REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No A393/2009

In the matter between:

NAMIBIA BUNKER SERVICES (PTY) LTD **APPLICANT**

And

ETS KATANGA FUTUR **FIRST RESPONDENT**

SAFMARINE NAMIBIA (PTY) LTD **SECOND RESPONDENT**

Case No A425/2009

In the matter between:

ETS KATANGA FUTUR **APPLICANT**

And

NAMIBIA BUNKER SERVICES (PTY) LTD **RESPONDENT**

In re:

Case No A393/2009

In the matter between:

NAMIBIA BUNKER SERVICES (PTY) LTD **APPLICANT**

And

ETS KATANGA FUTUR **FIRST RESPONDENT**

SAFMARINE NAMIBIA (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Namibia Bunker Services (Pty) Ltd v ETS Katanga Futur* (A393-2009 A425-2009) [2014] NAHCMD 197 (23 June 2014)

Coram: VAN NIEKERK J

Heard: 5 May 2010

Delivered: 23 June 2014

ORDER

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1. In Case No. 425/2009 the applicant's anticipation application is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

2. In Case No. A393/2009 the application is dismissed and the rule *nisi* is discharged with costs, such costs to include the costs of one instructing and one instructed counsel.

3. In Case No. A393/2009 the first respondent shall pay the costs of the two rule 30 applications.

JUDGMENT

VAN NIEKERK J:

[1] To avoid confusion in this judgment I shall refer to the parties by shortened versions of their names. Namibia Bunker Services (hereinafter 'NBS') is a Namibian company with its principal place of business in Walvis Bay, Namibia. ETS Katanga Futur (hereinafter 'Katanga Futur') is a company with limited liability incorporated and registered in accordance with the laws of the Democratic Republic of the Congo and with its principal place of business in Lubumbashi, Democratic Republic of the Congo. Safmarine (Pty) Ltd (hereinafter 'Safmarine') is also a Namibian company with its principal place of business in Walvis Bay, Namibia. No relief was sought at any stage against Safmarine, but it was cited as a party in Case No. 393/2009 because it was in possession of a container which NBS sought to attach.

[2] During November 2009 NBS brought an urgent application in Case No. 393/2009 against Katanga Futur and Safmarine on an *ex parte* basis. (I shall refer to this application as 'the attachment application'). On 11 November 2009 Silungwe, J granted an order which included a rule *nisi* returnable on 27 November 2009 calling on the respondents, Katanga Futur and Safmarine, to show cause, if any, why an order in the following terms should not be granted:

'2.1 That the Deputy Sheriff for the district of Walvis Bay is ..... [authorized] to attach the following Container and the entire contents thereof:

Container number: MSWU0104275

Seal No.: A415326

Type: 40 Reef 7'6

Weight: 28350 kgs

(hereinafter referred to as "the container") presently kept in bond at the port of Walvis Bay, Namibia under the authority and control of 2nd Respondent en route to the Democratic Republic of Congo *ad fundandam jurisdictionem*, alternatively *ad confirmandam jurisdictionem* in respect of an action to be instituted by Applicant against the 1st Respondent as set out in paragraph 4 *infra.*

2.2 That the Respondents are interdicted from transferring or hypothecating or encumbering or removing from the jurisdiction of this Honourable Court the aforesaid container pending the final resolution of the action referred to in paragraph 4 *infra.*

2.3 That the costs of this application be costs in the cause of the main action as contemplated in paragraph 4 *infra'.*

[3] The Court also granted the following further orders (only those relevant for purposes of this judgment are quoted in full):

'3. That paragraph 2.1 and 2.2 *supra* shall operate as an interim order with immediate effect pending the resolution of the action referred to in paragraph 4 *infra.*

4. The Applicant is granted leave to sue the 1st Respondent by edict within 60 days from date of confirmation of the rule *nisi* as aforesaid, in an action whereby the Applicant will claim:

   4.1 Payment of the sum of N$2,512 870.86;

   4.2 Interest *a tempore morae* calculated on the aforesaid amount at the rate of 20% per annum as from 1 November 2009 till date of payment;

   4.3 Costs of suit;

   4.4 Further and/or alternative relief.

5. - 9. .....

10. That the aforesaid container under attachment may only be released upon the giving of sufficient security by the 1st Respondent to the satisfaction of the Deputy Sheriff, alternatively the Registrar of this Honourable Court for the amount of the Applicant's claim as well as the costs of the application for attachment;

11. That the Respondents may anticipate the rule *nisi* so issued upon 72 hours notice to the Applicant.

12. .....'.

