

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**  
**Exercising its Admiralty Jurisdiction**  
**RULING**

Case no: AC 10/2021

Name of vessel: **MT "MARVIN STAR"**

In the matter between:

**WILMINGTON SAVINGS FUND SOCIETY FSB**  
**ACT MARITIME LLC**

**FIRST APPLICANT**  
**SECOND APPLICANT**

**and**

**THE MOTOR TANKER 'MARVIN STAR', HER**  
**OWNERS AND ALL OTHERS INTERESTED IN HER**  
**PANORMOS CRUDE CARRIERS LIMITED**  
**RESPONDENT**  
**PRIME PARADISE INTERNATIONAL LIMITED**

**FIRST RESPONENT**  
**SECOND**  
**THIRD RESPONENT**

**Neutral citation:** *Prime Paradise International Limited v Wilmington Savings Fund Society FSB* (AC 10/2021 [2023] NAHCMD 9 (25 January 2023))

**Coram:** NDAUENDAPO J

**Heard:** 08 November 2022

**Delivered: 25 January 2023**

**Flynote:** Shipping – Admiralty practice – Application to compel Prime to comply with preservation costs order – Counter application to stay hearing pending Prime’s application in terms of Rule 185 of Vice-Admiralty Court Rules – Prime’s application for leave to appeal the preservation costs order – Court order to be complied with unless set aside on appeal – Explanation for non-compliance with time period to launch application for leave acceptable.

**Summary:** The Banks launched an application to compel Prime to comply with the preservation costs order dated 28 September 2021. In terms of that order Prime was ordered to provide security for preservation costs of the motor vessel “the Marvin Star” which was under arrest at the port of Walvis Bay. Prime was ordered to put up security for preservation costs because it was opposing the sale of the vessel claiming that it was the *de facto* owner of the vessel whereas the registered owner of the vessel did not oppose the sale of the vessel. Prime appealed to the Supreme Court against the preservation costs order, but the appeal was struck from the roll because according to the Supreme Court the order was an interlocutory order and Prime should have obtained leave to appeal. The Banks brought an application to compel Prime to comply with the preservation costs order. Prime brought a counter application to have the Banks’ application stayed pending Prime’s application for leave to appeal being determined and if successful, until the appeal is determined by the Supreme Court. Prime explained that it was under a mistaken belief that it could appeal the preservation costs straight without obtaining leave. It submitted that the preservation order was novel as neither the Vice-Admiralty Court Rules nor the High Court Rules make provision for such an order. It also submitted that there are good prospects of success on appeal and that the Supreme Court may come to a different conclusion.

*Held that*, the Banks’ application succeeds, the relief as per the draft order is granted.

*Held further that*, the counter application succeeds to the extent that the operation and execution of the Banks' order is suspended pending the determination of the appeal against the preservation costs order that Prime intends to launch to the Supreme Court.  
*Held further that*, the application for leave to appeal to the Supreme Court is granted.

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## ORDER

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The Banks' application to compel Prime to provide security for preservation costs and Prime's counter application

1. The Banks' application succeeds, the relief as per the draft order is granted.
2. The counter application succeeds to the extent that the operation and execution of the Banks' order is suspended pending the determination of the appeal against the preservation costs order that Prime intends to launch to the Supreme Court.
3. Costs shall be costs in the appeal.

Prime's applications in terms of rule 185 of the Vice-Admiralty Court Rules and application for leave to appeal

1. Condonation is granted and the time period within which the notice of appeal is to be delivered is extended until 3 February 2023.
2. The application for leave to appeal to the Supreme Court is granted.
3. Costs shall be costs in the appeal.

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## RULING

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NDAUENDAPO J

### Introduction

[1] Before me are four applications brought by the applicants (“the Banks”) and the third respondent (“Prime”). The applications are as follows:

- (a) The Banks seek an order compelling Prime to comply with the court order dated 28 September 2021 in which Prime was ordered to pay security for preservation costs of the Vessel (Marvin star) in the amount of USD 2,959,992, failure to pay the amount, an order declaring Prime to be in contempt of court and failing the purging of such contempt within 5 days striking out the defence entered by Prime in the *rem* action issued under above captioned case number.
- (b) Prime launched a counter application seeking an order that the hearing of the Banks’ application be stayed pending the final determination of Prime’s application for an extension of the time period prescribed in Vice-Admiralty Court Rule 150, alternatively High Court Rule 115(3), for the delivery of a notice of appeal and the bringing of an application for leave to appeal against the order of this court handed down on 28 September 2021, and if leave to appeal is granted, until such time as the appeal has finally been determined.
- (c) Prime brought an application in terms of the Vice-Admiralty Rule 185 seeking an order that the time period prescribed in Vice-Admiralty Court Rule 150, alternatively High Court Rule 115(3) for the delivery of a notice of appeal and the bringing of an

application for leave to appeal the order of this Court dated 28 September 2021 be extended until and including the date of the launching of this application alternatively until such time as the application for leave to appeal against such order is heard, alternatively until such time as the notice to appeal has been filed. Prime also seeks condonation for its non-compliance with the time periods provided for in the Vice-Admiralty Rule 150, alternatively Rule 115, and that the operation and execution of the order referred above be suspended pending the final determination of the application for leave to appeal, and if leave is granted, pending the final determination of the appeal.

