REPUBLIC OF NAMIBIA **Reportable**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Exercising its Admiralty Jurisdiction

JUDGMENT

Case No: AC 10/2021)

In the matter between:

WILMINGTON SAVINGS FUND SOCIETY FSB	**1st APPLICANT**
ACT MARITIME LLC	**2nd APPLICANT**

and

PRIME PARADISE INTERNATIONAL LIMITED	**1st RESPONDENT**
THE MOTOR TANKER "MARVIN STAR", HER OWNERS AND ALL OTHERS INTERESTED IN HER	**2nd RESPONDENT**
PANORMOS CRUDE CARRIERS LIMITED	**3rd RESPONDENT**

Neutral citation: *Wilmington Savings Fund Society FSB N.O v The Motor Tanker "Marvin Star", her owners and all others interested in her N.O* (AC 10/2021 [2021] NAHCMD 112 (15 March 2022)

Coram: Ndauendapo, J

Heard: **25 February 2022**

Delivered: **15 March 2022**

Flynote: **Shipping - Admiralty - practice** - Application - Security for damages for pure economic loss-Occasioned by noting of frivolous and vexatious appeal-Appeal against ruling of sale of Vessel - Damages for pure economic loss to be instituted after dismissal of Appeal - Rule 6 of the Supreme court provides remedy for dismissal of such an Appeal - Applicants failed to invoke same - Court has no inherent jurisdiction to grant relief-application dismissed.

Summary: **Shipping - Admiralty – practice -** The applicants launched an application, on an urgent basis, seeking an order from this court ordering Paradise International Limited ("Prime') to furnish security in the amount of US$6,031,844.20 for damages suffered (and continued to be suffered) by the applicants occasioned by the noting and prosecution of an appeal by Prime against the ruling of this court ordering the sale of the vessel in the judicial sale application. The applicants alleged that the appeal is frivolous, vexatious and has no prospect of success because the court in the judicial sale application ruled that Prime did not adduce admissible evidence to the effect that it was the *de facto* owner of the vessel. Prime *in limine* raised the point that the matter was not urgent and that this court sitting as an Admiralty Court has no jurisdiction to entertain the contemplated claim.

Held that given the imminence of the hearing of the appeal on 29 March 2022, the parties agreeing to apply for an expedited hearing and Prime agreeing to the matter being enrolled in February 2022, the matter is urgent.

Held further that this court sitting as an Admiralty Court has no jurisdiction to entertain a claim for pure economic loss and to order Prime to furnish security.

Held further that this court's inherent jurisdiction to regulate its own affairs relates to procedural matters in the interest of justice or the proper administration of justice. The claim for pure economic loss is a substantive matter and this court does not have jurisdiction to grant the relief sought.

The application is dismissed.

JUDGMENT

Introduction

[1] By notice of motion, the applicants seek the following relief:

'1. Dispensing with the forms and service provided for in terms of Rule 73 of the Rules of the High Court of Namibia insofar as may be necessary and directing that the matter be heard of as one of urgency.

2. Directing that the First Respondent furnish security to the satisfaction of the Applicant, alternatively the Registrar of the High Court, in the amount of US$6,031,844.20 in respect of the claim for damages to be instituted by the Applicants against the First Respondent occasioned by the prosecution of the appeal by the First Respondent to the Supreme Court against the Judicial Sale Order under case number SA 92/202.

3. Directing that such security be furnished by the First Respondent within 5 days of service upon it of the order of this Honorable Court directing such security.

4. In the event that the First Respondent fails timeously within the aforesaid 5-day period to furnish such security, granting leave to the Applicants to apply to this Honorable Court alternatively the Supreme Court upon notice to the First Respondent on these application papers, duly supplemented where necessary, for an order dismissing the appeal under case number SA 92/2021 with costs.

5. Directing in terms of Rule 121(2) of the Rules of the High Court of Namibia that the order directing such security to be furnished by the First Respondent not be suspended notwithstanding any appeal against such order.

6. Alternative Relief

7. Directing the First Respondent to pay the costs of the Applicants, such costs to include the costs of one instructing and one instructed Counsel'.

The application is opposed by the first respondent.

The Parties

[2] The First Applicant is Wilmington Savings Fund Society, FSB ("WSF") a company incorporated in terms of the company laws of the United States of America and having its primary office at 500 Delaware Avenue, 11th Floor, Wilmington, Delaware, 19801, USA.

