argued that in *The Pickaninny*⁴ judgment the issue of insolvency of the Ship owner was raised by the necessaries men as an argument in favour of departing from the ordinary scheme of priorities. The learned judge, Hewson J, did not accept this argument because there was no evidence before him upon which he could find that at the material time the Ship owner was insolvent. In *The Posidon* the court applied the law of Singapore to determine whether the Ship owner was insolvent and held that the question to be asked is:

⁴ The "Pickaninny" Geor Hammond & Co. Lloyd's list Law Reports September 16, 1960 533.

When was the company unable to pay its debts as they fell due? And found that as a matter of Singapore law a temporary lack of liquidity did not amount to insolvency.

(2) Knowledge of the nature and extent of the expenditure:

(a) In *The Posidon* the learned judge endorsed the finding of Hewson J, in *The Pickaninny* that a factor that should be taken into account in a consideration of the equities and the avoidance of unjust result is whether the mortgagee had full knowledge of the nature and extent of the supplies that resulted in the claims brought by the necessaries men.

(b) The Referee took the view that more was required than a general awareness that operational costs would be incurred. "There must be full awareness in advance." He concluded that this level of awareness had not been demonstrated by Bunkernet.

(c) Counsel argued that there is no logical reason why a mortgagee should be required to have full and detailed knowledge that the costs are being incurred. In this case Bunkernet avers that the evidence leads to the inescapable conclusion that the Lender must have been aware that Tillman would need to purchase bunkers and lubricants to enable the vessel to sail from Lomé to Alang. There can be no need to insist that the Lender should have had knowledge of the precise quantities and other details of the purchase.

(d) Benefit to the Lender

Counsel argued that in *The Posidon* the learned judge articulated this requirement as being satisfied if the expenditure has the effect of bringing about "some benefit to the mortgagee." The learned judge did not suggest that the requirement that only the mortgagee must have derived some benefit from the expenditure. So, for example, the learned judge accepted that, as was the case in *The Pickaninny*, repairs to a mortgaged vessel "do result in something that is physical tangible and capable of deriving benefit from." In the same way, the supply of bunkers and lubricants had a result that the Lender was capable of deriving a benefit therefrom.

(e) The Referee concluded that the supply of bunkers to the vessel was made for the benefit of all creditors of the vessel, including the Lender. It is submitted that, whatever the position might have been regarding other creditors, the supply of bunkers and lubricants to the vessel was effected in order for Tillman to deliver the vessel to NKD at Alang. The benefit to the Lender was that when delivery was effected it would obtain payment of the loan together with interest thereon and all other charges due to the Lender in terms of the agreement.

Analysis and discussions

Ranking of claims and the law to be applied

[43] The Namibian High Court exercising its admiralty jurisdiction derives its jurisdiction from the English Statutes, namely the Admiralty Court Act of 1840, the Admiralty Court Act of 1861 and the Colonial courts of Admiralty Act of 1890. In *Freiremar v The Prosecutor General of Namibia and Others*⁵, the court held that by virtue of s 1(i) of Proclamation 21 of 1919 all statutes which applied in the Province of Cape of Good Hope as at 1 January 1920 were made applicable to the then South West Africa. The Colonial Courts of Admiralty Act 1890 was part of the statute law of the Province of Cape of Good Hope as at 1 January 1890 and accordingly it became part of Namibia. Those English statutes are archaic and Namibia is the only country in the world that still applies the limited jurisdiction conferred by the Colonial Courts of Admiralty Act of 1890. The Colonial Courts of Admiralty Act of 1890 is archaic, outdated and belongs to the colonial era. Its heads of jurisdiction are very limited. Claims relating to or arising out of charter parties, marine insurance, container, which should be dealt with under admiralty jurisdiction are excluded under the Colonial Courts of Admiralty Act of 1890. There is an urgent need for reform and updating of our maritime laws.

[44] In terms of the Colonial Courts of Admiralty Act of 1890 the law to be applied is English admiralty law as at 1890. Subsequent decisions that clarify or expand on the law as at 1890 also apply. Subsequent English admiralty statutes are not applicable to Namibia. Since 1890 English admiralty law has been updated and

⁵ *Freiremar v The Prosecutor General of Namibia and Others* 1996 NR 18 (HC).

modernized. Some of the provisions of international maritime conventions such as the Arrest Convention have been incorporated into English domestic laws.

[45] In terms of the Colonial Courts of Admiralty, Act 1890. Namibian Admiralty ranking of claims is based on equitable distribution and the usual order is as follows:

1. Charges and expenses of the admiralty Marshall (Deputy Sheriff)
2. Costs of the producer of the funds(s)
3. Maritime liens
4. Mortgages
5. Statutory rights of action *in rem*.

