CASE NO. CA 33/98

BOURGWELSS LTD -vs- VLADIMIR I SHEPAVOLOV AND 43 OTHERS

Coram: Teek, J.P. et Mtambanengwe, J et Gibson, J.

1999/09/14

FULL BENCH APPEAL : against discharge order of a rule nisi authorising and directing the Deputy Sheriff to attach all the respondents' rights, title and interest in and to the judgment amount and costs order awarded to the respondents and confirmandum jurisdictionem in respect of an action to be instituted by the applicant against the respondents

Issues considered and decided upon were whether: Appelant established a prima facie case;

remaining crew on vessel acted in concert and with a comon purpose with those who left vessel;

appellant made out a case that it suffered damages at hands of respondents;

appellant was entitled to attach as security for its intended action against respondents;

as the sureties of the right attached was situated abroad it could be attached despite the fact that it was effectively within the Court's jurisdiction;

the application should have been brought on an ex parte basis; and whether the application was a carefully planned strategem and had it been disclosed the Court may will have granted the order.

Appeal upheld and Rule issued on 28 November 1997 confirmed.

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"... the *rule nisi* and the interim attachment order are discharged and the applicant is ordered to pay the costs of this application including the costs of 22 January 1998."

On 26 March 1998 the appellant noted an appeal against the discharge of the *rule nisi* on the following grounds:

"The Court erred in the following findings of law and/or facts:

1) That appellant did not establish a *prima facie* case against the respondents.

2) That the crew remaining on the vessel did not act in concert and with a common purpose with those who left the vessel.

3. The appellant did not *prima facie* made out a case that it suffered damages at the hands of the respondents.

4. That appellant was not entitled, in the alternative, to the attachment as security for its intended action against respondents.

5. That as the situs of the right attached was situated abroad it could not be attached despite the fact that it was effectively within the Court's jurisdiction i.e. the

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amount was available in a local bank account.

3) That the applicant should not have been brought on an *ex parte* basis.

4) That the application was a carefully planned strategem and had the strategem been disclosed the Court may well not have granted the order."

The respondents opposed the appeal on an array of grounds to wit, that:

5) The record has not been prepared in accordance with the Rules of the High Court of Namibia;

6) the "papers" were not in order on the return date;

7) the appellants had to obtain leave to appeal in respect of Grounds 6 and 7 contained in the Notice of Appeal;

8) the Rule Nisi could not have been confirmed because the High Court will not have jurisdiction to adjudicate upon the dispute of ownership in the main action;

9) in terms of the common law, read with the Labour Act, 6 of 1992, wages cannot be attached *confirmandam jurisdictionem;*

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10) no *prima facie* case has been made out and no common purpose has been proved;

11) the wrongful manner in which the *ex parte* application was lodged; and

8) the situs of the right."

I shall concisely deal with these points raised by the respondent. As far as the first point is concerned Mr Heathcote for the respondents conceded that the appellant's non compliance with the rules of Court did not prejudice him albeit an inconvenience to the Court. As the non-compliance with the Rules was marginal and a reasonable explanation given thereanent by the appellant and the fact that the respondents are not prejudiced thereby and having regard to the importance of the matter the noncompliance with the Rules was condoned and the parties were allowed to argue the remainder of the issues. The respondents allege in the second ground that the Return of Service indicates that the *Rule Nisi* was served on an unauthorized person and that the respondents' right, title and interest in and to the judgment amount and costs were not attached in the manner as stipulated in Rule 45(8)(c) and therefore the *Rule Nisi* could not have been confirmed. This sub-rule provides that:

> "(8) If corporeal property, whether movable or immovable, is available for attachment, it may be attached without the necessity of a prior application to court in the manner hereinafter provided:

12) ...

that

13) ...

14) In the case of the attachment of all other incorporeal property or incorporeal rights in property as aforesaid:-

(i) the attachment shall only be complete when -

(aa) notice of the attachment has been given in writing by the deputy-sheriff to all interested parties and where the asset consists of incorporeal immovable property or an incorporeal right in immovable property, notice shall also have been given to the registrar of deeds in whose deeds registry the property or right is registered; and

(bb) the deputy sheriff shall have taken possession of the writing or document evidencing the ownership of such property or right, or shall have certified that he or she has been unable, despite diligent search, to obtain possession of the writing or document;

(ii) the deputy-sheriff may upon exhibiting the original of the warrant of execution to the person having possession of property in which incorporeal rights exist, enter upon the premises where such property is and make an inventory and valuation of the right attached."

