



**REPORTABLE**

CASE NO: SA 92/2021

CASE NO: SA 86/2021

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**PRIME PARADISE INTERNATIONAL LTD**

**Appellant**

and

**WILMINGTON SAVINGS FUND SOCIETY FSB**

**First Respondent**

**ACT MARITIME LLC**

**Second Respondent**

**THE MOTOR TANKER "MARVIN STAR", THE  
OWNERS AND ALL THE OTHERS INTERESTED**

**IN HER**

**Third Respondent**

**PANORMOS CRUDE CARRIERS LTD**

**Fourth Respondent**

**Coram:** DAMASEB DCJ, SMUTS JA and FRANK AJA

**Heard:** 29 March 2022

**Delivered:** 26 April 2022

**Summary:** This court was seized with two appeals, emanating from the same claim and involving the same parties. These appeals were heard on an expedited basis and they arise from the arrest of the crude oil tanker 'Marvin Star' (the vessel) in Namibian

waters and currently under arrest in the port of Walvis Bay. The first appeal (ie Case No. SA 86/2021: the appeal against security for preservation costs), concerns the High Court's order of 28 September 2021 directing that the appellant furnish security for preservation costs in relation to the vessel *pendente lite*; whereas the second appeal (ie Case No. SA 92/2021: the application for the sale of the vessel pending the determination of the claim) is directed against the order of the High Court given on 22 October 2021 authorising the sale of the vessel *pendente lite*. The merits of the second appeal are dealt with first.

*Case No. SA 92/2021: the application for the sale of the vessel pending the determination of the claim*

The vessel was arrested off Walvis Bay at the instance of first and second respondents (Wilmington Savings Fund Society FSB (Wilmington) and ACT Maritime LLC (ACT)) in terms of a summons *in rem* for monies due under a loan agreement secured by a mortgage encumbering the vessel. The registered owner, Panormos Crude Carriers Ltd (Panormos) did not dispute its indebtedness under the loan and supported the application by Wilmington and ACT to sell the vessel pending the determination of the vessel. That application was opposed by Prime Paradise International Limited (Prime) which asserted it was *de facto* owner of the vessel. Prime alleged through its South African lawyer that the registration of the vessel in the name of Panormos was the result of a fraud perpetrated upon Prime by Panormos and one of the principles of a company holding or related to it. Prime also asserted that it would sustain immense prejudice if the sale proceeded pending the determination of its claim whereas the mortgagee would not suffer prejudice if a sale *pendent lite* were to be refused.

*Held that*, that in determining whether or not to grant an order for the sale of a vessel under Rule 138, the High Court is required to exercise a discretion rightly characterised as wide by Scott, JA in *Sheriff of Cape Town v MT Argun, Her Owners and All Persons Interested in her & others; Sheriff of Cape Town & another v MT Argun, Her Owners and All Persons Interested in her & another* 2001 (3) SA 1230 (SCA) based upon what is just and equitable and more appropriate in the light of all the relevant considerations. This discretion, as in the case of winding-up a company on the ground of being just and equitable, is one in the wide and not the narrow sense.

*It is held that*, this court is thus not limited to the narrow ambit of an appeal as contemplated in *South African Poultry Association & others v Minister of Trade and Industry & others* 2018 (1) NR 1 (SC) and *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2013 (3) NR 664 (SC). This court is not bound by the conclusion of the High Court and may depart from the order of the High Court on grounds which it considers necessary.

*Held that*, the court *a quo* correctly found as persuasive the approach of the Full Bench in *The MT Tigr v Bouyges Offshore & another* 1998 (4) SA 206 (C) in listing as relevant factors in applications for a sale *pendente lite* being that such an order will more readily be granted where the owner of the vessel agrees thereto or is in default of appearance and another factor being the continuing deterioration of the vessel and accordingly the applicants' security. This approach applies with equal force to applications brought under rule 138.

*Held that*, the allegations of a fraudulent sale to Panormos are plainly not within Mr Norton's knowledge. These allegations reflect his instructions from his client. Nor are the sources of the specific allegations relating to fraud identified by him, as a deponent is required to do. Instead he merely asserts that where facts are not within his personal knowledge, they are based on information supplied by Prime's lawyer in Greece, Prime's lawyer in Turkey, a certain DAI Chencheng, a shareholder in Prime, and finally Shen Yong, a director of Prime. This is insufficient and the affidavit does not identify the specific factual averments allegedly provided by each of the respective sources. This must appear in his or their respective affidavits. It also does not appear in any of the supporting affidavits which merely confirm personal knowledge of the facts and allegations in Mr Norton's affidavit in so far as they relate to information provided by them which is nowhere specified.

*Held that*, the court *a quo* was thus correct in finding that the averments in Mr Norton's affidavit to the effect that Prime is the *de facto* owner and Panormos' registration of the vessel was the result of a fraud constituted inadmissible hearsay evidence.

*Held that*, the mortgagee's claim is clearly set out. It is not disputed by the registered owner (ie Panormos) which also supports the sale and the vessel does not dispute its

indebtedness under the loan agreement and the terms of the mortgage which entitle the mortgagee to sell the vessel upon default.

*Held that*, ACT as a party to the loan agreement, referred to as agent and as the security agent is authorised in terms of clause 24.1.2 of the loan agreement to perform duties and responsibilities by the lenders in the enforcement of the loan. Under clause 7 of the mortgage, it is the mortgagee which is to perfect the security created by the bond. But the sale application and underlying claim do not only relate to the perfection of that security, but also to the enforcement of the loan agreement where the security agent has duties, obligations and responsibilities relating to the enforcement of the loan.

*It is thus held that*, ACT does have standing in these proceedings.

*Held that*, the High Court did not err in exercising its discretion in terms of rule 138 of the Vice-Admiralty Court Rules in granting the sale application and was justified in doing so. The appeal against that order is accordingly dismissed.

*Case No. SA 86/2021: Appeal against security for preservation costs*

Wilmington and ACT launched an application against Prime on 1 September 2021. This application was set down on 3 September 2021 (but heard on 21 September 2021 instead), for an order directing Prime to pay security for the preservation costs of the vessel for the period 19 August 2021 until the sale application had been determined. Prime opposed the application, pointing out that there is no provision in the Vice-Admiralty Court Rules or the Rules of the High Court which authorises a *peregrinus* plaintiff to demand security from a *peregrinus* defendant for security for costs incurred by the plaintiff in preserving a vessel under arrest. Prime contended that it would be contrary to the law and not in the interests of justice to make such an order.

In granting the order in the far reaching terms sought, the court *a quo* accepted that there was no provision in the Vice-Admiralty Court Rules or the High Court Rules entitling a *peregrinus* plaintiff who has arrested a vessel to demand security from a *peregrinus* defendant for preservation costs of the vessel. The court *a quo* further found that its inherent discretion to regulate its own procedures arose from Art 78(4) of the Constitution in the interests of the proper administration of justice. It found that the

issue of payment of security for preservation costs was a procedural matter and not a matter of substantive law and thus within its inherent discretion to regulate in the interests of justice. Prime noted an appeal against this judgment and order.