[3] The Second applicant is Act Maritime LLC ("ACT"), a company incorporated in terms of the company laws of the United States of America and having its primary office at 15 River Road, Site 320, Wilton, Connecticut, 06897, USA.

[4] The First respondent is Prime Paradise International Limited ("Prime"), a party with unknown particulars which has asserted an interest in the judicial sale proceedings issued by the applicants and noted an appeal against the Ruling in the judicial sale application.

[5] The Second respondent is the MT "Marvin Star", ("the Vessel"), a crude oil tanker vessel build in 2009 and flagged in the Marshall Islands which bears IMO number 9422366 and which is currently within the jurisdiction of this Honorable Court and under arrest at the port of Walvis Bay.

[6] The Third respondent is the registered owner of the Vessel, Panormos Crude Carriers Limited ("the owner"), a company duly incorporated in accordance with the laws of the Marshall Islands with its place of registration at Trust Company Complex, Ajeltake Road, Ajeltake Island, Majuro Marshall Islands, MH96960.

Background facts

[7] On 11 August 2021, the applicants arrested the vessel in the port of Walvis Bay in terms of a summons in rem issued under Case No. AC10/2021 in this court in respect of monies due and owing under a Loan Agreement. On 19 November 2021, this Court granted an order at the behest of the applicants ordering the judicial sale of the vessel. The first respondent, Prime, opposed that application alleging that it was the true owner of the Vessel and that ownership of the Vessel was transferred to Panormos (the registered owner of the vessel) as a result of fraud perpetrated on it

by Mr. K and Panormos. This Court in the judicial sale application dismissed the opposition of Prime principally on the basis that no admissible evidence was adduced by Prime to support those assertions and ordered the sale of the vessel.

[8] Disenchanted with the ruling, Prime noted an appeal against that ruling. The noting of the appeal suspended the operation of the judicial sale ruling. Concerned with the ever increasing preservation costs which is borne by the applicants (the applicants obtained an order, ordering Prime to furnish security for preservation costs, but Prime appealed against that order), the applicants applied to the Supreme Court for an expedited hearing of the appeal. Whilst waiting for a hearing date of the appeal, the applicants launched this application as per the notice of motion.

Applicants' case

[9] Mr. Andonatos, deposed to the founding affidavit in support of the application. He is the Chief operating officer at GMTC LLC, duly authorized fund managers of the loan described in the judicial sale application. He is duly authorized to depose to this affidavit in support of an application for an order, inter alia, directing Prime to provide security to the applicants in respect of damages to be suffered by the later as a consequence of Prime prosecuting an appeal against the ruling in circumstance where the noting and prosecution of such appeal is not bona fide, is vexatious and malicious.

[10] He avers that Prime is prosecuting the appeal in order only to induce the applicants to abandon the ruling because, so Prime surmises, the costs occasioned by the ever increasing and continuing preservation costs and which are borne solely by the applicants-may render the continued arrest of the vessel commercially unviable. The direct consequence of the continued prosecution of the appeal is that the applicants will suffer damages represented by the diminution in the amount to be recovered by them from the Fund to be constituted by the judicial sale of the vessel. As at 30 November 2021, the applicants' claim against the third respondent, the registered owner, in consequence of the loan agreement was the amount of USD 24,332,354.89.

[11] The claim of the applicants increases each month by an amount of approximately US$201, 00.00. The applicants obtained two valuations of the vessel one by Clarksons valuing the vessel at US$29 million and another by associated shipbroking valuing the vessel in the amount of US$ 25,500,000.009("DA3").

[12] He avers that it is apparent from "DA3" that the preservation costs incurred since the arrest of the vessel, and in particular since the noting of the appeal by Prime, will result in the probability that the applicants will not recover from the registered owner of the vessel the total amount of its claim and that the shortfall will represent the damages suffered by the applicants as a direct result of the noting and prosecution of the appeal by Prime.

[13] During the applicants' application for preservation costs (which was granted, but suspended because of the noting of appeal) evidence was adduced to the effect that the daily preservation costs for the vessel was the amount of US$ 10,068.00. The vessel was arrested on 11 August 2021, the reasons for the judicial sale were released on 19 November 2021(100 days) and by that date the preservation costs amounted to US$1,006,800.00.

[14] Mr. Andonatos avers that the malicious prosecution of an appeal is wrongful and constitutes a basis to render Prime liable in delict for the damages suffered by the applicants in the amount of at least US$ 6,031,844.20.