[4] The founding affidavit in the attachment application is deposed to by Mr Richard van der Meer, a director of NBS. He makes the allegation that Katanga Futur is a *peregrinus* and that it is indebted to NBS in the amount of N$2, 512,870.86 in respect of transportation and logistical services rendered by the latter to Katanga Futur, as well as for disbursements made in relation to such services and interest which has accrued on outstanding invoices. The debt was incurred in the execution of a written agreement entered into between the parties on or about 17 December 2007.

[5] NBS also alleged at the time that there was a container being stored at the port of Walvis Bay under the control of Safmarine. It further alleged that the contents belong to Katanga Futur and had an estimated value of N$160 000.00. NBS sought the attachment *ad fundandam jurisdictionem*, alternatively *ad confirmandam jurisdictionem* of the container and the contents.

[6] NBS also set out further allegations in support of its application for leave to sue Katanga Futur for the outstanding debt by way of edict.

[7] As far as service of the attachment application and court order are concerned, Mr van der Meer alleged that he expected a representative of Katanga Futur by the name of Nada Rachid to visit Walvis Bay on or about 16 November 2009. He sought leave to serve the said documents on her in Walvis Bay. It is common cause that this was done by the Deputy Sheriff on 17 November 2009 in terms of paragraph 6 of the Court order.

[8] The headings of both the notice of motion and the Court order mistakenly refer to ETS Katanga Futur as ETC Katanga Futur. On 25 November 2009 Katanga Futur filed a rule 30 application in which it prays for the setting aside of the notice of motion in the attachment application on the ground that it, and consequently, the Court order refer to the wrong party. The rule 30 notice goes further to state that the entity ETS Katanga Futur which is cited in the founding affidavit also does not exist and that an entity by the name of STE Katanga Futur is the owner of the container.

[9] In response to this rule 30 notice NBS filed a rule 30 on 27 Nov 2009 taking issue with the fact that information in the nature of evidence is included in the rule 30 notice filed by Katanga Futur. Notice was given that the application would be moved on 22 January 2010.

[10] On the return day of the rule *nisi*, namely 27 Nov 2009 the Katanga Futur rule 30 application was postponed to 22 Jan 2010 and the rule *nisi* was extended to 22 Jan

2010 by agreement between the parties. Since then the rule was extended on several occasions until the matter was heard.

[11] On 4 December 2009 Katanga Futur lodged an urgent application against NBS under Case No. A425/2009. (I shall refer to this application as 'the anticipation application'). Katanga Futur incorporated its answering affidavit to the attachment application in the anticipation application. In the anticipation application Katanga Futur gave notice that it intends to move on 9 December 2009 for, *inter alia*, the following relief:

> '1.2 That the return date in the above matter be anticipated to 8 December 2009 and that the rule *nisi* be discharged.
>
> 1.3 In the alternative to prayer 2 above, that the attached goods (frozen turkey meat), be released from attachment against providing security in the amount of N$160 000.00 or such other amount as the honourable court may determine.
>
> 1.4 In the further alternative to prayers ..... 1.2 and 1.3 above, that the applicant instruct the sheriff to sell the attached goods (frozen turkey meat) by public auction as soon as possible; and to retain the proceeds of such sale under attachment. The proceeds to be placed in an interest bearing account; and that the sheriff is duly authorized to take such steps.
>
> 1.5 Costs of the application.'

[12] NBS opposed this application and filed its answering affidavit combined with its replying affidavit in the attachment application on 8 December 2009. On 9 December the anticipation application was postponed to a date to be arranged with the Registrar. This application and the attachment application were heard on 5 May 2010.

[13] Katanga Futur's answering affidavit in the attachment application is deposed to by Mr Rachid Ibrahim, its sole director and 'chief executive officer'. He raises several points *in limine* to which I shall return later. For the time being it suffices to state that Mr Rachid admits that the agreement relied on by NBS was concluded and that NBS transported certain goods in terms of this agreement. However, he denies that Katanga Futur is indebted to NBS for any amount. He alleges that the parties have entered into a compromise agreement and that it is in fact NBS which is indebted to Katanga Futur. He denies that the contents of the container belong to Katanga Futur, alleging that it is the property of the seller, Cap'Africa. He estimates the value of the turkey meat at N$250 000. Mr Rachid in any event also contends that any dispute about indebtedness should be referred to arbitration in terms of clause 6 of the transport agreement.