On appeal, counsel representing the parties were asked whether the order was of an interlocutory nature requiring leave to appeal from the High Court in terms of s 18(3) of the Act – reference was made to *Di Savino v Nedbank Namibia Limited* 2017 (3) NR 880 (SC) (*Di Savino*) and *Government of the Republic of Namibia v Phillipus* 2018 (2) NR 581 (SC).

Prime contended that the order granted by the High Court is an order for final relief in the form of payment for money. It was argued that upon the mere submission of the claim by Wilmington and ACT to the referee and not the determination of its validity or reasonableness, triggers payment of security. Prime further submitted that the order to furnish security of preservation costs is separate and distinct from the main claim. Wilmington and ACT argued that the application for security was incidental to the main proceedings and upon an application of *Di Savino*, leave to appeal was required by s 18(3) of the Act.

*Held that*, the term interlocutory in s 18(3) of the Act was employed in the wide and general sense of the term usefully explained by Corbett, JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 as opposed to simple or purely interlocutory orders.

*Held*, for the purpose of s 18(3) of the Act, interlocutory orders refer to all orders incidental to the main dispute, preparatory to or during the progress of litigation and include those which, although they may have a final and definite effect, do not finally dispose of the main action.

*Held that*, the application for preservation costs of the vessel *pendente lite* in this matter is ancillary to the main claim or suit. Whilst plainly prejudicial to Prime, it does not dispose of any issues or a portion of an issue in the main action or suit between the parties.

*Held that*, the order is thus interlocutory and in terms of s 18(3) of the High Court Act 16 of 1990, leave to appeal was required. Prime as appellant had not sought and was not granted leave.

*Held that*, the appeal against the order directing Prime to provide security for the costs of preservation *pendente lite* is struck from the roll with costs.

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## APPEAL JUDGMENT

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SMUTS JA (DAMASEB DCJ and FRANK AJA concurring):

[1] We have before us two appeals which arise from the same claim, and involve the same parties. They have accordingly been heard together and on an expedited basis. Both appeals arise from the arrest of the crude oil tanker 'Marvin Star' (the vessel) in Namibian waters and currently under arrest at the port of Walvis Bay.

[2] The first appeal (Case No. SA 86/2021) concerns the High Court's order of 28 September 2021 directing that the appellant furnish security for preservation costs in relation to the vessel *pendente lite* (pending the determination of the claim). Reasons for the order were subsequently given by the High Court on 5 November 2021.

[3] The second appeal is directed against the order of the High Court given on 22 October 2021 authorising the sale of the vessel *pendente lite* (Case No. SA 92/2021). Reasons for this order were provided on 19 November 2021. The second appeal is dealt with first in this judgment.

### Background facts

[4] On 10 August 2021, the vessel was arrested off Walvis Bay at the instance of the first and second respondents, Wilmington Savings Fund Society FSB (Wilmington) and ACT Maritime LLC (ACT) respectively, in terms of a summons *in rem* for monies due and owing under a loan agreement. The arrest of the vessel had been effected the day before at the instance of Destel Energy DMCC in respect of a much smaller claim of USD18 500 for unpaid lubricants supplied in Indonesia.

[5] The claim of Wilmington and ACT is for USD19 658 045,06. It arises from a loan agreement dated 23 December 2019 concluded between the registered owner of the vessel, Panormos Crude Carriers Ltd (Panormos) – fourth respondent in both appeals - and financial institutions listed as lenders, with ACT as ‘agent’ and Wilmington as ‘security trustee’. To secure its indebtedness to the lenders, Panormos as owner executed and registered a first preferred ship mortgage encumbering the vessel in the Marshall Islands on 23 December 2019 where the vessel is registered. The mortgage is in favour of Wilmington as mortgagee and security trustee for the finance parties as stipulated in the mortgage. Panormos, as borrower, undertook to repay the loan of USD20 million in 20 consecutive instalments.

[6] The lenders appointed ACT as security agent and Wilmington as security trustee to exercise the rights and powers given to them under the loan agreement.

[7] In the event of default, Wilmington as mortgagee is authorised to take possession of the vessel, navigate it to such places as ACT, as security agent, may decide to detain the vessel and sell it by private treaty or auction.

[8] Wilmington and ACT alleged that the borrower (Panormos) defaulted in its payments under the loan agreement. After giving notice, ACT caused a writ to be issued against the vessel out of Singapore.

[9] The arrest of the vessel followed in Walvis Bay on 10 August 2021. The writs of summons provided for seven days for an appearance to defend. The owner, Panormos, has not defended the claim.

[10] Shortly after the arrest and on 12 August 2021, lawyers representing the appellant (Prime Paradise International Limited – Prime) indicated to the legal practitioners representing Wilmington and ACT that Prime would defend the claim and that Prime asserted that it was the *de facto* owner of the vessel.

The application for the sale of the vessel pending the determination of the claim

[11] Wilmington and ACT thereupon on 19 August 2021 launched an urgent application in the High Court, exercising its admiralty jurisdiction, citing the vessel, Prime and Panormos as respondents for an order authorising the sale of the vessel pending the determination of its claim. The application also sought ancillary relief in the form of establishing a fund for the proceeds of the sale and the appointment of a referee to examine and report to the High Court on the validity and ranking of claims against the fund and other related ancillary relief.

[12] The application of Wilmington and ACT for the judicial sale of the vessel *pendente lite* was sought under rule 138 of the Vice-Admiralty Court Rules.



[13] As was made clear by Strydom JP in *Freiremar SA v Prosecutor-General of Namibia & another*,<sup>1</sup> admiralty jurisdiction is exercised by the High Court by virtue of the Colonial Courts of Admiralty Act 1890 because that legislation applied in the Cape of Good Hope when Proclamation 21 of 1919 provided that the law as applicable in the Cape of Good Hope was made applicable to then South West Africa. The statutory regime governing admiralty jurisdiction has since been reformed and modernised in South Africa in 1983 when the Admiralty Jurisdiction Regulation Act 105 of 1983 (the AJR Act) was passed but not made applicable to then South West Africa. Despite 32 years having passed since Namibian independence, the archaic Colonial Courts of Admiralty Act 1890 and the rules promulgated under it remain applicable in Namibia. As has been stressed by the High Court,<sup>2</sup> there is a pressing need to reform and update Namibia's outdated (and indeed antiquated) maritime laws.

[14] Rule 138 of the Vice-Admiralty Court Rules authorises a judge to order the sale of a vessel under arrest of the court before or after final judgment with or without appraisal and either by public auction or by private contract.