Mr Heathcote conceded that he would not make an issue about the service on an unauthorised

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attorney because the respondents were before the Court and filed answering affidavits, but persisted with the issue relating to the attachment of the moneys. The Rule Nisi and the Final order were meant to seek attachment of a right, title and interest pursuant to a judgment. In the premises, the fact that it was not attached prior to the Rule Nisi or at the confirmation of the Rule Nisi makes no difference. The attachment could have been affected if the Rule Nisi was confirmed. The respondents have in any event not been prejudiced because they anticipated the return date and filed opposing papers. Therefore the non-compliance with Rule 45(8)(c) can be condoned and is hereby condoned.

The respondents' third ground of attack states that the appellant should obtain leave to appeal in respect of ground 6 which reads "the application should not have been brought on an ex parte basis" and ground 7 which reads "the application was a carefully planned strategem and had the strategem been disclosed, the Court may well not have granted the order". Mr Heathcote submitted that as the appellant did not obtain the Court a quo's leave to appeal against the discharge of the order on the basis that it used the wrong proceedings while not disclosing the carefully planned stratagem, or did not obtain the leave of the court a quo to appeal against the order as to costs in respect of the proceedings of 22 January 1998, and therefore this Court cannot decide the issue and the appeal can thus not succeed.

Although Heathcote did not take the point that leave had to be obtained to appeal against the dismissal of the application to confirm jurisdiction he argued that appellant cannot appeal against the reasons for that dismissal because some of those reasons involve discretionary aspects. That surely cannot be the test. Whether one gets leave to appeal can not depend on

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one's grounds or reasons of appeal, but on the order or decision one is appealing against. In order to avoid dealing with the matter piecemeal one looks at the effect of the order and the nature of the relief sought. One looks at the substantive nature of the order or judgment appealed against whether or not it is applicable, irrespective of the reasons or grounds advanced against it.

Cf. Heyman v Jockshire Insurance Co Ltd 1964 (1) SA 487 (A); Holland v Deysel 1970 (1) SA 90(A) and Herbstein and van Winsen: Civil Practive of the Supreme Courts in SA 4,h ed pp 848 - 850.

Respondents' ground that one's appeal should depend on one's grounds is untenable and is dismissed.

The fourth ground raised by the respondents relates to the interim order which could not be confirmed because the High Court does not have jurisdiction to adjudicate upon the dispute of ownership in the main action. The High Court of Namibia exercising its jurisdiction as a Municipal Court and the High Court of Namibia exercising its jurisdiction as a Court of Admiralty are separate and distinctive courts. In order to substantiate this point Mr Heathcote cited The Law of Shipping and Carriage in S.A. 3rd Bamford at p. 179 and Peca Enterprises v Registrar of Supreme Court, Natal 1977(1) SA 76.

In the Peca Enterprise case supra the Court grappled with an apparent jurisdictional situation. It seemed that there was conflicting and concurrent jurisdiction where the Supreme Court of South Africa exercised its normal Roman Dutch jurisdiction and in tandem with that the Court

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there was the Admiralty Court which had an extended jurisdiction which might have been in conflict with the Roman Dutch law. Prior to the Admiralty Jurisdiction Act of 1983 there existed this anomalous situation where the

Supreme Court said in its capacity as such with concurrent jurisdiction with the Colonial Court of Admiralty dependant upon the choice of forum by the dominus litis. This anomaly was removed by Section 7 of this new Act in South Africa but not in Namibia which means the old provisions applicable prior to 1983 are still in force in Namibia. Piros v Rose 1990 (1) SA 420 (N) at 424A-C and LA WSA vol 25, par 113 and 142 note 2. Therefore this Court has jurisdiction in terms of the Common Law to determine the ownership as the vessel and the crew were within the Court's jurisdiction and the Court can deal with the matter on the normal delictual principles and determine the delict and deal with the issue of ownership. Thus this point has no merit and must also fail.