[15] He avers that upon the dismissal of the appeal, applicants will institute a claim for damages against Prime to recover that amount of its claim not recovered from the Fund because of the diminution of the Fund by the total preservation costs occasioned by the appeal and which will result in the total amount recovered by the appellants under their preferent mortgage claim being less than that which they would have recovered, but for the unnecessary increase in the costs, the latter being a direct consequence of the malicious prosecution of the appeal by Prime. Prime is a peregrinus of this court and has no assets within its area of jurisdiction against which the applicant can satisfy any judgment for damages. In the circumstances it is fair and equitable and in the interest of justice that Prime be directed to furnish the applicants with security for the damages that it will suffer in consequence of the malicious prosecution of the appeal against the ruling by Prime.

[16] He avers that the appeal against the ruling in favor of the applicants in the judicial sale application has no reasonable prospects of succeeding. It is vexatious, frivolous and malicious because this court ruled that the evidence of Mr. Norton alleging that the vessel was transferred to Panormos, the registered owner, as a result of fraud committed on Prime by Mr. K and Panormos was ruled as inadmissible hearsay evidence because Mr. Norton, an attorney based in Durban, had no personal knowledge of such fraud. Mr Shen and Chengcheng (the director and shareholder of Prime were appointed after the alleged fraud occurred) who deposed to confirmatory affidavits also had no personal knowledge of the alleged fraud. In the premises, it is not possible as a matter of law or fact for Prime to establish on appeal those said by Mr. Norton to have furnished him with the relevant factual circumstances had personal knowledge of the alleged fraud.

[17] Counsel avers further that, the matter is urgent given the imminence of the appeal hearing on 29 March 2022. Prime also agreed to an expedited hearing of this application on 25 February 2022, without at any stage having raised the issue of urgency. Having agreed to the above, it is not now open to Prime to argue that the application is not urgent.

[18] He avers that the court has admiralty jurisdiction to entertain the application because section 2 of the Colonial Court of Admiralty Act 1890 specifically “reserves all the powers which it possesses for the purpose of its other civil jurisdiction”. Extension of aquilian liability in respect of claims for pure economic loss has been recognized by the Supreme Court in this country.

First respondent’s case

[19] Mr. Norton, an attorney of the High Court of South Africa and an executive of ENSAfrica deposed to the answering affidavit on behalf of the applicants, to oppose the application. He raised three points in limine. First, the application is not urgent, second, the court has no jurisdiction, inherent or otherwise and third, the applicants waived their right to contend that Prime’s appeal is vexatious or malicious.

[20] He avers that the application is not urgent. This court does not have the power to make an order dismissing an appeal and it cannot authorize the applicants to apply to the Supreme Court for an order dismissing the appeal. He submitted that if an order was made obliging Prime to furnish security for a claim for damages in the event of security not being furnished, the appropriate remedy would be one directly related to the action itself and would be of the nature of an order made by a managing judge described in High Court rule 59(5). The application should therefore be dismissed for lack of urgency as provided for in High Court rule 73(2).

[21] He avers that if a claim for damages for vexatious prosecution at an appeal exists, which is denied, such a claim does not fall within the admiralty jurisdiction of this court.

[22] The admiralty jurisdiction of this court is prescribed by the provisions of the Colonial Courts of Admiralty Act, 1890 and a claim for damages for pure economic loss caused by the vexatious prosecution of an appeal does not fall within the admiralty jurisdiction of this court and a claim for pure economic loss does not exist as part of this court parochial jurisdiction either.

[23] He further avers that this court does not have general or parochial jurisdiction, inherent or otherwise, to order at the instance of a peregrinus plaintiff, a defendant, whether peregrinus or incola, to furnish security for the capital amount of a claim.

[24] He avers that should it be contended that the appeal is vexatious or frivolous, then the parties to the appeal have a remedy described in rule 6 of the Supreme Court Rules. In light of the conclusion this Court has come to, it is not necessary to consider the averments by Mr. Norton on the merits of the application.

Issues for determination

[25] Given the conclusion this Court has arrived at, there are only two issues for determination, namely: (a) Whether the application is urgent and (b) Whether this court has admiralty jurisdiction to grant the relief sought?