[15] The affidavit in support of the application is deposed to by the South African attorney representing Wilmington and ACT. It outlines the terms of the loan and the mortgage, the breach of those terms by non-payment and the notices given to rectify that breach and the invocation of the remedies set out in loan agreement and mortgage. These steps culminated in Wilmington and ACT causing the vessel to be brought to Walvis Bay for foreclosure and then issuing a summons *in rem* on 10 August 2021 and causing the arrest of the vessel on 10 August 2021.

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<sup>1</sup> *Freiremar SA v Prosecutor-General of Namibia & another* 1996 NR 18 (HC) at 27-28 (Full Bench).

<sup>2</sup> Most recently in *MV Palenque 1: GMTC I LLC v Fund Constituted from the sale of MV Palenque 1 & others* 2019 (4) NR 1142 (HC) para 43.

[16] An email from Prime's South African attorneys was received on 12 August 2021 in which Prime asserted ownership of the vessel and indicated it would defend the claim of Wilmington and ACT.

[17] Wilmington and ACT's attorney further alleged that the vessel was valued for USD29 million on the basis of a willing seller and willing buyer sale and with reference to a valuation attached to her affidavit. The attached valuation was not however confirmed under oath by its author. The prospects of sufficient value being realised in the sale to cover both claims and anticipated costs were stated to be sound.

[18] An urgent order for the sale of the vessel was sought in view of the substantial costs of preserving the vessel and ensuring that it remained operational. These costs are estimated at just over USD10 000 per day. It was alleged that the determination of the defended claim would take several months to complete and would be subject to an appeal as of right and that these accumulating preservation costs justified the sale *pendente lite*.

[19] The application was launched when Prime entered an appearance to defend the claim of Wilmington and ACT.

#### Prime's opposition

[20] Prime's opposition is contained in the affidavit of Mr Norton, its South African attorney, where it is claimed that Prime is the 'de facto owner' of the vessel.

[21] The point is first taken that ACT lacks standing to sue because the mortgage is executed in favour of Wilmington – the only party with standing to enforce the terms of the mortgage according to Prime.

[22] It is also disputed on Prime's behalf that there are grounds for the sale of the vessel pending the determination of the competing claims. It is stated that Prime as '*de facto* owner' would sustain immense prejudice should it ultimately succeed in its defence to the claims in contrast to much less prejudice which Wilmington and ACT would sustain as the vessel was under arrest and effectively under their control at the time (and remains so).

[23] Mr Norton alleges that the registration of the vessel in the name of Panormos was the result of a fraud perpetrated on Prime by a certain Mr A Kairaktides and Panormos. Mr Norton alleges that Prime purchased the vessel from Marvin Shipping Services Inc (Marvin) on 18 January 2018 and that on 30 March 2018 Prime entered into a bareboat charter agreement with Panormos for five years on a standard form for such agreements, and delivered the vessel to Panormos on 25 June 2018.

[24] Mr Norton further stated that charter invoices were sent and were unpaid and that Prime terminated the charter on 1 October 2020 (although no invoices were attached to his affidavit). As a consequence of the non-payment of invoices and termination, Prime instituted arbitration proceedings in London in January 2021 against Panormos, claiming unpaid hire and profit share.

[25] The pleadings in those arbitration proceedings were attached to Mr Norton's answering affidavit. In a preliminary challenge to the claim in arbitration, Panormos

contends that the arbitration lacked jurisdiction because the bareboat charter remained inchoate and never entered into force because no entity was ever nominated to be Prime's counter party under the charter. Further in its plea on jurisdiction, Panormos expanded that Marvin never nominated a counter party because Prime's sole shareholder is the Islamic Republic of Iran Shipping Lines (IRISL). Because of the imminent prospects of the re-imposition of sanctions on Iran in 2018, it is alleged that, instead of a five year bareboat charter in June 2018, Prime agreed to the sale of the vessel to a company to be nominated by Marvin. The plea further alleged that Marvin nominated Panormos as purchaser in July 2018 and the sale was entered into (between Prime and Panormos), with delivery of the vessel on 27 July 2018. Panormos was registered as owner in the Panamanian Shipping Register on 12 September 2018 and later (on 20 July 2020) in the Marshall Islands' registry.

[26] Mr Norton stated that Prime did not dispute Panormos' registration as owner but contended that this was a consequence of fraud by Marvin and its related company, Panormos, carried out by Mr Kairaktides, the principal of Marvin and a shareholder of Panormos, who was also a director of Prime at the time of the sale agreement between Prime and Panormos. It is alleged that this sale agreement for the vessel was signed by Mr Kairaktides on behalf of Prime when he had no authority to do so and without Prime's knowledge.

[27] Mr Norton further stated that Prime had commenced an action *in rem* in the Singapore High Court on 15 March 2021, seeking a declaratory order to the effect that it is the owner of the vessel. Prime could not however serve the writ because the vessel did not call upon Singapore.

### Panormos' position

[28] Panormos was represented and participated in the proceedings in both the High Court and in this court. It did not oppose the sale application and in fact supported it. It took part in the proceedings as a result of allegations made by Prime to the effect that it (Prime) is '*de facto* owner' of the vessel and that Panormos acquired registration as a result of a fraud perpetrated upon Prime by Mr Kairaktides of Marvin.

[29] It sought to deliver two affidavits deposed to by Mr Kairaktides and a director of Panormos respectively. Prime objected to the affidavits as they had not been sworn and authenticated in accordance with rule 128 of the High Court Rules. Panormos did not pursue its attempt to adduce those affidavits and agreed that the matter be argued upon the papers filed by Prime and the mortgagees and presented argument in the court below in support of the sale and accepted that Panormos had defaulted under the loan agreement.

[30] Panormos as well as Wilmington and ACT contended that Prime's allegations of fraud in support of its claim of '*de facto* ownership' of the vessel were based on inadmissible hearsay evidence and that no admissible evidence was placed before the court in support of Mr Norton's allegations of fraud.

### Approach of the High Court

[31] The High Court rejected the challenge to ACT's standing, finding that clause 24 of the loan agreement read with clause 7 of the mortgage afforded standing to ACT in an action to enforce security provided by the mortgage.

[32] The court found that rule 138 vested it with a discretion to order the sale of a vessel *pendente lite*. The court further referred to recent South African authorities to the effect that such an order would more readily be granted where the owner either agrees to the order or is in default of appearance and that a factor which should weigh heavily with a court is the continuing deterioration of the vessel.<sup>3</sup> The court found this approach to be persuasive even though adopted under a differently worded yet similar empowering provision under the more recent AJR Act.<sup>4</sup>

[33] The High Court further found that Mr Norton's statements concerning the alleged fraud constituted inadmissible hearsay evidence as he had no personal knowledge of the alleged fraud and that those who deposed to confirmatory affidavits on behalf of Prime did not identify specific facts or allegations in Mr Norton's affidavit and that certain of them were only appointed as director or became a shareholder after the alleged fraud.