This next legal point raised by the respondents' counsel was that in terms of the common law read with the Labour Act 6 of 1992 wages cannot be attached ad confirmandam jurisdictionem and for this reason the ride nisi could have been discharged. This point was totally ill-conceived and thrown into the array of the rest to serve as ballast. We have a foreign vessel with a Bulgarian crew whose contract of employment stipulates that their conditions of employment shall be determined and interpreted according to Bulgarian Law. Clause 18 of the contract of employment provides as follows:

"18 Interpretation of the Contract.

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> The Employee declares that he has read and understood the present Contract and that he signs this contract in accordance with his free will. Any interpretation of this Contract should be made in accordance with Bulgarian Law."

And clause 19 provides

> "19. Disputes/ Jurisdiction
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> Any disputes arising from this Contract that can not be solved amicably between the Employer and the Employee shall be referred only and exclusively to the jurisdiction of the Bulgarian Court and Bulgarian Law should apply. The Employee is not entitled to seek the intervention of any foreign Authorities, Organisations or Trade Unions for the implementation of the present Contract."

The Namibian Labour Act (No. 6 of 1992) does not have extra-territorial jurisdiction. Sub-Section 2(1) thereof specifically states that its provisions only apply to persons in Namiba by employers and employees in Namibia. It reads as follows -

> "2(1) Subject to the. provisions of Sub-Section (2) and (3) this Act shall apply in relation to every employer, including the State, and every employee in Namibia."

Moreover, the applicant is not seeking to attach wages, but the attachment of a right, title and

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interest to a judgment. Therefore, the Merchant Shipping Act (No.57 of 1951, section 135) relied upon by Heathcote does not avail him at all. This section refers and is applicable to "a seaman or apprentice-officer of a Namibia ship." The section reads as follows:

> "The following provisions shall apply to wages and salvage due or to become due to a seaman or apprentice-officer of a Namibian ship." (Emphasis provided).

This is not the case in casu. The Bourgwells is a foreign vessel and not a "Namibian ship."

Similarly, section 172 of the Act relied upon by Mr Heathcote does not avail the respondents. The section stipulates that

> "Airy person who receives or takes into his possession or under his control any money or other property of a seaman or apprentice-officer who belongs or has recently belonged to any ship wherever registered shall return the same or pay the value thereof when required by the seaman or apprentice-officer subject to such deductions as may be justly due to him forthwith the seaman or apprentice-officer in respect of board or lodging."

Clearly this section provides for instances of self-help where the employee takes into his possession or control money or property belonging to a seaman or apprentice and does not relate to instances pursuant to a Court order. A seaman or apprentice-officer can surely not be in a different position than any other citizen before a court of law. In any event the section deals with a voluntary relinquishment of such goods by the seaman or an apprentice officer

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and a subsequent refusal by the employer to refuse same. Therefore, the Labour Act and the Merchant Shipping Act are not applicable in the instant case because wages are not being attached or sought to be attached, but a right to a judgment. In the premises this point must also fail and is therefore dismissed.

I shall now proceed to deal with the merits of the appeal. As mentioned hereinabove the appeal is against the discharge of the Rule Nisi. To decide whether or not the discharge was justified the following matters must be addressed pursuant to the amended notice of appeal read in conjunction with the judgment of the Court a quo":

15) Did the appellant establish a prima facie case? In considering this aspect the following aspects are also of relevance namely whether or not the crew that remained on board the vessel acted in concert and with the common purpose with those who had already left the vessel and whether or not the appellant established the fact that it suffered the damages alleged in this regard.

16) Did the situs of the right which appellant sought to attach, fall within the jurisdiction of the Court a quo and could it be attached?

17) Was the appellant entitled to launch the application on an ex parte basis and would the Court a quo have been entitled to refuse the relief sought on the basis of its disapproval of the appellant's stratagem.