[46] The Referee was therefore correct in his finding as to the Law to be applied and the order of priorities. The established order of priorities may be altered if it can be shown that 'powerful reason' or special circumstances exist to avoid an obvious injustice. For the sake of certainty and uniformity the order of priorities should not be lightly overturned.⁶

[47] The onus is on the party seeking deviation from the established order of priorities to adduce cogent evidence as to why the established order must be altered. Bunkernet argued that its third claim for bunkers and lubricants supplied to the Vessel should rank above the mortgage claim of the Lender. As security for the loan, the Lender registered a preliminary mortgage bond on 14 November 2017 and a permanent mortgage bond on 11 December 2017 in the Panamanian registry. In terms of Panamanian law a temporary registration is valid for 6 months and if within the 6 months all the formalities are complied with, then the mortgage bond is registered permanently. Security for the loan advanced operates immediately once temporary registration is done. What is also important to note is that according to Bunkernet the bunkers and lubricants were ordered on 14 and 16 November 2017 and delivered on 15 and 16 November 2017 that is on the same date or a day later after the temporary registration of the bond. The final registration took place on 11 December 2017. Bunkernet accepts that there was registration of the mortgage bond and then the Lender ranks above Bunkernet. The next issue that the court must

⁶ Prof. William Tetley QC, *Maritime liens and claims* 1st ed, Business Law Communication Ltd 1985.

consider is whether Bunkernet discharge the onus of proving the 3 factors mentioned in *The Posidon* judgment. (1) knowledge of insolvency. There is no evidence that the borrowers have been liquidated or subjected to winding up proceedings at the time the loan was advanced. The Lender rejects the argument that it knew that the borrowers were insolvent at the time the loan was advanced. The Referee found that at the time the bunkers were supplied to the Vessel in Lomé, the sea Pioneer was trading and the 'Huascar' and the Vessel had been sold for almost USD6.3 million. Upon delivery of the 2 vessels in Alang, USD4.5 million was to be repaid to the Lender, the balance of the loan was to be repaid by quarterly payments of USD250 000 and a final balloon payment of USD3 million from the purchase price for the 2 vessels approx. USD1.8 million was available to pay creditors other than the Lender. The Referee was therefore correct to come to the conclusion that the Lender was not aware of any insolvency on the part of the borrowers. Did the mortgagee have full knowledge of the nature and extent of the supplies that resulted in the claim for necessaries by Bunkernet? In the ordinary course of shipping business, the Lender is not involved in the day to day management of the ship and to expect the Lender to have full knowledge in advance of operational costs to be incurred is not fair. The Referee was therefore correct to accept the argument that 'at all material times the management and operation of the Vessel was attended to by the owner or it's agent and the Lenders was not aware in advance of the nature and extent of the necessary supplied to the Vessel.

[48] Bunkernet argued that the supply of the bunkers and lubricants benefited the Lender (Mortgagee) and therefore its claim should rank above the mortgagee's claim. Bunkernet argued that the supply of bunkers and lubricants to the vessel was effected in order for Tillman to deliver to NKD at Alang and when delivery was effected it would obtain payment of the loan and other charges due to the Lender. The supply of bunkers to the Vessel was to enable the Vessel to sail to Alang and upon arrival NKD would have paid the balance of the purchase price which would have been used to all the creditors, including Bunkernet. It is therefore not correct to argue that the supply of bunkers was only for the benefit of the Lender. There is also no evidence that the Lender directed the Vessel to Walvis Bay, but it was a decision of the Master because the Vessel had run out of fresh water. In the circumstances

there is no merit in the argument of Bunkernet. The Referee was also correct to reject that argument.

Referral to oral evidence

[49] In the alternative, Bunkernet argued that should a genuine dispute of fact arise or should this court conclude that serious doubt exists that the Lender's claim should be ranked for payment ahead of Bunkernet's claim, Bunkernet submits that this is a case where the issue of whether or not the equities are in favour of subordinating the Lender's claim to that of Bunkernet should be referred to oral evidence after proper discovery of all document relevant to its claim, all documents relevant to the Lender's knowledge of the financial circumstances of Tillman at the time the bunkers were supplied to the Vessel at Lomé, the Lender's knowledge of the circumstances in which the bunkers and lubricants were supplied to the Vessel and the purpose for which the Vessel was diverted from Luanda to Walvis Bay.

[50] Counsel for the applicant argued that there is no genuine or material dispute of fact. 'No objective facts are set out to justify any dispute of the fact or the existence of serious doubts. In regard to the claim of the lender and its ranking furthermore counsel argued that oral evidence will ordinarily only be permitted where such evidence may disturb the probabilities. The version of the lender in regard to these issues is already available to the court on oath and there is no reason to doubt the veracity thereof and the inherent probabilities flowing therefrom will not be disturbed by way of oral evidence.'