[34] The court referred to the fact that the registered owner supported the sale. A further consideration referred to by the High Court was the length of time it would take for the dispute to become finally resolved if it went to trial which would extend beyond months and possibly run into years. During that time, the vessel would continue to deteriorate. This, the court found, would be prejudicial to creditors.

[35] The court concluded that Wilmington and ACT had made out a case for the relief sought and granted a rule *nisi* authorising the sale of the vessel and that their costs be paid out of the fund. The court further directed that Prime pay the costs of Panormos. On the return date of 22 October 2021, the rule was confirmed.

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<sup>3</sup> *The MT Tigr v Bouyges Offshore & another* 1998 (4) SA 206 (C) (Full Bench) (*MT Tigr*).

<sup>4</sup> Section 9.

[36] Prime appealed against this judgment and order. Wilmington and ACT directed an application to this court for an expedited hearing of the appeal in view of the cost of preserving and maintaining the vessel. That application was unopposed and was granted. This appeal together with the appeal directed against the order of the High Court on security were accordingly afforded an expedited hearing date.

#### Submissions on appeal

[37] It was argued on behalf of Prime that ACT lacked standing and that the High Court erred in its finding in this regard.

[38] Counsel for Prime referred to South African authorities which stress that a court should exercise its discretion in favour of ordering a sale of vessel *pendente lite* sparingly.<sup>5</sup>

[39] It was also contended on behalf of Prime that, given the fact that the value of the vessel exceeded the claim of the mortgagee, there was a weighty consideration against ordering a sale *pendente lite*. The other claim for necessaries was in a far lesser amount of USD18 500 and could be disregarded in the exercise of weighing prejudice. The evidence thus indicated, so counsel argued, that the mortgagee would not be unduly prejudiced if an order for the sale for *pendente lite* were to be refused.

[40] Counsel for Prime also submitted that the evidence adduced on behalf of Wilmington and ACT in their attorney's founding affidavit, especially that concerning

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<sup>5</sup> *Hilane Ltd v Action Partner Ltd & others: MV Silver Star* 2014 (2) SA 392 (ECP) para 10; *Sheriff of Cape Town v MT Argun, Her Owners and All Persons Interested in her & others; Sheriff of Cape Town & another v MT Argun, Her Owners and All Persons Interested in her & another* 2001 (3) SA 1230 (SCA) para 34; *MT Tigr* para 14.

the valuation of the vessel, amounted to inadmissible hearsay evidence. It was submitted that if this evidence were to be disregarded, no grounds (or insufficient grounds) had been advanced by Wilmington and ACT for an order for the sale of the vessel *pendente lite*.

[41] It was further contended that Mr Norton's answering affidavit was not hearsay as certain relevant allegations were confirmed. It was finally contended that there were contradictions in the versions before court as to how Panormos acquired ownership of the vessel which, so it was argued, tended to strengthen Prime's case that its registration was fraudulent.

[42] It was argued on behalf of Wilmington and ACT that the latter had standing by virtue of clause 24.2 of the loan agreement which provided that the secured parties as defined did not have independent power to enforce or have recourse to security or to exercise any right or power under the security documents except through the security agent. Counsel submitted that under this power and clause 7 of the mortgage that ACT had standing and that it was appointed for that very purpose.

[43] As for the lack of prejudice to the mortgagee if a sale were to take place in due course because the value of the vessel was more than sufficient to cover both the claim and preservation costs, it was pointed out that if the vessel were to be under arrest until October 2022, the earlier date reckoned for finalisation of the claim in the High Court, preservation costs would by then exceed USD3,6 million. If a further period is considered for an appeal, those costs would amount to some USD6 million.



[44] Counsel for Wilmington and ACT contended that the court below took into account relevant considerations and gave its order for good reasons in line with authority.

[45] Counsel further argued that hearsay evidence in the founding affidavit on behalf of Wilmington and ACT was confirmed under oath in reply by Mr Drakoulis prior to the hearing of the matter and thereafter by Mr Andonatos prior to the return date. It was also submitted that the application was brought as one of urgency and Prime could have availed itself of the right to file a further affidavit given the amplification in reply.

[46] Counsel for Wilmington and ACT also argued that the court below was correct in finding that Mr Norton's evidence amounted to inadmissible hearsay.

[47] It was contended that there were no material contradictions concerning the registration of the vessel in the name of Panormos and that the document relied upon, properly considered, does not give rise to a contradiction.

[48] It was finally submitted that the court below properly exercised its discretion and that it is not open to this court to tamper with that on the strength of *South African Poultry Association & others v Minister of Trade and Industry & others (SAPA)*.<sup>6</sup>

[49] Counsel for Panormos confirmed that Prime did not dispute that Panormos is the registered owner of the vessel and that it had defaulted on its loan obligations to the mortgagees and also did not dispute that Wilmington is registered as the first mortgagee over the vessel. Counsel also stressed that Prime had not disputed that

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<sup>6</sup> *South African Poultry Association & others v Minister of Trade and Industry & others* 2018 (1) NR 1 (SC) para 44.

Panormos did not oppose the sale application and in fact supported it. Counsel also stressed that registration as owner of a vessel is *prima facie* proof of ownership of the vessel. In this case, counsel pointed out that Panormos was both registered owner and also in possession of the vessel until its arrest.

[50] With reference to the defence mounted to the claim by Prime, counsel argued that Prime had failed to put up any admissible evidence to support it. Counsel also subjected the defence raised by Prime (of *de facto* ownership and the alleged fraud) to severe criticism, pointing out inconsistencies between Prime's contemporaneous conduct and its case advanced in the arbitration as compared with its approach set out in its opposition to the sale application. It was also pointed out that Prime had failed to put up a single contemporaneous document to corroborate the contention central to its defence that Panormos only had possession of the vessel pursuant to a bareboat charter concluded in March 2018 and pointed out that Prime had still not vindicated the vessel. Counsel also argued that Prime had not shown that the sale would be prejudicial to it because it had not been earning revenue with it and had not shown it had been trading with it as an asset and did not explain or claim how it would trade with it.