[14] In reply NBS denies that any compromised was reached or that it owes Katanga Futur any money. It also alleged that the sale of the turkey meat to Katanga Futur was a credit sale and that ownership in the meat passed on delivery to Katanga Futur or its authorized agent.

[15] At the hearing of the matters before me I denied with costs the application by NBS to strike Katanga Futur's replying affidavit in the anticipation application on the ground that it was filed out of time.

[16] Mr *Barnard* on behalf of Katanga Futur indicated that his client would not be proceeding with the point *in limine* concerning his client's reliance on the arbitration clause and with the issue of the wrong entity being before the Court as the first respondent in the attachment application. Although he did not refer expressly to Katanga Futur's rule 30 application, I think it must be accepted that the abandoning of the wrong entity issue includes an abandonment of the rule 30 application. As the NBS rule 30 application was aimed at the Katanga Futur rule 30 application, I think NBS should be awarded its costs in both these applications.

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[17] Mr *Mouton* on behalf of NBS took the point that, as the rule *nisi* was extended on 27 November 2009 by agreement to 22 January 2010, Katanga Futur had no right to anticipate the extended return date. In this regard counsel relies on *Peacock Television Co (Pty) Ltd v Transkei Development Corporation* 1998 (2) SA 259 (TK).

[18] Mr *Barnard*, on the other hand, submitted that the approach in *Peacock Television* should not be blindly followed in Namibia. He pointed, firstly, to the fact that rule 6(8) does not differentiate between anticipation before the first return date or before a second (or later) return date. In *Peacock Television* the court dealt with a similar argument and said (at 262E-263A):

> 'It is so that Rule 6(8) does not stipulate any time limit within which an affected person may anticipate a return day. The Rule reads:
>
> > `Any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than 24 hours' notice.'
>
> Though the Rule be so worded, it cannot be that persons adversely affected by a rule *nisi* obtained *ex parte* are free, as of right, to anticipate the extended return day thereof despite an extension or extensions of the rule *nisi* in their presence. It seems to me that Rule 6(8) was meant to come to the aid of a litigant who finds himself/herself taken by surprise by an order granted *ex parte*. Once such a litigant becomes aware of the order, he/she should then take steps to avoid and/or ameliorate the effect thereof by anticipating the return day of the rule *nisi*. Rule 6(8) could never have been meant to cover a situation like the one now before me. If respondents, in circumstances like the present, were to be allowed to anticipate a return day as they please, the orderly practice of this Court and the purpose thereof would be defeated. Such anticipation would amount to allowing respondents to avoid having to properly set their matters down for hearing on the opposed roll. This would not only result in chaos but it would also prejudice those litigants who have set down their opposed matters properly and have waited their turn on the opposed roll. Of course, it is not inconceivable that, after a rule *nisi* granted *ex parte* has been

> extended with the acquiescence of the party adversely affected thereby, special circumstances necessitating the urgent determination of the issues relating to such rule *nisi* may suddenly arise. The question then arises as to whether, in that event, the respondent would be entitled to anticipate in terms of Rule 6(8) or to bring an application (call it interlocutory if you will) on notice seeking appropriate relief. I do not find it necessary to decide the appropriate procedure on this because in the instant case no special circumstances have been proffered. Suffice to say that any difference in the two approaches, in my view, would be a matter of formalism rather than substance.'

[19] Mr *Barnard* stressed the time constraints under which Katanga Futur operated since service of the attachment application on it on 17 November 2009 and submitted that the time period of 72 hours' notice required for anticipation made it impossible to anticipate the first return day, which was set after a short period of 16 days since the granting of the rule *nisi*. He submitted that the short periods, coupled with the requirement of 72 hours' notice amounted to a deliberate misuse of process whereby NBS effectively ensured that the respondent would not be able to anticipate prior to the first return date. He further submitted that it would be most unfair not to permit Katanga Futur to anticipate after the first return date. He also pointed out that at the hearing on 27 November 2009 he expressly reserved Katanga Futur's 'right' to anticipate.

[20] In this regard Mr Rachid gives further details in paragraph 16 of his founding affidavit in the anticipation application:

> 'I expected the legal issues raised in the Rule 30 application brought by the applicant [i.e. Katanga Futur], and the in limine legal issues raised in the answering affidavit, to be argued on the return day. At the postponement of the matter on 27 November 2009 due to the time constraints of a congested motion court roll, the *rule nisi* was extended to 22 January 2010.'