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I shall now proceed to deal with these matters seriatim. But before I do so, it is necessary to mention that the Court a quo made several factual findings which are not assailed in the appeal and which facts must therefore be regarded as having been established prima facie by the appellant and these are:

(i) that the ownership of the vessel vests in the appellant;

(ii) that flowing from such ownership and notwithstanding the fact that the vessel was kept under arrest at the behest of various creditors of the appellant the latter still retains all possessory rights including all remedies which are based on such possession;

(iii) that by necessary implication the appellant was entitled to put a replacement crew as well as a repair crew on board its vessel;

(iv) that the respondent's refusal to allow appellant access to the vessel was unlawful; and

(v) that the appellant as a result of such unlawful action by the respondents suffered damages.

Incidentally, there occurred an error in the calculation of the damages suffered by the appellant. The correct computation of the damages suffered by the appellant should in fact add up to USS91014-13 and not USS103805-53 as stated by the Court a quo. The total damages suffered is given as US$141 014-13 and if the amount of US$50 000 of the property removed from the vessel is deducted one safely arrives at US$91,014-13.

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A. A PRIMA FACIE CASE

Several facts were accepted to have been established prima facie by the Court a quo and there is no cross appeal in this regard, therefore it can be accepted as correctly so found, namely that:

i) The appellant is the owner of the vessel;

ii) the respondents unlawfully refused to allow a replacement crew and a repair crew on board the vessel while it was under arrest;

iii) the appellant suffered damages as a result of the abovementioned unlawful conduct to the tune of US$83 805-53; and

iv) in respect of the alleged unworthiness of the vessel appellant's claim is for at least an amount of US$20,000-00.

However, the Court a quo held that in respect of appellant's claim that it suffered damages due to its property being removed from the vessel to the tune of US$50,000 that appellant did not establish this claim prima facie. The relevant part of appellant's case regarding this aspect is stated as follows in the founding affidavit:

"As applicant was and is denied access to the vessel, it is impossible to state exactly what items were removed from the vessel by the respondent. I can however state that

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> as far as applicant knows, at least the following items have been removed which items are reflected on annexure "DA7" as being valued at approximately US$50,000-00."

The test to be applied in deciding whether or not a prima facie cause of action, in relation to an attachment to found jurisdiction is satisfied is

> "... where there is evidence which, if accepted, will show a cause of action. The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against him, the requirement would still be satisfied. It is only where it is quite clear that he has no action, or cannot succeed, that an attachment should be refused or discharged." Bradburry Gretorex Company Limited v Standard Trading Company (Pty) Ltd 1953(3) SA 529 (W) at 533D.

This means that even if evidence relied upon by the applicant is disputed, or where there are factual conflicts between the parties, same does not warrant the setting aside of the arrest. It must be borne in mind that in these applications which are preliminary in nature the matter of primary concern is the attachment and not the cause of action. It therefore also follows that only when the action is groundless or frivolous will the Court be inclined not to grant it. Compare: Great River Shipping Inc. v Sunnyface Marine Ltd 94(1)SA 64(C) at 75(H).

It is clear that the appellant asserts that there are more things missing which it could not establish due to not having access to the boat but that it could positively establish that the goods mentioned had gone missing and estimated the value thereof as US$50,000-00. The appellant could do no more as it had no access to the vessel and could thus not state where,

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when and by whom the goods had been removed. It is common cause that the respondents or at least some of them had possession of the vessel and refused appellant access to the vessel and it is thus for them to explain what happened to the goods and it could not have been expected from the appellant in the present proceedings to have stated more than it has stated. Moreover, it is not disputed that the alleged goods were there and that these were damaged or removed.

The next question to be decided is whether the appellant made out a prima facie case that all the respondents were liable to it in respect of the damages set out above as joint wrongdoers or whether it had to pinpoint the individual culprits involved. To hold all the respondents liable the appellant had to establish prima facie that the respondents acted in concert and with a common purpose when the damages were caused.

In this regard the Court a quo held that the appellant did not establish the inference that it sought and that appellant's submissions were based on conjecture or speculation and not based on objective facts.

> **"... prima facie evidence means evidence capable of being supplemented by inferences drawn from the opposing party's failure to reply. Whether such inferences may legitimately be drawn depends upon the nature of the case and the evidence which has been adduced. Most important, it depends upon 'the relative ability of the parties to contribute evidence on**

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> **that issue.' If the evidence adduced by one party can reasonably support an inference in his favour, and it lies exclusively within the power of the other party to show what the true facts were, his failure to do so may entitle the court to infer that the truth would not have supported his case."**

Hoffmann and Zeffert: South African Law of Evidence, 3rd edition, p 468 - 469.