(d) Prime also seeks leave to appeal to the Supreme Court against the whole of the order and judgment of this Court handed down on 21 September 2021 and reasons released on 5 November 2021.

#### The Parties

[2] The first applicant is WILMINGTON SAVINGS FUND SOCIETY, FSB (“WSFS”), a company incorporated in terms of the company laws of the United States of America and having its primary office at 500 Delaware Avenue, 11<sup>th</sup> Floor, and Wilmington, Delaware, 19801, USA.

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

[4] The first respondent is MT “MARVIN STAR”, (“the Vessel”), a crude oil tanker vessel built 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.

[5] The second 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 registered address at Trust Company Complex, Ajeltake Road, Ajeltake Island, Majuro, Marshall Islands, and MH96960.

[6] The third 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

[7] For the sake of convenience I shall refer to the first and second applicants as the Banks and the third respondent as Prime.

The Banks’ application to compel Prime to provide security for preservation costs and Prime’s counter application

[8] Mr. Cunningham deposed to the affidavit on behalf of the Banks. The Banks seek an order compelling Prime to pay the security it ought to have paid in terms of the preservation security order totaling, initially, USD 2,959,992 but at the launch of the application reduced to USD 644 352.

[9] The order of 28 September 2021 provided that Prime pays such security into the trust account of ENS Africa, (attorneys acting on behalf of Prime), to be paid to the Banks on demand or to the Fund constituted by the sale of the Vessel to be paid out to the Banks upon submission of their claim to the Referee.

[10] After the order of 28 September 2021 was granted, Prime did not comply with the order. On 5 October 2021, the Banks applied for the Vessel to be sold *pendent lite* the opposed sale application was granted. Prime appealed the sale application judgment and on 26 April 2022, the Supreme Court dismissed the appeal. Prime also appealed the preservation security costs order of the 28 September 2021. The Supreme Court ruled that Prime should have first obtained leave to appeal from this court before it could

appeal the preservation security costs order. On 31 May 2022, the dies in respect of any application for leave to appeal expired. On 22 June 2022, the Vessel was sold by way of public judicial auction.

[11] On 3 June 2022, Bowmans Attorneys, on behalf of the Banks, addressed a letter of demand to ENS Africa, representing Prime, regarding the payment of the security (Annexure CNC6). On 10 June 2022, ENS Africa responded that it did not have instructions from Prime, it however advised Prime that it had no obligation to pay such security (Annexure CNC7). Following that response, the Banks launched this application to compel Prime to comply with the court order dated 28 September 2021.

[12] Prime opposed the application and launched a counter application. Mr Norton deposed to the opposing affidavits (founding and answering) on behalf of Prime. He avers that it is in the interest of justice that the Banks' application be stayed pending the final determination of its application to extend the time within which it may bring its application for leave to appeal and, if it is successful, file its notice of appeal.

[13] He avers that the Banks' application seeks a new order and there is no notice of motion for the new order sought. He further avers that the amount sought to be paid into the Fund shall form part of the Fund comprising the proceeds of the sale of the vessel and be available for distribution to creditors having valid claims against the Fund and payment into the Fund no longer constitutes security, payment shall simply constitute part of the Fund. It is therefore a new relief. He submitted that the preservation order was vague and unclear, and difficult to comply with.

#### Submissions on behalf of the Banks

[14] Mr. Fitzgerald submitted that the order is not new, the Banks are only seeking compliance with the court order dated 28 September 2021. He submitted that actual payment of security will only be determined by the action in rem.

[15] Mr. Fitzgerald argued that the amount in the order which they seek to be implemented has been reduced from USD 2,959,992 to USD 644 352. The initial amount was erroneously calculated.

[16] He argued that the sanction sought for failure to pay security is for another day, if not paid, the Banks will apply to court for an order that Prime be declared in contempt. He submitted that the objections raised by Prime that the preservation security order is vague and incomprehensible, are not bona fide and should have been raised before the order was granted.

#### Submissions on behalf of Prime

[17] Mr Wragge submitted that the order sought is a new relief different from the earlier order of the 28 September 2021 and that the Banks' application falls to be determined as a free standing application for separate and distinct relief. However, if the court does not agree with that contention then the application must be stayed until Prime's application for extension of time period has been determined.