[21] I pause at this stage to observe that the allegations as to Mr Rachid's expectation lack credibility. He raises three *in limine* legal issues in his answering affidavit. At least the first and second of these are partly based on factual allegations which Mr Rachid makes in the very answering affidavit. He could not have expected these factual allegations to be before the Court because the answering affidavit was still in Lubumbashi on 27 November 2009 and only filed at this Court on 4 December 2009.

[22] In my view the submissions made on behalf of Katanga Futur are without merit. The purpose of rule 6(8) is, as was stated in the *Peacock Television* case, to come to the aid of a litigant who is surprised by an order granted *ex parte.* It allows the litigant to speed up the hearing of the matter by not waiting until the return date, which is often, in this jurisdiction, set at a date four weeks from the date of the order. Clearly Katanga Futur did not need to speed up the hearing of the return date, because it could not meet that date. When it became evident that it would miss the opportunity to anticipate it should have concentrated its endeavours on filing its answering affidavit in time for the return date on 27 November and to press to be heard on that date. If this was impossible because of short time periods, it should not have agreed to an extension of the rule *nisi* to 22 January 2010. It should have applied for a short postponement and extension of the rule to file its answering affidavit and a conditional counter-application for the alternative relief now sought in the anticipation application. It could also have requested the Court to make an order regarding the further filing of affidavits and the setting of an early date for hearing.

[23] Mr *Barnard* pointed to the fact that paragraph 27(3)(c) of the Consolidated Practice Directives (issued on 2 March 2009), which deals with urgent applications provides that, if the rule *nisi* is opposed and the return date is not anticipated in terms of rule 6(8), the return date must be extended to a Monday during the following term. He submitted that the short notice provided to Katanga Futur, coupled with the

extended notice of 72 hours required for anticipation ensured that Katanga Futur was not in a position to anticipate and would therefor become subject to paragraph 27(3)(c), which, in turn, meant that the rule had to be extended to a date in the following term. However, it seems to me that the answer to this argument is that the particular practice directive is not cast in stone and may be deviated from upon good cause being shown. I can see no reason why Katanga Futur could not have sought to provide grounds why the particular practice directive should not be followed in this particular case.

[24] Although the facts in the *Peacock Television* case are distinguishable from the facts in the present case, I respectfully agree with the general principle expressed in the passage quoted above. (See also the *obiter* remarks in *Regular Investments (Pty) Ltd v Du Plessis* 1972 (2) SA 493 (O) at 495F). As far as the reservation of Katanga Futur's so-called 'right to anticipate' is concerned, in my view at least on 27 November 2009 and thereafter it had no right to anticipate in the circumstances and as such none could be reserved. (By this I should not be taken to say that a respondent cannot apply for leave to anticipate a return date in appropriate circumstances).

[25] Before I step off this issue, I should deal with an argument proffered by counsel for Katanga Futur during the course of submissions made on the short time periods within which Katanga Futur was expected to prepare its affidavits and to anticipate. Learned counsel submitted that the matter falls under section 24 of the High Court Act, 1990 (Act 16 of 1990), which states that the time allowed for entering an appearance to a civil summons served outside Namibia shall not be less than 21 days. He pointed out that the definition of a 'civil summons' in terms of section 1 of the High Court Act 'includes any rule *nisi* or notice of motion the object of which is to require the appearance before the court of any person against whom relief is sought in such proceedings or of any person having an interest in resisting the grant of such

relief'. He submitted with reference to *Shield Insurance Co. Ltd v Van Wyk* 1976 (1) SA 770 (NC) that non-compliance with section 24 cannot be condoned and that, as service in this matter took place on 17 November 2009, Katanga Futur was not granted 21 days within which to oppose the application.

[26] Counsel for NBS protested against this point being taken for the first time in the heads of argument. Mr *Mouton* submitted on the basis of authorities such as *Yannakou v Apollo Club* 1974 (1) SA 614 (A); *Van Der Berg v Chairman of The Disciplinary Committee (Oranjemund of C D M (Pty) Ltd) and Others* 1991 NR 417 (HC) 42B-C; and *Vaatz v Law Society of Namibia* 1990 NR 332 (HC) 335J-336D that Katanga Futur should have referred specifically to the particular statutory provision relied on.

[27] I do not agree with this submission. The cases really are to the effect that the facts must be pleaded clearly so that it is justified to draw the conclusion that the statutory provision applies. In any event, the point taken by Katanga Futur is one relating to procedure and is, in essence, that there was short service which cannot be condoned. The facts on which the point is based are evident from the papers and the return of service. In the circumstances it was not necessary that express reference should have been made in Katanga Futur's affidavits to section 24 of the High Court Act.