This is apparently also the case in English law where Cross on Evidence deals with it under the subheading **"Absence of an explanation and failure to give evidence or call a witness"** and states

> **"failure to give evidence is specifically mentioned because its effect has been a subject of a good deal of judicial observation in both civil and criminal proceedings."**

Cross on Evidence, 6th edition, p29.

In conjunction with the aforegoing and in consideration of the possible inferences that can be drawn from the papers of the appellant in establishing a prima facie case regard should be had to what is stated by Denning, LJ in Smithwick v The National Coal Board.f 1950) 2 KB 335 at 351 - 352 where the following distinction was drawn between inference and conjecture:

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> **"As Lord MacMillen said in Jones v Great Western Railway Co** (1931) 144 **It** 194 **at p**.202: **the dividing line between conjecture and inference is very often a very difficult one to draw but it is just the same as the line between some evidence and no evidence. One often gets cases where the facts proved in evidence - the primary facts -are such that the tribunal of fact can legitimately draw from them an inference one way or the other, or, equally legitimately, can refuse to draw any inference at all. But that does not mean that when it does draw an inference it is making a guess. It is only making a guess if it draws an inference which cannot be legitimately be drawn: that is to say, if it is an inference which no reasonable person could draw."**
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> **"The court, however, recognise that a litigant will be handicapped when facts are within the exclusive knowledge of his opponent and that they hold, when that is so, that less evidence will suffice to establish a prima facie case.**

South African Law of Evidence, supra p398. Gericke v Sack 1978 (1) SA 821 (A) at 827.

In so far as inferences in general are concerned, the position is succinctly set out in the Ocean Accident and Guarantee Corp Limited case as follows:

> **in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence, 3rd ed., para 32, by**

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> **balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'.**
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> **I need hardly add that 'plausible' is not here used in its bad sense of 'specious', but in the connotation which is conveyed by words such as acceptable, credible, suitable. (Oxford Dictionary, and Webster's International Dictionary)."**

Ocean Accident Guarantee Corp Limited v Koch 1963 (4) SA 147 (A) at 159 C-D.

The Ocean Accident case, supra deals with the position at the end of a case and after consideration of all the evidence. Where one deals with a prima facie case, as at present, the test is less stringent:

> **"Mr Hofmeyr also relied on the statement on Cochran v Miller 1965 (1) S 162 (D) at 163C that in an application for arrest to found jurisdiction the test for a prima facie case is whether there is evidence which, if believed, might persuade a reasonable man to draw the inference that the wrong complained of had been committed. That seems to me, with respect, to be the same as a prima facie case in the absolution context in a trial. In that context, to put it slightly differently from the statement in Cochran's case, a prima facie case is established by circumstance where the inference the plaintiff seeks to have drawn is as 'more or less equally open' on all the available evidence as the inference favouring the defendant."**

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Great River Shipping Inc v Sunnvface Marine Ltd case supra at 75 I - 76B.

Thus in proceedings such as the present where a diversity of facts justify different inferences to be drawn, some of which could establish the appellant's case, the court should not pause to consider the value and persuasiveness of each and every inference that can be drawn but should only confine its attention to the fact or question whether one of the possible inferences to be drawn is in favour of the plaintiff in order to determine whether a prima facie case has been established or not.

Marine and Trade Insurance Co Ltd v Van der Schyf 1972(1) SA 26 (a) at 38 G-H.

Ruto Flour Mills (Ptv) Ltd v Adelson 1958 (4) SA 307 (T) at 310D.

If the abovementioned principles are taken congisance of, then it is clear that the appellant made out a prima facie case that the respondents acted in concert and with common purpose in respect of all the damages, alternatively, at least in respect of the damages accepted by the Court a quo.