[18] He submitted that the relief is new because, *inter alia*, the preservation security order provides for Prime to provide security for the preservation costs of the vessel for a specific period. The new order requires payment of the sum of USD 2.959 992 into the Fund Account; whereas the sanction in the preservation security order provided for application to strike out Prime's opposition to the sale application. The sanction now provided for in the new order is one declaring Prime to be in contempt and for an order striking out its defense in the action in rem.

[19] Counsel submitted that by reasons of its contradictory and confusing terms, the preservation security cost order was incapable of compliance.

[20] He submitted that the relief sought in the new application is unheard of. There is no provision in the Vice-Admiralty Rules or in the Rules of the High Court which entitles



a *peregrinus* plaintiff to demand that a *peregrinus* defendant pay into a Fund preservation costs for a vessel under arrest and in custody of the sheriff in his capacity as Admiralty Marshall.

### Discussion

[21] This court on 28 September 2021 issued an order directing Prime to, *inter alia*, provide 'security for the preservation costs of the Mt "Marvin Star" for the period 19 August 2021 until its opposition has finally been determined by the Court at a rate of USD 10,068 per day....; 4.1 cash deposited into the trust account of ENS Africa and payable on demand to the applicants in the event that Prime's opposition is dismissed by this honorable Court'.

[22] The court order has not been complied with. It is trite that an order of court stands and is enforceable until such time as it has been set aside by a higher court with competent jurisdiction. That has not happened. The belated objections raised against the order being vague and unclear should have been raised when the application for the order was sought and that was not done. Counsel for the Banks correctly argued, those objections are not bona fide and stand to be rejected. The court can simply ignore them because they were not raised at the hearing when the preservation security order was granted.

[23] The submission by Prime that the order sought now is different from the order granted on 28 September 2021, is not correct. The order sought is in compliance with paragraph 4.2 of the preservation costs order dated 28 September 2021. The Banks merely seek that payment of the amount referred in the order be paid into the Fund, which constitutes compliance with para 4.2 of the preservation order. As counsel for the Banks submitted, the objective wording of the order demonstrates unequivocally the obligation on the part of Prime to pay, by way of security, the amounts described therein.

[24] Prime objects to the amount of security sought being reduced from USD 2, 959,992 to USD 644 352 and the Banks explained that the amount of USD 2, 959,992 originally claimed in the notice of motion was based on the erroneous calculation of preservation costs to be incurred to the date of the judgment handed in the appeal. The amount was reduced to USD 644 352 and according to counsel for the Banks the reduced amount will only become payable to the Banks upon submission of its claim to the Referee, pending determination of Prime's objections and therefore its liability in respect of such costs or, in light of the Referee's recommendation that claims against the fund be stayed, pending determination of the action in rem. How the reduced amount could be prejudicial to Prime is any one's guest. There is no merit in that objection.

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

1. The Banks' application succeeds, the relief as per the draft order is granted.
2. The counter application succeeds to the extent that the operation and execution of the Banks' order is suspended pending the determination of the appeal against the preservation costs order that Prime intends to launch to the Supreme Court.
3. Costs shall be costs in the appeal.

Prime's applications in terms of Rule 185 of the Vice-Admiralty Court Rules and application for leave to appeal

[26] By notice of motion the Prime seeks an order in the following terms:

'1. That the time period prescribed in the Vice-Admiralty Court Rule 150, alternatively Rule 115(3) of the Rules of this Court for the delivery of a notice of appeal and launching an application for leave to appeal against the order of Honorable Justice Ndauendapo handed

down on 28 September 2021 (with the judgment delivered on 05 November 2021) a copy which is annexure 'A', be extended until, and including the date of the launching of this application (or such further time as this honorable court may deem meet) alternatively until such time as the application for leave to appeal against such order is heard, alternatively until such time as the Notice of Appeal has been filed.

2. Condoning the applicant's non-compliance with the time periods provided for in Vice-Admiralty Rule 150, alternatively Rule 115 of the Rules of this honorable court (insofar as it relates to the time period within which an applicant is to obtain leave to appeal and to file a notice of appeal and insofar as it may be necessary in the circumstances).

3. That the operation and execution of the order referred to in para 1 be suspended pending the final determination of the application for leave to appeal and, if leave to appeal is granted, pending the final determination of the appeal.'

[27] Mr. Norton in the founding affidavit avers that after the order was granted on 28 September 2022, Prime's legal representatives took the view that they could directly appeal to the Supreme Court without obtaining leave to appeal. When the appeal against the preservation security order was heard in the Supreme Court, it was struck from the roll because according to the Supreme Court it was an interlocutory order as described in section 18(3) of the High Court Act, Act 16 of 1999 and therefore leave was required.