[28] Counsel for Katanga Futur also submitted that service in this case fell foul of rule 4(5)(a) which provides that where process is to be served in a foreign country of which English is not an official language, the process should be accompanied by a translation into one of the official languages of that country. In *casu* the process which was served in this matter was not translated into an official language of the Democratic Republic of the Congo and NBS did not apply for condonation for such failure.

[29] In summary, therefore, the point taken by Katanga Futur is that, for two different reasons, there was improper service and that this is fatal to the NBS application. While this argument is really of relevance in considering the NBS application, it is convenient to deal with this argument at this stage because Mr Barnard also relied on it in an attempt to show that the short time period under which Katanga Futur laboured was not only illegal but exacerbated by the fact that the papers were not translated.

[30] Counsel's argument cannot be upheld as section 24 and rule 4(5)(c) do not apply in this case because service was not effected in a foreign country, but in Namibia in terms of paragraph 6 of the rule *nisi*, which states:

> 'That the Applicant is to inform the Deputy Sheriff for the district of Walvis Bay of the whereabouts of Nada Rachid, for the purposes of service of the application, addendums "A" and "B" thereto and this Order, if such information becomes available to the Applicant during November 2009, and the Deputy Sheriff for the district of Walvis Bay is directed and authorized to serve the application, addendums "A" and "B" thereto and this Order on Nada Rachid.'

[31] To sum up on the issue of Katanga Futur's anticipation application, it was not entitled to anticipate for the reasons already set out. The result is that the anticipation application cannot be upheld.

[32] I now turn to the attachment application. In the papers and in its heads of argument NBS takes a point *in limine* that Katanga Futur's answering affidavit deposed to by Mr Rachid should be struck on the grounds that (i) '..... was not properly executed by or in front of a Notary Public as no Certificate by such Notary Public appears from such affidavit verifying the identity of the Deponent or giving credentials of his own position *ex officio.'* ; and (ii) the answering affidavit was not sufficiently authenticated as required by rule 63. Katanga Futur did not present any

submissions on the matter. However, as the point was not abandoned, I shall deal with it.

[33] On the face of it Katanga Futur's answering affidavit does appear to have the deficiencies pointed out. However, in paragraph 17 of Katanga Futur's founding affidavit in the anticipation application Mr Rachid states under oath that the answering affidavit was signed by him before a notary in Lubumbashi. He confirms the contents of the answering affidavit (subject to certain corrections, which are later set out) as if repeated in the founding affidavit. In paragraph 6 of the founding affidavit he again states that he prepared the answering affidavit, a copy of which would be attached to the founding affidavit and that he incorporates the facts and legal arguments raised in the answering affidavit in the founding affidavit. Although Mr Rachid mentions that a copy of the answering affidavit would be attached to the anticipation application, it is in fact the original which is attached. The founding affidavit was properly deposed to by Mr Rachid in the Republic of South Africa before a police officer who is *ex officio* a commissioner of oaths, who also initialled every page of the answering affidavit and the annexures thereto.

[34] Rule 63(4)(a) provides the Court with some discretion. Moreover, rule 63(4)(b) provides that no authentication shall be required in respect of any affidavit which has been made in the Republic of South Africa before a commissioner of oaths appointed as such in terms of any law of the Republic of South Africa. Although the founding affidavit in the anticipation application does not form part of the attachment application, I think it is fair to have regard to it for purposes of deciding this point. In the circumstances I am prepared to accept the answering affidavit and as such the point *in limine* fails.

[35] As stated before, Katanga Futur took certain points *in limine* in the attachment application. I shall now consider these.

[36] The first point raised by is that the entire attachment application to found or confirm jurisdiction is unnecessary because this Court clearly has jurisdiction, *inter alia* for the reasons which are set out in paragraphs 15.1 to 15.4 of the NBS founding affidavit. These are as follows (i) that NBS is an *incola* of this Court; (ii) that the agreement between the parties provides for arbitration in Namibia; (iii) that the agreement is governed by the laws of Namibia; and (iv) that the services rendered and disbursements made under the aforesaid agreement were made partly within Namibia. Furthermore, Katanga Futur contends, it has a (v) consistent presence in Namibia in that (a) Mr Rachid's daughter, Nada Rachid, who is also Katanga Futur's sales manager, visits Walvis Bay regularly at intervals of at least once every two months in order to attend to issues *inter alia* arising from the agreement between the parties; (b) as is evident from the nature of the contractual relationship and the large amount of containers and goods handled by NBS for Katanga Futur, there is a consistent flow of Katanga Futur's goods being handled and transported onward through Walvis Bay; and (c) Walvis Bay is for Katanga Futur the only convenient and cost-effective port through which to channel its goods. Katanga Futur further relies on the fact, which is stated in paragraph 15.5 of the NBS founding affidavit, that (vi) under the agreement Katanga Futur has to make payment in Namibia.