It is clear that the respondents acted in concert and after consultation with each other and with their lawyer in the occupation of the vessel and its respectfully submitted that one can infer as the only probable inference that they were all party to the damages caused to the vessels even if they did not all partake therein. There is nothing to suggest that anyone of them ever disassociated himself from the damages caused to the applicant. In this regard it should be noted that none of the respondents made an affidavit to disassociate themselves with the behaviour of the remaining crew and there is the general denial by Stephan M. Minchev in the

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answering affidavit on behalf of the respondents, and who however, admits that the remaining crewmen **"acted in the best interest of all the respondents".** This lack of response by any individual crew member to disassociate himself from actual damages caused, is a factor that must enter into play when considering whether the inference contended by appellant has been established.

To support the only inference that all respondents are liable on the ground that they were acting in common cause and had done so all along to enforce their perceived rights flows from the following facts:

(i) The remaining respondents prevented the repair and replacement crew in an effort to enforce all the respondent's claims;

(ii) the monies already paid were distributed pro rata amongst all members;

(iii) the legal practitioner specifically stated that the respondents acted as they did to safeguard the interests of all respondents;

(iv) they used the same deponent they authorise to depose on their behalf and share a common stance in the legal proceedings; and

(v) it is admitted on affidavit that the remaining respondents acted in the best interest of all the respondents.

Had some of the respondents disassociated themselves from certain actions one would have expected affidavits from them or at least a letter indicating this. If they all deny involvement and the damages are established the only inference is that they acted with a common purpose

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and in concert.

In this regard it must be borne in mind that all the respondents laid siege to the vessel before most of them left the country. In a letter from their legal representatives dated 27th of June 1997 in which it is expressly stated that the said legal representative acted for all the crew members, the complaint is that the appellant was trying to compel the respondents to leave for Bulgaria. The following then appears:

> **"Clients have instructed us that they are not prepared to leave the MFV Ofelia until such time as the amount has been paid in full. In addition, your clients must pay the crew salaries up to the date of repatriation only after the necessary arrangements have been made with ourselves and our clients in good faith failing which our clients will stay put."**

In an attempt to have the crew repatriated to Bulgaria, their country of origin, 36 flight tickets together with an amount of US34 800.00 was tendered and paid into the trust account Messrs. Erasmus and Associates, the legal practitioners acting on behalf of the respondents during June 1997. Notwithstanding this payment and the tendering of airline tickets all respondents persisted in their attitude not to vacate the vessel or to allow the appellant access thereto. The bulk of the crew only left the vessel at the end of July, beginning August 1997.

On 25 August 1997, the same legal representative once again, writing on behalf of all the crew members, reiterates that

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> **"Our clients shall remain in possession and on board the MFV Ofelia until all crew claims have been paid in full."**

and also further stated:

> **"Our clients only have the MFV Ofelia to ensure payment of their claims."**

and further stated:

> **"Although the vessel is in need of maintenance, it is not of such importance that it cannot wait until the matter of our client's claim had been resolved."**

It is quite clear also from the abovementioned quotations that the crew that remained on board, did so to enforce the claim of all the crew members and it is clear that is why the other members left as they were sure that their claim would be safeguarded by the remaining crew members.

If one must decide whether it is more likely than not, that the respondents acted in concert and in common cause at least in respect of the damages relating to the refusal to allow a replacement crew and the repair crew onto the vessel the court must elect the plausible inference and if this inference favours the appellant, the appellant is entitled to the relief claimed. The most plausible inference in the present matter is that the respondents acted in

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concert and with a common purpose.

> Marine and Trade Insurance case, supra.
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> Ruto Flower Mills (Pty) Ltd case, supra.
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> Great River Shipping Inc v Sunnvface Marine Ltd 1994 (4) SA 64 (C) at 76A-B."

In the circumstances the facts set out hereinabove do indeed constitute prima facie proof.

B. THE SITUS OF THE RIGHT

> The court a quo held that the situs or the incorporeal right which appellant sought to attach was not situated in Namibia and the court did not have jurisdiction to grant the order sought. In this regard the court relied, inter alia, on the case of The MV Snow Delta: Discount Tonnage Limited v Serva Ship Limited 1997 (2) SA 719 C. The Snow Delta-case was taken on appeal and the Full Bench reversed the decision. The court a quo in the Snow Delta-case held that the right, being an incorporeal right was attached to the person who could exercise such right and this being so, the situs of such right was the place where such person was resident. The question of the locality in law of the property in question and whether such property can be found within the jurisdictional borders of the court must be decided according to the principles of the Roman Dutch Law.