#### Ambit of this appeal

[51] The first question to be considered is the ambit of this appeal. It was argued on behalf of Wilmington and ACT that there is a narrow ambit to this appeal in the sense that where a court acted within its powers to select an option open to it, a court would only interfere if the discretion was not exercised judicially – in the sense of being exercised capriciously or upon a wrong principle or had not brought an unbiased judgment to bear or not acted for substantial reasons. This was found to be the case

where a court exercises a discretion regulating its own proceedings such as when considering condonation for a delay as was found in *SAPA*<sup>7</sup> following *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others (RDP II)*.<sup>8</sup> *RDP II* concerned a decision as to whether a proper or satisfactory explanation was given in an application to supplement papers. *SAPA* concerned a decision as to whether condonation should be given for a delay in bringing review proceedings. In matters of that kind, the power to interfere on appeal is strictly circumscribed.<sup>9</sup>

[52] The nature of the exercise of the discretion in this narrow sense as set out in *RDP II* was recently explained by this court in *TransNamib Holdings Ltd v Stocks & Stocks Leisure (Namibia) (Pty) Ltd & others*.<sup>10</sup>

'In matters of that kind, this court found that, where there was the exercise of a discretion in this "strict or narrow" sense, the power to interfere on appeal would be strictly circumscribed — and only where "the court below had exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons, or materially misdirected itself". In the course of its reasoning this court approved the principle underpinning a narrow discretion as one where "the court of first instance is in a better position than an appeal court to decide a question which involves the exercise of a value judgment, especially on a question of procedure" where an appeal court would be reluctant to interfere. Apart from discretionary powers of a presiding judge in controlling the conduct of proceedings (such as granting postponements, amendments and leave to adduce further evidence), other instances within this category include making orders for costs, imposing sentence and authorising the alienation of immovable property in which a minor child has an interest.' (Footnotes excluded).

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<sup>7</sup> Para 44.

<sup>8</sup> *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2013 (3) NR 664 (SC) para 106 (*RDP II*).

<sup>9</sup> See also *Ex parte Neethling & others* 1951 (4) SA 331 (A) at 335 (*Neethling*) followed in *RDP II* para 106.

<sup>10</sup> *TransNamib Holdings Ltd v Stocks & Stocks Leisure (Namibia) (Pty) Ltd & others* 2021 (2) NR 497 (SC) para 58 (*TransNamib Holdings*).

[53] In *MT Tigr*,<sup>11</sup> the Full Bench approached an appeal on the basis that the discretion exercised under the equivalent power under South African legislation<sup>12</sup> was equally determinable by a court of appeal which would have jurisdiction 'to substitute its own exercise of discretion on the basis that it considers its own exercise of the discretionary power to be wiser or more appropriate in the circumstances'.<sup>13</sup> So too did the Supreme Court of Appeal not approach the appeal before it in *MT Argun* in a confined manner, although this issue was not expressly raised or dealt with in that judgment.<sup>14</sup>

[54] In an application under rule 138, a court of first instance is not in a better position than this court to determine whether a sale should be ordered or not.

[55] This court in *TransNamib Holdings*<sup>15</sup> referred to the discretionary power of a court to order the winding-up of a company on the grounds of being just and equitable and found that it entails a broad conclusion of law, justice and equity and a judgment on the facts found by a court to be relevant and not merely a discretion between different options as stressed in *Neethling*.<sup>16</sup> This court in *TransNamib Holdings* found that the exercise of a discretion of this nature did not fall within the narrow ambit of those contemplated in confined appeals on discretion referred to in *Neethling*.

[56] So too, the erstwhile Appellate Division in *Knox D'Arcy Ltd & others v Jamieson & others*<sup>17</sup> held that a court, in exercising its discretion to grant an interim interdict pending an action, exercises a wide discretion, where it is 'entitled to have regard to a

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<sup>11</sup> At 208D-E.

<sup>12</sup> Section 9 of the AJR Act.

<sup>13</sup> *MT Tigr* at 208E.

<sup>14</sup> *MT Argun* paras 34-37.

<sup>15</sup> Para 62.

<sup>16</sup> At 355I-J.

<sup>17</sup> *Knox D'Arcy Ltd & others v Jamieson & others* 1996 (4) SA 348 (A) at 361.

number of disparate and incommensurable features in coming to a decision'. That court concluded in this context:

'Finally, in regard to the so-called discretionary nature of an interdict: if a Court hearing an application for an interim interdict had a truly discretionary power it would mean that, on identical facts, it could in principle choose whether or not to grant the interdict and that a Court of appeal would not be entitled to interfere merely because it disagreed with the lower court's choice (*Perskor* case at 800D-F). I doubt whether such a conclusion could be supported on the grounds of principle or policy. As I have shown, previous decisions of this Court seem to refute it.'<sup>18</sup>

[57] In determining whether or not to grant an order for the sale of a vessel under rule 138, the High Court is required to exercise a discretion rightly characterised as wide by Scott, JA in *MT Argun*<sup>19</sup> based upon what is just and equitable and more appropriate in the light of all the relevant considerations. This discretion, as in the case of winding-up a company on the ground of being just and equitable, is one in the wide and not the narrow sense. This court is thus not limited to the narrow ambit of an appeal as contemplated in *SAPA* and *RDP II*, and this court is not bound by the conclusion of the High Court and may depart from the order of the High Court on grounds which it considers necessary.<sup>20</sup>

#### Rule 138 and the finding by the High Court that a sale of the vessel was justified

[58] Rule 138 of the Vice-Admiralty Court Rules provides:

'The judge may, either before or after final judgment order any property under arrest of the Court to be appraised, or to be sold with or without appraisal and either by public auction or by private contract.'

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<sup>18</sup> At 362. See also *Ndlovu v Ngcobo; Bekker & another v JIKA* 2003 (1) SA 113 (SCA) para 18.

<sup>19</sup> Para 34.

<sup>20</sup> *Hix Networking Technologies v System Publishers (Pty) Ltd & another* 1997 (1) SA 391 (A) at 402B-C.

[59] As was stated by the SCA with reference to the similar power in the current legislation, the discretion vested in the High Court in an application brought under rule 138 is a wide one.<sup>21</sup>

[60] The High Court correctly found as persuasive the approach of the Full Bench of the Cape High Court in *MT Tigr*<sup>22</sup> in listing as relevant factors in applications for a sale *pendente lite* being that such an order will more readily be granted where the owner of the vessel agrees thereto or is in default of appearance and another factor being the continuing deterioration of the vessel and accordingly the applicants' security. This approach applies with equal force to applications brought under rule 138.

[61] A further factor listed by the court in *MT Tigr* is the amount of the claim in relation to the value of the vessel.

[62] In support of the first factor, the court in *MT Tigr* stressed that the reason why a sale *pendente lite* is ordinarily ordered when an owner agrees or is in default of appearance and sparingly when the claim is disputed by an owner is because of 'the inability of a court at an interlocutory stage to assess even *prima facie* the merits of contending cases'.<sup>23</sup>

[63] In this matter, the High Court correctly took into account that the registered owner, Panormos, supported the sale (and also that it did not dispute its indebtedness under the claim). The court proceeded to characterise Prime's claim as '*de facto*' owner as founded upon inadmissible hearsay evidence of Mr Norton.

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<sup>21</sup> *MT Argun* para 24.

<sup>22</sup> At 210.

<sup>23</sup> At 210D-E.