[51] Rule 67(1) provides:

'Where an application cannot properly be decided on the affidavits the court may dismiss the application or make any order the court considers suitable or proper with the view to ensuring a just and expeditious decision and in particular, but without affecting the generality of the foregoing, it may –

- (a) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or her or any other person to be subpoenaed to appear be examined and cross-examined as a witness; or

- (b) refer the matter to trial with appropriate directions as to pleadings, definition of issues or any other relevant matter.’

[52] The applicant submitted that there is no need to refer the matter to oral evidence as there is no genuine dispute of fact. The evidence is before court under oath and no genuine dispute of fact exist. In addition, Bunkernet did not file a replying affidavit in the counter application and in the absence of that, the allegations of Mr. Cunningham in the answering affidavit are undisputed. The allegations cannot be ignored, as counsel for the Lender put it, but must be accepted. If Bunkernet elected not to file a relying affidavit then it must suffer the consequences.

[53] I agree with the submissions made by the Lender that there is no dispute of fact on the affidavits submitted before me. The issues of why Bunkernet wants its claim to rank above the Lender’s claim are set out in detail on the papers.

[54] In *CF Kalilo v Decotes (Pty) Ltd and another*⁷ it was said that oral evidence will ordinarily only be permitted where such evidence may disturb the probability.

[55] Rule 67(1)(a) of the rules of court, permits referral to oral evidence on specified issues whilst Bunkernet, in their papers in para 4.1.4 of the relief, are asking for all other issues relevant to the equities of subordinating the Lender’s claim to that of Bunkernet to be referred to oral evidence. It appears that is not permissible under the Rule and that is also another reason why the court is not inclined to refer the matter to oral evidence. There is in my view no genuine dispute of fact to warrant referral to oral evidence.

Striking out application

[56] Bunkernet filed a notice in terms of Rule 17(4) seeking to strike out paragraphs 37 – 45 of the replying affidavit of Mr. C. Cunningham on the grounds that the averments made in those paragraphs are vexatious and inadmissible.

The grounds are as follows:

⁷ *CF Kalilo v Decotes (Pty) Ltd and another* [1988] 2 ALL 5A 159(A).

- '1. The averments made in these paragraphs constitute foreign law which falls the (sic) be proved by mean of expert evidence;
2. Insofar as the averments refer to provisions of statutory Panamanian law, the relevant statutes have not been put before this honourable Court;
3. No averments are made which might suggest that the deponent to the replying affidavit and the persons identified in paragraph 3 are qualified or have the necessary expertise to give evidence as regards the Panamanian law relating to marine mortgages;
4. The fourth respondent will be prejudiced should this application not be granted.'

[57] Mr. Cunningham replied that the information contained in paragraphs 37 to 45 at his replying affidavit is submitted solely in direct response to the allegations raised in the answering affidavit of Pfeiffer where he submits that provisional registration of a mortgage bond provides a lesser form of security interest than a finally registered mortgage bond. In *Vaatz v Law Society of Namibia*,⁸ the court held that: 'vexatious matter are allegations that may or may not be relevant but are so worded as to convey an intention to harass or annoy. With regard to the requirement of prejudice' the court held that 'the phrase 'prejudice' to the applicant's case, clearly does not mean that, if the offending allegations remain, the innocent party's chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances; for instance, in motion proceedings it is necessary to answer the other party's allegations and a party does not do so at his own risk.' Different countries place information regarding ship registration on the internet. In this case Panama ship registry information is also accessible on the internet. All what Mr. Cunningham did was to draw this court's attention to the requirements of ship registration in Panama and to answer to the allegations regarding ship registration. There is no prejudice whatsoever to Bunkernet if such information remains on the affidavit.

[58] For all those reasons, I make the following order:

1. The application to confirm and implement the Referee's report in terms of the order marked "X" is granted.

⁸ *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (NM) at 566C-E, 566 – 567J-A.

2. The fourth respondent is ordered to pay the costs of the applicant, such costs to include the costs of one instructing and two instructed counsel.
3. The counter application is dismissed.
4. The fourth respondent is ordered to pay the costs of the applicant, such costs to include the costs of one instructing and two instructed counsel.
5. The application in terms of Rule 17(4) is dismissed.
6. The fourth respondent is ordered to pay the costs of the applicant, such costs to include the costs of one instructing and two instructed counsel.

G N NDAUENDAPO
Judge

APPEARANCES:**FOR THE APPLICANT**

Mr. Fitzgerald SC (assisted by Ms De Bruin)
Instructed by Koep & Partners, Windhoek

FOR THE FOURTH RESPONDENT

Mr. Wragge SC (assisted by Mr. Pfeiffer)
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