The Shipping Corporation of India Ltd v Evdomon Corporation and Another 1994 (1) SA 550

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(A) at 559 (E), 562 C -1.

The Full Bench with reference to Pollak on Jurisdiction accepts that as a general rule the statement by Foxcroft J is indeed correct namely that:

> **"In attributing in situs to incorporeal property, the general principle adopted by the law is that an incorporeal is situated where it can be dealt with effectively."**

Judgment of the Full Bench p 26-27.

Following from this principle of effectiveness, it is clear that in normal situations this would mean that the debtor must be followed or as is stated

> **"Where the debtor is, and where fulfillment can be demanded and exacted instanter."**

> **"such claims are governed by the laws of the place of residence of the debtor ... where there are due and proper judgment can be obtained upon them."**

> **And where the debtor resides and must be sued."**

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Judgment of the Full Bench p29-31,

The fact that the normal rule is that an incorporeal right follows the person entitled to exercise that right does not mean that that is the only place where such a right can be enforced.

> **"It does not seem to me to follow from this, however, that the right concerned can exist only at the place where the debtor is, or where he resides, or where he is domiciled, or where he is an incola: if the right can be enforced as effectively at some other place, it may equally be deemed to exist there."**

Full Bench decision p 33.

In the Snow Delta case the Full Bench then confirmed a rule to found jurisdiction and authorised the Sheriff to **"attach all the respondents right to or interest in the use and enjoyment of the MV Snow Delta",** despite the fact that the situs of the right in so far as it followed the person entitled to exercise it, was not within the jurisdiction of the Cape Court. In my opinion, The Full

> Bench decision sets out the position correctly and is also the practical way of dealing with the matter.
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> It would amount to an extremely "ivory tower" and academic approach if the court were to decline to exercise jurisdiction when it can do so effectively because of the

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> rigorous enforcement of sterile legal formalisms.

A. EX PARTE APPLICATION

The Court a quo accepted that applications for attachment are normally brought on an ex parte basis but found that

> "The respondents' attorneys had asked the applicant's attorneys to give notice to them of any application or action which might be brought and it is reasonable to assume that had notice been given the attorneys would have agreed to accept service of any application. The property sought to be attached was an incorporeal right and there was no question of that right being removed from the jurisdiction, assuming that it existed within the jurisdiction, and there was no threat of the respondents disposing of their interest in or right to the judgment and costs order. It seems clear to me that the application was brought ex parte as part of a carefully planned stratagem. Step one was to obtain the interim attachment order. Step two was to satisfy the judgment debt by paying monies which would automatically become frozen. And step three was to set aside the sale of the MFV Ofelia. Had this stratagem been disclosed to the Court it may well be that the Court would not have made the ex parte order."

That applications for attachments are normally made on an ex parte basis has been the settled practice of the courts. Pollack on Jurisdiction 2nd ed. at p85;

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Anderson & Coltman Ltd v Universal Trading Company 48(1) SA 1277 (W) at pl284;

Bradburv Gretorex Company Ltd v Standard Trading Company (Ptv) Ltd 53(3) SA 529 (W) at 531 and

Utach International Inc v Honeth & Others 87(4) SA 145 (W) at 146 E.

An applicant may employ ex parte procedure when no relief of a final nature is sought against an interested party. The existence of a particular practice such as the one in question renders it unnecessary or improper to require that due notice be given to the other party in accordance with the provision of rule 6(5) of the Rules, especially when the relief sought by such an application only constitutes a preliminary step in the proceedings, which proceedings like in casu contemplate the bringing of a legal suit within a stipulated time after the confirmation of the Rule.

Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa 4th ed. p.232.

Even where the object of the attachment or the embodiment thereof is held by an incola on behalf of the respondent no notice to either the incola or the peregrini respondent need to be given in applications of this nature.