[37] On the basis of the above factors, Katanga Futur contends in its answering affidavit that any judgment which this Court may give will be effective and therefore the Court's jurisdiction is complete. However, in paragraph 23 of its heads of argument, the stance is taken that the applicant has, by virtue of the factors mentioned in (ii) and (iii) above, 'arguably' submitted to this Court's jurisdiction. Mr *Barnard* did not refer to any authority for the proposition (and I am not aware of any) that the inclusion of a choice of law provision in an agreement in itself constitutes submission to jurisdiction. I am not prepared to find that it does.

[38] I also do not agree with the contention that, by virtue of the factors set out in (v) (a) – (b), Katanga Futur has a 'consistent presence' in Namibia which is sufficient to found jurisdiction in the sense that it can be said that Katanga Futur is a person, albeit artificial, 'residing or being .... within Namibia' as required by section 16 of the High Court Act, 1990 (Act 16 of 1990). (Cf. *T. W. Beckett & Co Ltd v Kroomer Ltd* 1912 AD 324 at 334 – 5; *Ochs v Kolmanskop Diamond Mines Ltd* 1921 SWA 8; *Appleby (Pty) Ltd v Dundas Ltd* 1948 (2) SA 905 at 909 – 10; *Frank Wright (Pty) Ltd v Corticas 'BCM' Ltd* 1948 (4) SA 456 (C) at 460).

[39] Furthermore, I do not agree with the contention that because of the factors set out in (i) to (vi) above, attachment is unnecessary. Where, as in this case, an *incola* wishes to sue a peregrine defendant to enforce a claim sounding in money, it is still necessary for the *incola* plaintiff to attach the property of the *peregrinus* to confirm jurisdiction even if the Court has jurisdiction based thereon that the cause of action arose within the Court's jurisdiction. (*Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 300D and 311E; *SOS-Kinderdorf International v Effie Lentin Architects* 1990 NR 300 (HC) at 302I-303A); *SOS Kinderdorf International v Effie Lentin Architects* 1992 NR 390 (HC) 401I).

[40] In the result this point fails.

[42] The second point *in limine* deals with the arbitration clause in the transport agreement. As indicated before, this issue was abandoned during the hearing.

[43] As I understand it, the last point taken *in limine* is that NBS abused the attachment process and acted *mala fide* by (i) not disclosing that the container and the contents are not the property of Katanga Futur; and (ii) by not disclosing that the contents consist of perishables, namely frozen turkey meat. It is also alleged in passing that NBS did not seek leave from the Court to remove and place the

contents in cold storage as was done by the Deputy-Sheriff of Walvis Bay on 19 November 2009.

[44] In its replying affidavit NBS states that it never alleged that Katanga Futur is the owner of the container, but that the container had to be controlled in order to have the contents attached. The container itself had in the meantime, after attachment and removal of the contents, been released to its rightful possessor.

[45] It is indeed so that NBS did not allege at any stage in its founding affidavit that the container was the property of Katanga Futur. This being the case, NBS should rather have framed its notice of motion to indicate that it is the contents of the container fitting the description given in the notice of motion that was seeking to attach. This matter was also, it seems, not pertinently brought to the attention of the Court which granted the rule *nisi* authorising the attachment of the 'container and its entire contents'. However, I am satisfied that there is no *mala fides* shown on the part of NBS.

[46] It might have been prudent for NBS to apply for leave to release the container in view of the terms of paragraph 10 of the Court order dated 27 November 2009, but I do not think it is necessary to decide this issue. For purposes of this case I am prepared to accept that neither NBS nor the Deputy-Sheriff should be criticized for returning the container to its rightful possessor without the leave of the Court, it being clear that the container is not the property of Katanga Futur.

[47] I now turn to the contents of the container.

[48] In an application for attachment to found or confirm jurisdiction the property sought to be attached must be that of the respondent. The onus is on the applicant to establish on a balance of probabilities that the respondent is the owner or has some other attachable interest in the property. (See *Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others* 1976 (4) SA 464 (A) at 489B-C;

Italtrafo Spa v Electricity Supply Commission 1978 (2) SA 705 (W) 709A-B); *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA) at 182D).