[64] The allegations of a fraudulent sale to Panormos are plainly not within Mr Norton's knowledge and rather reflect his instructions from his client. Nor are the sources of the specific allegations relating to fraud identified by him, as a deponent is required to do. Instead he merely asserts that where facts are not within his personal knowledge, they are based on information supplied by Prime's lawyer in Greece, Prime's lawyer in Turkey, a certain DAI Chencheng, a shareholder in Prime, and finally Shen Yong, a director of Prime. That is insufficient as Mr Norton does not identify the specific factual averments allegedly provided by each of the respective sources as I have already said. This must appear in his or their respective affidavits. It also does not appear in any of the supporting affidavits which merely confirm personal knowledge of the facts and allegations in Mr Norton's affidavit in so far as they relate to information provided by them which is nowhere specified.

[65] Furthermore, Prime's Greek and Turkish lawyers, like Mr Norton, would not have personal knowledge of the fraud and would have been dependent upon instructions from their client, Prime.

[66] It is also however evident from Prime's documentation that Shen Yong was only appointed a director of Prime on 24 December 2019 and Dai Chengchen is referred to as Prime's current shareholder in Prime's response in the arbitration as at 21 May 2021. In Prime's certificate of incumbency dated 30 December 2019, its sole shareholder is stated as Lam Pik Ling of Hong Kong.

[67] It follows that neither this shareholder nor this director would have been involved in the relevant events concerning the alleged fraud or have personal knowledge of them as these events preceeded their involvement in Prime.

[68] The High Court was thus correct in finding that the averments in Mr Norton's affidavit to the effect that Prime is the *de facto* owner and Panormos' registration of the vessel was the result of a fraud constitute inadmissible hearsay evidence.

[69] Quite apart from being inadmissible hearsay, there were also unsatisfactory unexplained features to the defence raised by Prime. Despite being alive to the fact that the existence of the bareboat charter was squarely placed in issue in the arbitration pleadings attached to Mr Norton's affidavit, no contemporaneous documentation is attached to his answering affidavit to support claims for charter hire. No explanation is provided why Prime failed to pursue a claim for charter hire for more than a year and a half and the absence of steps taken to regain control of the vessel for almost two years. These issues are plainly relevant to Prime's defence, yet remain unexplained.

[70] The difficulty identified by the Full Bench in *MT Tigr* of a court's inability at an interlocutory stage to assess the merits of contending cases even on a *prima facie* basis would not arise in this matter. The defence raised by Prime is based upon inadmissible hearsay which, despite that disqualifying factor, is compounded by unexplained unsatisfactory features.

[71] On the contrary, the mortgagee's claim is clearly set out. It is furthermore not disputed by the registered owner which also supports the sale of the vessel and does not dispute its indebtedness under the loan agreement and the terms of the mortgage which entitle the mortgagee to sell the vessel upon default.



[72] As has been stressed, registration of ownership is *prima facie* proof of ownership unless an error in registration or fraud is established.<sup>24</sup>

[73] The High Court further took into account the length of time which the dispute between Prime, Panormos and the mortgagees would take to be finally resolved. It would in the court's consideration take months if not years to be resolved during which time the condition of the vessel would deteriorate. If an appeal were to proceed, preservation costs would amount to some USD6 million. This, the court correctly found, would be prejudicial to the mortgagee and other creditors as it would amount to a significant portion of the vessel's value.

[74] Counsel for Prime contended in this context that the value of the vessel was not established by admissible evidence and that this was destructive of the application.

[75] Establishing the value and the impact of delays are central to succeeding with an application under rule 138 where the sale is opposed by the registered owner and of less importance where the registered owner agrees to the sale or is in default of appearance.

[76] It is correct that the mere attaching of a document purporting to be a valuation without confirmation of the author under oath would constitute inadmissible hearsay evidence. But in this instance, the founding affidavit attaches the document which is said to emanate from Clarksons, 'a leading sale and purchase broker'. In his answering affidavit, Mr Norton states the following with reference to this paragraph:

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<sup>24</sup> *The Akademik Fyodorov: Government of the Russian Federation & another v Marine Expeditions Inc* 1996 (4) SA 422 (C) at 436I-437A.

'In paragraphs 57 and 58 of her affidavit, Ms Stockton refers to a valuation performed by Clarksons, a leading international scale and purchase broker.'

That a valuation was performed by Clarksons and its qualification to do so are thus admitted.

[77] With specific reference to the paragraph in question, he states:

'The averments made in these paragraphs are noted. Given the difference between the value of the vessel and the quantum of the applicant's claim, it is clear that the applicants will suffer no prejudice should the vessel remain under arrest until such time the applicants' claim has been determined . . . .'

[78] No objection is made to the attachment of the valuation on the grounds of being inadmissible hearsay evidence. It was open to Prime to do so and plead over without prejudice to that objection. It elected instead not to do so but rather to rely upon that valuation in support of its contention concerning prejudice, after admitting Clarksons' qualification to do so and that it had done so.

[79] In its grounds of appeal, Prime does not contend that the court erred in taking the valuation into account or not disregarding it as inadmissible hearsay. It rather contends that the court erred 'in failing to take into account the evidence produced by (Wilmington) and ACT regarding the value of the vessel which is substantially greater than the quantum of the plaintiff's claim . . . .'

[80] It follows that Prime by implication admitted the valuation in these circumstances taken together – by accepting that Clarksons were qualified to provide it and had done it, and then not objecting to it and instead relying upon it.

[81] The cavil on the part of Prime concerning the evidence of valuation, is misplaced but is in any event of less importance in the context of the support for the sale by the registered owner which does not dispute the mortgage claim.

[82] There remains the point about the standing of ACT. On appeal, Prime persisted in its point that ACT lacks standing to bring the application for the sale *pendente lite*, despite accepting that Wilmington has the necessary standing. The point is taken that as agent or security agent, no authority is given to ACT in its capacity as agent to institute proceedings for the recovery of amounts owing under the loan agreement.

[83] In the loan agreement, ACT is referred to as a party to the agreement as agent and as the security agent.

[84] In terms of clause 24.1.2 of the loan agreement, the agent and security agent are authorised to perform duties and responsibilities by the lenders in the enforcement of the loan. Under clause 7 of the mortgage, it is the mortgagee which is to perfect the security created by the bond. But the sale application and underlying claim do not only relate to the perfection of that security, but also to the enforcement of the loan agreement where the security agent has duties, obligations and responsibilities relating to the enforcement of the loan.

[85] It further follows that ACT does have standing in these proceedings.

[86] In the result the High Court is not to be faulted in the exercise of its discretion in granting the sale application and was justified in doing so. The appeal against that order is accordingly to be dismissed.

#### Appeal against security for preservation costs

[87] On 1 September 2021, Wilmington and ACT launched an application against Prime, set down for 3 September 2021, for an order directing Prime to pay security for the preservation costs of the vessel for the period 19 August 2021 until the claim had been finally determined. An order was thus sought claiming, a capitalised amount of USD434 924 in respect of the period 19 August 2021 to 30 September 2021 and thereafter calculated at a rate of USD10 068 per day for three weeks from the date of hearing until the giving of judgment. If however judgment were to take longer than three weeks, the ‘applicants’ attorneys may . . . on good cause shown, extend the period for which the security must be provided on notice to Prime’. In the event of Prime objecting to such an extension, ‘the parties shall approach the Registrar for a determination as to the extended period, who may refer the determination to a judge in chambers’.