Submissions on behalf of applicants

[26] Counsel argued that, in summary, an order is sought directing the First Respondent ("Prime") to furnish security in the amount of US$6, 031, 844, 20 in respect of the damages to be suffered by the applicants in consequence of the malicious and vexatious prosecution by Prime of its appeal against the judicial sale order under case number SA 92/202. The computation of the amount of US$6, 031, 844, appears from the founding affidavit of Mr Cunningham ("Cunningham").

[27] Counsel argued that, the application is urgent because of the imminence of the hearing of the appeal which is set down for hearing on 29 March 2022. He further argued that Prime agreed to an expedited hearing of the appeal and agreed to have this application heard on 25 February 2022 and for those reasons the matter is clearly urgent and warrants an expedited hearing.

[28] Counsel argued that, it is indeed so that the admiralty jurisdiction conferred on this court by the Colonial Courts of Admiralty Act 1890 confines this court's admiralty jurisdiction to the admiralty jurisdiction exercised by the English High Court in 1890.

[29] Counsel submitted that the law to be applied by this court in admiralty matters is English admiralty law as administered by the English High Court exercising admiralty jurisdiction in 1890,[1] but, section 2.1 of the Colonial Courts of Admiralty Act 1890 expressly provides that for the purposes of its admiralty jurisdiction, this court exercises "all the powers which it possesses for the purpose of its other civil jurisdiction".

[30] Counsel contended that it follows that in terms of the Colonial Courts of Admiralty Act which, in terms of the Second Schedule thereto expressly provides for the Admiralty Court Acts of 1840 and 1861 to remain in force, the claim of the Applicants is a claim in terms of section 3 of the 1840 Admiralty Act but, in addition thereto, this court for the purposes of its Admiralty Jurisdiction continues to exercise all the powers which it possesses for the purpose of its other civil jurisdiction.

[1] *MV Palenque* 2019 (4) NR 1142 (HC) at para 43; also see *Malilang v Houda Pearl* 1986 (2) SA 714 (AD) at 723 B).

[31] Counsel contended that amongst this latter power, is the power of this court to exercise its inherent jurisdiction so as to regulate its own procedures and, significantly, avoid an injustice, and it is competent for this court to direct that security be provided in respect of a malicious and vexatious appeal.

[32] Counsel argued that although the courts admiralty jurisdiction in this matter arose in terms of section 3 of the 1840 Admiralty Court Act, in directing the provision of security, this court is simply exercising its inherent civil jurisdiction in terms of section 2.1 of the Colonial Courts of Admiralty Act.

[33] Counsel submitted that it matters not therefore that the claim for damages is not a maritime claim recognised in terms of the latter Act. It is, however, a claim cognisable by the court in terms of its civil jurisdiction, which jurisdiction is not confined to that which existed in 1890.

[34] Counsel argued that it is demonstrated by a reference to section 78(4) of the Namibian Constitution which preserved the courts inherent jurisdiction “which vested in the Supreme Court of South-West Africa immediately prior to the date of independence, including the power to regulate its own procedures and to make court rules”.

[35] Counsel argued that in the premises, and to the extent that Prime contends that this court has no general and parochial jurisdiction to direct that security be provided, this contention is simply wrong. Where justice demands, and in accordance with its inherent jurisdiction, this court can therefore direct that security be provided.

[36] Counsel further submitted that the contention of Prime that this court has no jurisdiction in respect of a delictual claim for damages for malicious prosecution of an appeal is also wrong.

[37] Counsel argued that this court has recognised the extension of aquilian liability to encompass claims for pure economic loss and, thus, in the exercise of its inherent

jurisdiction, this court is able to grant the relief sought insofar as the claim to be asserted by the applicants for damages is a claim now cognisable by this court.

[38] Counsel argued that the claim to be asserted by the applicants flows directly from and is a consequence of the sale order and the appeal against that order. It is, thus, linked to the sale application, a matter in which this court unquestionably exercised admiralty jurisdiction.

[39] Counsel submitted that, even if neither the Vice-Admiralty Rules nor the High Court Rules make specific provision entitling a peregrinus plaintiff to demand security from a peregrinus defendant, it is submitted that where justice demands, the court may, in the exercise of its inherent jurisdiction, come to the rescue of an applicant to direct the provision of security.[2]

[40] Counsel contended that, with regard to the recognition by the courts of Namibia of claims for pure economic loss, the Supreme Court has, inter alia, in *Alwyn Petrus Van Straten N.O,*[3] recognised the entitlement of a plaintiff to seek damages in delict for pure economic loss.