Tallacchi NO v Volkskas Bpk 1971 (1) SA 289 (T) at 290 C-E

It can therefore not be left to a litigant to prescribe the procedure especially not to the respondents in this matter as seems to be suggested by the court a quo. Either the rule is that

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applications are brought ex parte or the rule is that they are not brought ex parte. The reason why these kinds of applications are brought ex parte is because a court will not have jurisdiction over a respondent or will not exercise jurisdiction over a respondent until his property has been attached. It thus follows that the court will not even hear such a respondent on the return date unless property had been attached in the event of such respondent indeed being a peregrinus. (Here it must be borne in mind that it is only in recent times that there developed a marked difference between the principles relating to an attachment to found jurisdiction and an attachment to confirm jurisdiction).

The court a quo however assumes that the reason for this rule is that the property that sought to be attached may be removed from the court's jurisdiction. Even if this is accepted and that is the reason why the rule developed that these applications be brought ex parte then it surely was not for the appellant to allege that such property would disappear if notice is given but this is assumed as this is the normal rule.

In any event, for the court a quo to have stated that the bulk of the crewmen who had already left the country and who, on their own admissions, are impecunious seamen, would not have taken their money and transferred it to Bulgaria is totally untenable.

"An application to found or confirm jurisdiction is not in the nature of discretionary relief and if an appellant is entitled to such relief if he can establish the requisites entitling him thereto.

"In our law, once an incola applicant (plaintiff) establishes that prima facie he has a good cause of **action against the peregrine respondent (defendant), the Court must, if**

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other requirements are satisfied, grant an order for attachment ad fnndandam of the property of the peregrine respondent (defendant). It has no discretion ... the Court will not enquire into the merits or whether the Court is a convenient forum in which to bring the action ... Nor, it is conceived, will the Court inquire whether it is 'fair' in the circumstances for an attachment to be granted." Longman Distillers Ltd v Drop Inn Group 1990 (2) SA 906 (N) at 914 E - F.

The same applies where the applicant is a pereginus. Thus in the Sowrv-case Clayden, J had stated the following where the applicant was aperegrinus:

"If there was a discretion to refuse attachment I should do so. But there is not."

Sowry v Sowry 1953 (4) SA 629 (W) at 632H - 633A. Herbstein and Van Winsen. supra at 102.

The way in which an applicant elects to bring his application or the considerations of strategic importance to him in relation to other disputes, is thus of no consequence and there is no basis on which the court a quo or any other court could have refused the application because of any so-called "stratagem" of the applicant because the court does not approve of it unless it is a clear abuse of the court process which it can only be if the applicant was in any event not entitled to seek an order for attachment. Which is not the case in casu because all the relevant facts were placed before the court a quo namely that

(i) The Court a quo was informed that the vessel was under arrest and that

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amongst the creditors who arrested the vessels, were the respondents;

(ii) the respondents obtained default judgment against the appellant subsequent to the arrest; and

(iii) the vessel was about to be sold in execution by the Deputy Sheriff on the 3rd of December 1997.

It does not matter whether the vessel would be sold at a public auction or whether appellant satisfied the Writ because whichever happened, the respondents' right, title and interest would have been attached. That the appellant's action was to pay the amount mentioned in the Writ and so to preserve it's interest in the vessel instead of it being sold at a bargain basement price at a public auction is not worthy of censorious comment. Even if it is correct that the court granting the Rule Nisi would have been entitled to express displeasure at the stratagem employed by the appellant, it (does not follow that) it would have expressed its displeasure in some other way, e.g. by mulcting the applicant with costs. This is especially so where the court was not dealing with a discretionary remedy such as a temporary interdict.

Paizes v Phitides 1940 WLD 189.

Trakman N.O. v Livshitz & Others 1995 (1) SA 282 (W)

In the circumstances and having regard to the fact that the appellant did not seek final relief against the respondents, that the lodging of the application constituted a preliminary step towards other proceedings contemplated and that it has become settled practice to bang applications for attachment on

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an ex parte basis there exist no reason why the Rule Nisi given in this particular matter should have been discharged because the appellant followed such a procedure.

In the result the appeal is upheld with costs including the costs of two counsel and the Rule Nisi issued on the 28"' of November 1997 is confirmed."

I agree.

GIBSON, J.

ON BEHALF OF THE APELLANT	ADV. T J FRANK SC and ADV. JAN STRYDOM
Instructed by:	P F Koep & Co.
ON BEHALF OF THE RESPONDENT	R HEATHCOTE
Instructed by:	Fisher, Quamby & Pfeifer