[49] On the return day of a rule *nisi* authorising attachment and if the applicant seeks confirmation of the rule, the relief claimed is final in nature. Should there be a dispute of fact on any issue, e.g. ownership of the property attached, that needs to proved on a balance of probabilities, the test to be applied is the well-known rule laid down in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G and refined in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634G-635G (see generally *Slabber v Blanco and Others* 1991 NR 404 (HC)).

[50] The allegations regarding ownership of the contents are set out as follows in the founding affidavit by Mr van der Meer on behalf of NBS (the omissions and insertions are mine):

> '16. I am advised and respectfully submit that there is currently a container being stored at the port of Walvis Bay under the control of ..... [Safmarine], of which the contents belong to ..... Katanga Futur as per copy of..... [Safmarine's] Notification of Arrival annexed hereto as annexure **"RVDM7"**. I estimate the value of the contents of the container to be approximate[ly] N$160 000.'

[51] Katanga Futur's answer to this is as follows (the omissions and insertions are mine):

> '26. **AD PARAGRAPH 16 THEREOF**
>
> 26.1 I point out to the honourable court that the allegation that annexure "RVDM" is proof that the content of the container belongs to the second respondent [the reference here to the 'second' respondent is clearly a mistake, it should be to the 'first' respondent, i.e.

Katanga Futur] is farfetched. This is simply an arrival notice and not proof of ownership at all.

26.2 The content of the container, turkey meat, was purchased from Cap'Africa. The agreement with Cap'Africa is that ownership passes only upon payment.

26.3 Upon learning of the attachment, I had to inform Mr Réjane Cruveilher of the attachment. This resulted in an email from Cruveilher of Cap'Africa to me. This email confirms the fact that ownership is vested in Cap'Africa and not in ..... [Katanga Futur]. A copy is attached hereto as annexure **"RI3"**.'

[52] In reply NBS states (the omissions and insertions are mine):

'39. **AD PARAGRAPH 26 THEREOF**

39.1 .....[Katanga Futur] is described as the consignee and annexures **"Rachid1", "A"** and **"B"** provide for deferred payment by bank guarantee and as a result, ownership passed upon delivery to .... [Katanga Futur].

39.2 The allegations herein contained are consequently denied as traversed.

39.3 No Confirmatory Affidavit by Cap Africa is attached confirming the contents of annexure **"RI3"** and as a consequence such letter has no evidentiary value.'

[53] Mr *Barnard* submitted that the allegations made by NBS in its founding affidavit concerning the alleged ownership of the contents are not based on facts, but on hearsay as Mr van der Meer states that he was 'advised' of the presence of the container containing property of Katanga Futur. Moreover, he submitted, the fact that Katanga Futur is described in Safmarine's Notification of Arrival as the

consignee of the goods, is not proof of ownership. He submitted that Katanga Futur's denial of ownership and its explanation that the agreement with Cap'Africa is one where ownership of the goods passes only upon payment, coupled with the email by Cap'Africa, sufficiently places the matter in issue. In the said email Mr Cruveilher states that the goods in the particular container belong to Cap'Africa and that the goods remain its property until payment is made.

[54] As far as this email is concerned, I agree with Mr *Mouton* on behalf of NBS that it is inadmissible as its author has made no affidavit confirming its contents. I shall therefore ignore it.

[55] Mr *Mouton* further submitted that Katanga Futur should have and could have provided proof that it is not the owner of the turkey meat. He further submitted with reference to annexures **"Rachid1"**, **"A"** and **"B"** that the contract between Katanga Futur and Cap'Africa was a credit sale and that ownership passed when the meat was delivered at Walvis Bay to the authorised agent of Katanga Futur, being the consignee.

[56] Annexure **"Rachid1"** is attached to the founding affidavit in Katanga Futur's anticipation application. It is a copy of the pro forma invoice issued by Cap'Africa to Katanga Futur in respect of the turkey meat which was attached. The invoice is dated 21 September 2009 and specifies that the turkey meat is shipped c.i.f for delivery at Walvis Bay. It also sets out the terms of payment as being 'by banker's draft at 60 days of B.L. with all export documents (original invoice, health certificate, no radio activity, origin certificate) via Commerzbank Boulevard Louis Schmidt Numero 29 – 1040 Bruxelles.' Details of what appears to be Cap'Africa's bank account are given underneath. It is reasonable to assume that the reference to 'B.L.' is to 'bill of lading'.