[28] The Supreme Court judgment was handed down on 26 April 2022. Had Prime taken the view that the preservation security order was an interlocutory, in terms of rule 150 of the Vice-Admiralty Rules, it was obliged to bring the application for leave within one month from the date the order was handed down. The preservation security order was handed down on 28 September 2021, therefore the application should have been brought before 28 October 2022, or if the approach adopted by the Banks is correct, by 26 May 2022, a month after delivery of the Supreme Court judgment.

[29] Norton avers that if Prime is not given leave to bring this application for leave to appeal and should it brings its application and not be granted leave to appeal, it will suffer irreparable prejudice. On the other hand, should an extension of time be allowed and should leave to appeal be granted, the Banks will suffer no prejudice. If the Supreme Court dismisses Prime's appeal the Banks will be entitled to take whatever steps are legitimately available to them to enforce the preservation costs order.

[30] Norton further avers that after the appeal was struck from the roll, his firm and senior counsel gave consideration to the consequences of appeal against the preservation costs order having been struck from the roll. Their consideration of the preservation costs order suggested the following, in summary, Prime cannot tell from the order what quantum of security must be provided to comply with the order; what form of security should be in; and in what circumstances the security will be payable to the Banks.

[31] He avers that on 3 June 2022, after the appeal was struck from the roll, his firm received a letter from the Banks demanding Prime to provide security as directed in terms of the order within 5 days. The letter further stated that if Prime failed to do that, the Banks would apply for an order directing Prime to do so, failing which its defense to the Banks' action in rem would be dismissed, or Prime would be held in contempt of court which, until purged, will preclude Prime from continuing with its opposition to the action in rem.

[32] The Banks opposed the application. The Banks disputed the correctness of the legal advice Prime relied on. The Banks submitted that the delay from 26 April 2022, the date of the Supreme Court judgment, to 22 June 2022, when the application was brought is simply inexcusable. Prime elected to do nothing despite knowing the legal position and only launched its application after the Banks launched their application to enforce security. Prime was of the view that the preservation security costs order could simply be disregarded and ignored, and that was a manifest rejection of the sanctity of an order of court which showed a willful disregard and lack of bona fides on the part of

Prime. The Banks contended that the application for condonation is not bona fide and irrespective of any prospects of success should be refused.

[33] Prime delivered an application for leave to appeal against the judgment of this Court dated 28 September 2021. The grounds of appeal are set out in the notice of motion. Prime submitted that there are reasonable prospects that another court will find that the learned judge erred on one or more of the grounds set out in the notice of motion and that the High Court did not have jurisdiction, inherent or otherwise, and competence in law, to order a defendant in an action in rem to furnish security for the costs of preserving property arrested in an action in rem and in the custody of the sheriff, at the instance of the arresting plaintiff.

#### Submissions on behalf of Prime

[34] Counsel submitted that a full and detailed explanation was proffered as to why there was non-compliance with the rules. Counsel also submitted that the preservation costs order is novel as neither the Vice-Admiralty Court Rules nor the High Court Rules provide for such a relief. Counsel further submitted that the prospects of success on appeal are good and the Supreme Court may come to a different conclusion.

#### Submissions on behalf of the Banks

[35] Counsel submitted that the fact that the order granted was novel does not mean that it was a wrong decision or moreover, a wrong exercise by the court of its inherent jurisdiction to achieve justice between the parties. This is particularly so where Prime is a *peregrinus* with no assets situated in Namibia and because of its Iranian connections any order issued by this court is not easily enforced. Counsel contended that in the absence of the provision of security, there is simply no realistic prospect of the Banks ever recovering the additional unnecessary preservation costs occasioned by the culpable conduct of Prime in respect of the sale application and that is manifestly unfair.

## Discussion

[36] Rule 55(1) of the Rules of Court and Rule 185 of the Vice-Admiralty Court Rules provides;

‘The judge may, upon the application of either party, enlarge or abridge the time prescribed by these rules or forms or by any order made under them for doing any act or taking any proceeding upon such terms as him shall deem fit, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time prescribed’.

[37] The explanation proffered by Prime as to why the application was not brought within the required time and why Prime did not initially sought leave from this court to appeal is detailed, reasonable and acceptable.

[38] I agree with counsel for Prime that the preservation costs order granted by this court dated 28 September 2021, is novel and that neither the Vice-Admiralty Court Rules nor the High Court Rules provide for such an order. I further agree with counsel for Prime that there are good prospects of success on appeal and the Supreme Court may come to a different conclusion.

[39] For all those reasons, I make the following orders:

1. Condonation is granted and the time period within which the notice of appeal is to be filed is extended until 3 February 2023.
2. The application for leave to appeal to the Supreme Court is granted.
3. Costs shall be costs in the appeal.

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GN NDAUENDAPO

Judge

APPEARANCES:

APPLICANTS: Advocate M Fitzgerald SC  
Instructed by Pf Koep & Co, Windhoek

THIRD RESPONDENT: Advocate M Wragge SC  
Instructed by ENS Africa, Windhoek