[41] Counsel argued that, the claim to be asserted by the Applicants for the damages suffered by it in consequence of the prosecution of the appeal is premised upon the malicious i.e. deliberate and intentional, conduct on the part of Prime. It follows, it is submitted, in the premises, that the law of Namibia recognises the extension of aquilian liability in respect of a claim in delict for pure economic loss flowing from deliberate and dishonest conduct which has caused loss to a party.

[42] Counsel further argued that, the purported reliance upon rule 6 of the Supreme Court Rules is misplaced. That rule merely provides an alternative remedy to a party who contends that an appeal is vexatious. It is not an exclusive remedy.

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[2] *Moulded Components and Ratomoulding SA (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 461F – 462H, which was approved by the Supreme Court in the matter of *Likanyi v The State* CA 2/2016 delivered on 7 August 2017.

[3] *Alwyn Petrus Van Straten N.O. v Namibia Financial Institutions Supervisory Authority* 2016 (3) NR 747 [SC].

Submissions on behalf of First Respondent (Prime)

[43] Counsel raised three points in limine, namely, (a) the application is not urgent (b) the court does not have jurisdiction to entertain the matter and (c) waiver/estoppel.

In light of the conclusion this court has reached, the point in limine relating to waiver will not be considered.

[44] On urgency, counsel contended that, this court does not have the power to make an order dismissing an appeal and it cannot authorize the applicants to apply to the Supreme Court for an order dismissing the appeal. He submitted that if an order was made obliging Prime to furnish security for a claim for damages in the event of security not being furnished, the appropriate remedy would be one directly related to the action itself and would be in the nature of an order made by a managing judge described in High Court Rule 59(5).The application should therefore be dismissed for lack of urgency as provided for in High Court Rule 73(2).

[45] Counsel contended that s2 of the Colonial Courts of Admiralty Act, 1890 cannot be construed so as to give a court exercising admiralty jurisdiction the power to simply entertain all claims falling within its ordinary civil jurisdiction[4]. The issue is whether as at 25 July 1890, the English admiralty court had jurisdiction to determine a claim by a mortgagee for pure economic loss caused by the malicious prosecution of an appeal?

[46] Counsel contended that, a claim for pure economic loss does not fall within the ambit of the English admiralty court Acts of 1840 and 1861 nor within the inherent admiralty jurisdiction of the English High Court as at 25 July 1890. Counsel further contended that, this court has no jurisdiction, admiralty or otherwise, to determine a claim by the applicants, both peregrine, against Prime, also a peregrinus. Prime has not submitted to this court jurisdiction in respect of such claim and no other grounds exist which might vests this court with jurisdiction in respect of such a claim.

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[4] *Underwater Sampling Ltd and Another v MEP Systems PTE Ltd* (SA 2 of 2010) [2010] NASC 15 (05 November 2010).

[47] Counsel also argued that, there is no Vice-Admiralty rule or practice which empowered the court to order a defendant in a contemplated action to provide security for the claim to be advanced at a future date.

[48] Counsel relying on the authority of *Botes v McLean,*[5] argued that the inherent jurisdiction of this court is limited to the power to regulate its procedures in the interests of the proper administration of justice. The reservoir of power is confined to procedural and not substantive law.

[49] Counsel submitted that the legislator has vested the Supreme Court with jurisdiction to summarily dismiss an appeal on the basis that it is frivolous or vexatious or that it has no prospects of success. The applicants have not provided an explanation why that remedy was not invoked. Counsel argued that this court should dismiss the application on that basis alone.

Discussion

[50] Given the imminence of the appeal hearing on 29 March 2022 and the fact that Prime had agreed to have this matter set down on 25 February 2022 and to have an expedited appeal hearing, the matter is indeed urgent.

[51] The second point raised in limine by Prime is that this court does not have jurisdiction to entertain the claim for damages or pure economic loss to be instituted by the applicants and therefore has no jurisdiction to grant the relief sought. The crucial issue for determination is whether this court, sitting as an Admiralty Court, has jurisdiction to order Prime to furnish security for a delictual claim for damages or pure economic loss suffered (and continued to be suffered) by the applicants occasioned by the noting and prosecution of an appeal by Prime against the ruling ordering the sale of the vessel, which appeal is alleged to be frivolous and vexatious and without any prospects of success?