[57] Annexures **“A”** and **“B”** are annexed to the replying affidavit of NBS. They are copies of invoices by Cap’Africa to Katanga Futur dated 19 January 2009 and 18 February 2009 for frozen poultry shipped c.i.f. to Walvis Bay. They stipulate the same terms of payment as in annexure **“Rachid1”**. As I understand the significance of Annexures **“A”** and **“B”**, it is that they tend to show the usual dealings between Katanga Futur and Cap’Africa.

[58] It was contended on behalf of Katanga Futur that the terms of payment provide for a deferred payment to be made after a period of 60 days. As such the sale is one for credit and therefore, it was contended, ownership passed upon delivery of the turkey meat in Walvis Bay to Katanga Futur’s authorised agent.

[59] Even if it is assumed in favour of NBS that it may use annexure **“Rachid1”** to bolster its claim that the contract between Katanga Futur and Cap’Africa is one for a credit sale, it is, in my view, an important consideration that it is evident from the papers, including Safmarine’s arrival notice (annexure **“RVDM7”**), that delivery by Cap’Africa to Katanga Futur ‘....involved sea transit and a contract of affreightment with a carrier evidenced by the issue of a bill of lading. In this type of case our law, evolving in conformity with generally accepted mercantile law and custom, has recognised that a bill of lading, itself a product of the law merchant, may have certain special attributes in regard to symbolic delivery and the passing of ownership in goods sold and consigned by bill of lading to the purchaser.’ (*Lendalease Finance, supra*, at 491A-B).

[60] In order to establish who is, in law, the possessor of the shipped goods one must have regard to the bill of lading. (*Sunnyface Marine Ltd v Hitoroy Ltd (Trans Orient Steel Ltd Intervening); Sunnyface Marine Ltd v Great River Shipping Inc* 1992 (2) SA 653 (C) at 655J-656A). A bill of lading is a symbol for the property for which it has been given, the endorsement and delivery of which to the purchaser will, if the necessary mutual intention is also present, transfer ownership. (*Numill Marketing CC*

v Sitra Wood Products Pte Ltd 1994 (3) SA 460 (C) 473C and 474H.) In a credit sale it is delivery of the bill of lading and not delivery of the goods which passes ownership (see *Lendalease Finance, supra*).

[61] NBS did not attach the bill of lading or make the necessary allegations to indicate when and to whom delivery of the bill of lading was given. No express allegation is in any event made to indicate who the 'authorized agent' is to whom NBS refers in its papers and during argument.

In the circumstances I agree with Mr Barnard that the allegations by NBS do not pass the test set by the rule in the *Stellenbosch Farmers' Winery* case, which is as follows:

> '..... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order. ... Where it is clear that facts, though not formally admitted cannot be denied, they must be regarded as admitted.'

[62] Having said this, I nevertheless do not have the impression that the allegations as to ownership, or the lack thereof, were *mala fide* and that NBS necessarily abused the process of attachment. In the result the point *in limine* fails.

[63] However, as the turkey meat has not been shown on a balance of probabilities to be the property of Katanga Futur, the unavoidable conclusion is that the attachment application fails. In the result the rule *nisi* must be discharged.

[64] The issue of costs remains. It is clear that NBS should pay the costs of the attachment application, such costs to include the costs of one instructing and one instructed counsel. On 27 November 2009 and 22 January 2009 when the rule *nisi* was extended, costs stood over for argument in the application. The wasted costs of those days therefore form part of the costs of the attachment application. On 29 Jan

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2010, 5 Feb 2010, 19 Feb 2010 and 12 March 2010 no order of costs was made. The costs of these extensions also form part of the costs of the attachment application.

[65] As far as the anticipation application is concerned the costs thereof should be paid by Katanga Futur, such costs to include the costs of one instructing and one instructed counsel. The costs of the postponement of the matter on 9 December 2009 were ordered to be in the cause. As such these costs are also to be paid by Katanga Futur.

___(Signed on original)_____

K van Niekerk

Judge

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APPEARANCE:

Case No. A393/2009

For the applicant: Adv C Mouton

Instr. by MB de Klerk & Associates

For the first respondent: Adv P Barnard

Instr. by Du Pisani Legal Practitioners

Case No. A425/2009

For the applicant: Adv P Barnard

Instr. by Du Pisani Legal Practitioners

For the respondent: Adv C Mouton

Instr. by MB de Klerk & Associates

Adv C Mouton

Instr. by MB de Klerk & Associates