[88] In support of its claim for Prime to be directed to provide this form of security, Wilmington and ACT referred to their claim, its basis, the arrest of the vessel and Prime’s opposition to the application for the sale of the vessel brought under rule 138. Prime’s defence is said to be unclear and to lack of evidence in support of it, and to be based upon hearsay and conjecture. In addition to the failure to provide a clear description of the claim, and the inadmissible evidence to support it, the point is made that Prime did not explain why it allowed the vessel to trade for years without taking steps. It is also stated that the true control of Prime was not disclosed. Prime’s

opposition to the sale is described as prejudicial to the mortgagee and unreasonable and has the inevitable consequence of increasing the preservation costs to its detriment.

[89] The application concludes by asserting that Prime's opposition is unreasonable and vexatious and amounts to an attempt to put pressure on the mortgagee to extract a settlement.

[90] Prime opposed the application, pointing out that there is no provision in the Vice-Admiralty Court Rules or the Rules of the High Court which authorises a *peregrinus* plaintiff to demand security from a *peregrinus* defendant for security for costs incurred by the plaintiff in preserving a vessel under arrest. It would be contrary to the law and not be in the interests of justice to make such an order. Prime also denied that any factual basis had been established to warrant an order of this nature. It is also stated on behalf of Prime that there is sufficient security, given the valuation of the vessel at USD29 million and the size of the mortgagee's claim. Prime further elaborated upon its defence and denied that it is vexatious or unreasonable.

[91] The application was opposed and heard on 21 September 2021. An order was given on 28 September 2021 and reasons for that order were provided on 5 November 2021.

#### The approach of the High Court

[92] The High Court granted the order in the far reaching terms sought. In doing so, the court accepted that there was no provision in the Vice-Admiralty Court Rules or the

High Court Rules entitling a *peregrinus* plaintiff who has arrested a vessel to demand security from a *peregrinus* defendant for preservation costs of the vessel.

[93] The High Court found that its inherent discretion to regulate its own procedures arose from Art 78(4) of the Constitution in the interests of the proper administration of justice. The court found that the issue of payment of security for preservation costs was a procedural matter and not a matter of substantive law and thus within its inherent discretion to regulate in the interests of justice.

[94] The High Court held that Wilmington and ACT were entitled to arrest the vessel and sell it under the loan agreement. The court also held that Prime would have been aware of the vessel's registration from 23 December 2019, yet failed to take steps to enforce its claim and when it did so in these proceedings, failed to clearly formulate its claim/defence. It was also held that Prime's defence/claim had nothing to do with the contractual right of Wilmington and ACT to enforce the security under the mortgage bond. It was further held that the dispute of fact as to the ownership of the vessel would have to be referred to trial which would take a lengthy time to resolve. The increasing costs of preservation over that period, the court held, would be prejudicial to Wilmington and ACT and other creditors and could jeopardise the recovery of their full claim.

[95] Prime noted an appeal against this judgment and order.

Is the order appealable without leave?

[96] At the outset of the proceedings in this court, counsel representing Prime was asked whether the order was of an interlocutory nature requiring leave to appeal from

the High Court in terms of s 18(3) of the High Court Act.<sup>25</sup> As this question had not been raised in written argument, the parties sought and were granted leave to file further supplementary argument to address the issue.

[97] Section 18(3) of the High Court Act reads:

'No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the court shall be subject to appeal save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court.'

[98] The parties were referred to the leading judgment of this court on this question in *Di Savino v Nedbank Namibia Ltd*.<sup>26</sup> In that matter, the Chief Justice conducted a detailed and comprehensive survey and analysis of prior decisions of this court and leading cases in South Africa before and after the procedure in respect of appeals had been amended in 1982. The Chief Justice concluded that the meaning to be given to s 18(3) is:

'It would appear to me therefore that the spirit of s 18(3) is that before a party can pursue an appeal against a judgment or order of the High Court, two requirements must be met. Firstly, the judgment or order must be appealable. Secondly, if the judgment or order is interlocutory, leave to appeal against such judgment or order must first be obtained even if the nature of the order or judgment satisfies the first requirement. The test whether a judgment or order satisfies the first requirement is as set out in many judgments of our courts as noted above and it is not necessary to repeat it here.'<sup>27</sup>

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<sup>25</sup> Act 16 of 1990.

<sup>26</sup> *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC) (*Di Savino*).

<sup>27</sup> Para 51.

[99] Subsequent to *Di Savino*, this court in *Government of the Republic of Namibia v Phillipus*<sup>28</sup> followed *Di Savino* and further explained the position thus:

[10] The court in *Di Savino* found that a wide meaning is to be accorded to interlocutory orders and is to include all orders upon matters “incidental to the main dispute, preparatory to, or during the progress of the litigation” — and not merely what have been described in especially South African cases as “simple” or “pure” interlocutory orders. But they would also need to have the characteristics of appealability in order to qualify for leave. The defining features of the vexed issue of appealability have been considered in several appeals which have served before this court and are usefully referred to in *Di Savino*. Thus, interlocutory orders which are appealable require leave to appeal.

[11] There are sound policy reasons for restricting appeals in interlocutory matters as is done in s 18(3) by requiring leave of the High Court. These have been previously articulated by this court in *Shetu Trading CC v Chair, Tender Board of Namibia, Knouwds NO (in his capacity as Provisional Liquidator of Avid Investment Corporation (Pty) Ltd) v Josea and Another* and again emphasised in *Di Savino*. Central to these considerations is the avoidance of piecemeal appellate disposal of the issues in litigation with the unnecessary expense involved. It is generally desirable that all issues are resolved by the same court at one and the same time. This rationale finds eloquent expression in the new Rules of the High Court which place emphasis on speedy finalisation of cases with minimum delay and costs. It is a regrettable fact of litigation in our country that interlocutory skirmishes both delay and add to the costs of litigation. It is in order to minimise interlocutory skirmishes that rule 32(11) of the High Court Rules caps costs in interlocutory proceedings.’

And

[18] As is pointed out in *Di Savino*, when the High Court Act was passed in 1990, leave to appeal was required in all civil appeals in South Africa where there was no longer reference to interlocutory orders in its legislation governing appeals. As is also pointed out by the Chief Justice in *Di Savino*, the Namibian jurisprudence on s 18 has evolved in the context of the different legislative provisions applying in Namibia and

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<sup>28</sup> *Government of the Republic of Namibia v Phillipus* 2018 (2) NR 581 (SC) (*Phillipus*).