[52] Is the claim for pure economic loss justiciable by this court in the exercise of its admiralty jurisdiction?

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[5] *Botes v McLean* (I 853/2014) [2019] NAHCMD 330 (2 September 2019) at para 114.

[53] In my respectful view the applicants can only succeed with the relief sought, if this court (sitting as an Admiralty Court) has jurisdiction to entertain the claim for delictual damages or pure economic loss.

[54] The admiralty jurisdiction of this court is regulated by the jurisdiction of the English High Court as it existed on 25 July 1890, when the Colonial Courts of Admiralty was passed. The law to be applied by this court in admiralty matters is English admiralty law as at 1890. The sources of admiralty jurisdiction include, the Admiralty Court Acts of 1840 and 1861 and the Court's original jurisdiction.[6] The admiralty claims justiciable by the Admiralty Court are set out in the 1840 and 1861 Acts and do not include a delictual claim for damages occasioned by the prosecution of a frivolous appeal or pure economic loss.

[55] Section 2(1) of the Colonial Courts of Admiralty Act,1890 cannot be interpreted as to give this court, exercising its admiralty jurisdiction, the power to entertain all claims falling within its ordinary civil jurisdiction. As pointed out, a claim for pure economic loss was not one of the claims justiciable by Admiralty Court as at July 1890.

[56] Applicants submitted that their "claim is in terms of section 3 of Act 1840, but in addition thereto, this court for the purposes of its admiralty jurisdiction continues to exercise all the powers which it possesses for the purpose of its other civil jurisdiction. Amongst this latter power is the power of this court to exercise its inherent jurisdiction so as to regulate its own procedures and, significantly, avoid an injustice". This court is therefore competent to direct that security be provided where justice demands and in accordance with its inherent jurisdiction.

[57] This court's inherent jurisdiction to regulate its own affairs relates to procedural matters[7] in the interest of justice or the proper administration of justice. The claim for pure economic loss is a substantive matter. The court sitting as Admiralty Court has no jurisdiction to entertain a claim for pure economic loss.

[58] The Vice - Admiralty Court Rules of 1883 are still applicable to this court in the

[6] G Hofmeyer *Admiralty Jurisdiction Law and Practice in SA* para 7.
[7] *Botes v McLean* (I 853/2014) [2019] NAHCMD 330 (2 September 2019), *Likanyi v The State* CA 2/2016 delivered on 7 August 2017.

exercise of its admiralty jurisdiction, and as counsel for Prime correctly submitted, there is no rule which empowered this court to order the defendant in a contemplated action to provide security for the claim to be advanced at a future date.

[59] Counsel for applicants submitted that the court must grant the relief in order to prevent a grave injustice. Rule 6 of the Supreme Court Rule provides a remedy in circumstances where an appeal is frivolous or vexatious and it has no prospects of success on appeal. Rule 6 provides:

> 'Summary dismissal of appeal in civil proceedings
>
> 6. (1) A party to an appeal who is of the opinion that the appeal is frivolous or vexatious, may within 21 days of service of the notice of appeal apply on notice of motion supported by an affidavit setting out the reasons why the party contends that the appeal should be dismissed on the basis that it is frivolous or vexatious or that it has no prospects of success'.

The applicants have not invoked that remedy.

[60] Counsel for the applicants argued that an expedited appeal was granted and the remedy is not peremptory. Even if that is the case, the rule 6 remedy provides a quicker and less expensive procedure to dispose of an appeal which is frivolous or vexatious and to prevent an injustice. Once that remedy is invoked and the party invoking it is successful, then the frivolous or vexatious appeal will be dismissed and that will be the end of the matter. No explanation has been proffered by the applicants why that remedy was not invoked.

[61] For all those reasons, this court does not have jurisdiction (inherent or otherwise) to entertain the contemplated claim and cannot order the first respondent to furnish security for that contemplated claim.

In light of that conclusion, it is not necessary for this court to consider the other point in lime raised and the merits of the application.

Order

For all those reasons, I make the following order:

1. The application is dismissed.
2. The applicants are ordered to pay the costs of the first respondents, such costs to include the costs of one instructing and two instructed counsel.

G.N. Ndauendapo

Judge

APPEARANCES:

APPLICANTS:	Mr. M Fitzgerald SC Ms. W De Bruin of Koep & Partners
THIRD RESPONDENT:	Mr. M Wragge SC J A N Strydom of ENSAfrica