South Africa, with Namibia proceeding to develop its own jurisprudence in the area, with this court interpreting s 18(3) to the effect that interlocutory orders are not appealable except with leave. That is after all by giving effect to the clear wording of s 18(3) with its different wording which meant that Namibian courts would not need to grapple with what the Chief Justice in *Di Savino* described as the “convoluted dichotomy” of what may or may not amount to “simple” interlocutory orders. Had the Namibian legislature intended that the term interlocutory in s 18(3) would mean only “simple” interlocutory orders, as is the consequence of Ms Machaka’s argument, the use of the term in s 18(3) would have been superfluous. This is because a simple interlocutory order would not constitute a judgment or order for the purpose of s 18(1) and not be appealable for that reason. There is a presumption against the legislature using words which would be superfluous.’

[100] The term interlocutory in s 18(3) was employed in the wide and general sense<sup>29</sup> of the term usefully explained by Corbett, JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*,<sup>30</sup> as opposed to simple or purely interlocutory orders:

- ‘(a) In a wide and general sense the term “interlocutory” refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes:
- (i) those which have a final and definitive effect on the main action; and
  - (ii) those, known as “simple (or purely) interlocutory orders” or “interlocutory orders proper”, which do not.’

[101] Interlocutory orders for the purpose of s 18(3) would thus refer to all orders incidental to the main dispute, preparatory to or during the progress of litigation and

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<sup>29</sup> *Fillipus* paras 10 and 11.

<sup>30</sup> *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 at 549F-550A.

include those which have a final and definite effect upon the main action but which do not finally dispose of the main action.<sup>31</sup>

[102] In its supplementary written argument, counsel for Prime contended that the order granted by the High Court is an order for final relief in the form of payment for money. It was argued that upon the mere submission of the claim by Wilmington and ACT to the referee and not the determination of its validity or reasonableness, triggers payment of security. It was further submitted that the order to furnish security of preservation costs is separate and distinct from the main claim. Counsel also referred to *Ecker v Dean*<sup>32</sup> and description given there to an application for security as being a 'separate and ancillary' issue between the parties. Counsel also referred to *Shepstone & Wylie & others v Geyser NO*<sup>33</sup> where an order dismissing an application for security for costs was found to be appealable and *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council & another*<sup>34</sup> where an order granting security for costs was held to be appealable. The reliance on these latter two judgments is misplaced and fails to appreciate the difference in the applicable legislative context in South Africa and Namibia emphasised by the Chief Justice in *Di Savino*<sup>35</sup> and also in *Fillipus*.<sup>36</sup> As was made abundantly clear in *Di Savino*,<sup>37</sup> s 18(3) requires firstly that a judgment must be appealable and secondly, if interlocutory, leave is first to be obtained. Those orders (in *Shepstone & Wylie* and *Bookworks*) are undoubtedly appealable, as is the order in this matter.

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<sup>31</sup> *Fillipus* para 20.

<sup>32</sup> *Ecker v Dean* 1937 (3) SWA 3 (*Ecker*).

<sup>33</sup> *Shepstone & Wylie & others v Geyser NO* 1998 (3) SA 1036 (SCA) (*Shepstone & Wylie*).

<sup>34</sup> *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council & another* 1999 (4) SA 799 (W) (*Bookworks*).

<sup>35</sup> Paras 34-38.

<sup>36</sup> Para 18.

<sup>37</sup> Para 51.

[103] The question posed is whether the order in this matter is interlocutory in the wide sense, and if so leave to appeal is required by s 18(3).

[104] Counsel for Wilmington and ACT, in their supplementary heads, argue that the application for security was incidental to the main proceedings and upon an application of *Di Savino*, leave to appeal was required by s 18(3).

[105] In *Ecker*, the court described an application for security for costs as a 'separate ancillary issue between the parties, collateral to and not directly effecting the main dispute between the litigants' and also referred to the prejudice caused by such an order. That meant it was appealable. It however found that leave to appeal was necessary (because it was interlocutory).

[106] In an earlier edition of Herbstein and Van Winsen<sup>38</sup> dealing with the pre-1982 position in South Africa, the learned authors list a number of orders which are interlocutory in effect and form for the purpose of the provisions then governing appeals. First on the list is the grant of an interdict *pendente lite*, even though it may cause considerable – at times irreparable – prejudice. It is interlocutory because, so the learned authors explain, it clearly does not dispose of any issue or any portion of an issue in the main action or suit. So too is the grant or refusal of an order requiring the plaintiff to give security for costs included in the list of interlocutory orders. This statement is made with reference to *Ecker* and other early matters.<sup>39</sup> In one of those, matters Wessels, J in *Mears v Nederlandsch Zuid Afrikaansche Hypotheek Bank Ltd*

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<sup>38</sup> J Herbstein; L Van Winsen; JPG Eksteen and AC Cilliers *Herbstein & van Winsen: The Civil Practice of the Superior Courts in South Africa* 3<sup>rd</sup> ed (1979) at 713.

<sup>39</sup> *Lombard v Lombardy Hotel Co Ltd (In Liquidation)* 1911 TPD 866; *Godlo v Ntuna* 1920 EDL 353; *Kalk v Marks* 1910 LLR 283; *Mears v Nederlandsch Zuid Afrikaansche Hypotheek Bank Ltd* 1908 TS 1147 (*Mears*).

found that an application for security for costs is interlocutory as it is ancillary to the main claim and does not dispose of the applicant's claim which is left intact.<sup>40</sup>

[107] This approach would appear to be correct. The application for preservation costs of the vessel *pendente lite* in this matter is indeed ancillary to the main claim or suit. Whilst plainly prejudicial to Prime, it also does not dispose of any issues or portion of an issue in the main action or suit between the parties.

[108] The order is thus interlocutory and in terms of s 18(3), leave was required to appeal against it. Prime as appellant had not sought and was not granted leave.

[109] It follows that the appeal against the order directing Prime to provide security for the costs of preservation *pendente lite* is to be struck from the roll with costs.

[110] As this issue may return to this court, it would not be apposite for this court to express itself on the question as to whether such an order was competent, and if so, if a case had been made out for the granting of such order. Those questions are left open for subsequent determination.

### Orders

[111] The following orders are made:

#### In the appeal Case No. SA 92/2021

1. The appeal is dismissed with costs.
2. Prime is to pay the costs of Panormos.

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<sup>40</sup> *Mears* at 1149.

3. These cost orders are to include those occasioned by the employment of one instructing and two instructed legal practitioners, where engaged.

In the appeal Case No. SA 86/2021

1. The appeal is struck from the roll with costs.
2. These costs are to include costs of one instructing and two instructed legal practitioners, where engaged.

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**SMUTS JA**

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**DAMASEB DCJ**

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**FRANK AJA**

## APPEARANCES

APPELLANT:

M Wragge, SC

Instructed by ENSafrica

FIRST and SECOND

RESPONDENTS:

M Fitzgerald, SC (with him W de  
Bruin)

Instructed by Koep &amp; Partners

THIRD and FOURTH

RESPONDENTS:

R MacWilliam, SC

Instructed by Engling, Stritter &  
Partners