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Shepstone & Wylie ATTORNEYS

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1. Introduction :

• The 2010 Football World Cup

The year that many South Africans have been waiting for has now dawned and with frantic final preparations under way to ready the stadia and the infrastructure for the anticipated influx of overseas football (soccer) fans, we can only hope that it all "comes together" and that many of our overseas clients and friends will come out to attend the first FIFA World Cup to be held on African soil.

There really is a lot to see and experience in this beautiful country of ours, apart from the football itself.

You will be welcome and please do come in and see us while you are here. There is always a cold and frosty beer to say "cheers" (of course you can have a cup of tea if you really prefer it).

• "Post" Rule B

Much has been written about the state of the world shipping markets and the plethora of litigation that has been generated from the collapse of many freight and chartering markets in consequence.

Almost as much interest (and expectation) followed the developments in the USA with regard to the reported demise of the apparently lucrative (to US lawyers at least) procedure under Rule B in consequence of the "Winter Storm" decision regarding attachment of EFT's being reversed retrospectively by the Shipping Corporation of India v Jaldhi Overseas case. (We do understand from recent reports that this is to be further appealed to the Supreme Court, so the worm may yet turn again).

This seemed to leave few jurisdictions where claimants could obtain security for claims which they wished to pursue in arbitration, other than perhaps Belgium, France and of course South Africa with its associated ship arrest procedures.

Some South African lawyers triumphantly and aggressively started "marketing" their services and intimating that the procedure here was the answer to all claimant's prayers. But of course in reality little had changed overnight in our procedures. We have been here with most of those procedures since at least 1983 when our Admiralty Jurisdiction Regulation Act was promulgated, albeit that for a time it seemed to be quicker and easier to freeze money remitted by electronic fund transfer as it briefly and apparently only notionally passed through a clearing bank for a millisecond in New York.

And yes we have certainly seen a massive increase in the level of enquiries and requests to post fleets of ships on our ship watch system and for a time a steep increase in the number of arrests followed by the need to apply for the sale of the ship as the claims have been so high they exceeded the value of the ship – and certainly so taking into account the amounts owed under mortgage debts and the sudden crash in the value of the ships themselves in consequence of the collapse of the freight markets.

However, the associated ship provisions do not provide an instant means of simply arresting any ship in common management as seems to be assumed and careful analysis of the structure of company shareholding and direct or indirect control of the owning and chartering companies themselves is necessary.

We at this firm will not knowingly allow our clients to be exposed to claims in damages for reckless arrests on minimal information and we take extreme care to satisfy ourselves that the evidence to be relied on is credible and defensible.

Equally of course for every arrest there is an operator loudly denying that there in fact exists common control of companies owning ships under the same management. We regularly (and often successfully) represent them and will continue to do so.

So it is that we have been (and remain) very busy as a firm and we can bring to our client's and friend's attention some recent developments in the material law here as may affect them. In this briefing it so happens that all the cases referred to have been dealt with by members of the firm – thankfully successfully for the specific clients on either side of the "divide".

Shane Dwyer

2. Case Notes :

Some recent decisions under the Admiralty Jurisdiction Regulation Act

- **The Kwazulu-Natal High Court (Durban) revisits Section 1(3)**

In our client advisory e-mail flyer in June 2009 we reported on the decision by a Western Cape judge in the matter of the "Pacific Yuan Geng".

We remind our readers that where a claimant has a claim against the charterer (company "A") of one vessel (vessel "A"), in terms of section 3(7)(c) of the Admiralty Jurisdiction Regulation Act, that charterer (company "A") is for purposes of the associated ship arrest provisions, deemed to be the owner of ship "A", the so-called "guilty ship".

Where then the chartering Company "A" can be shown to be controlled by Mr. X who is also shown to control Company "B" which in turn owns a ship "B", that ship can be arrested to enforce or obtain security for a claim, against Company "A".

This deeming provision is restricted to the first "leg" of the associated ship enforcement provisions and the claimant cannot arrest ship "A" to enforce that claim - and in fact very often it is the owner of Ship "A" who wishes to enforce a claim *in personam* against his charterer, company "A".

Separately in terms of section 1(3) of the Act, for the purposes of an action *in rem* a charterer by demise is deemed to be, or have been, the owner of the ship for the period of the charter by demise. So if ship "B" is not owned by Company "B" but is demise chartered to that company, can the claimant rely on the deeming provision of section 1(3) and the associated ship provisions, to arrest ship "B" for a claim against company "A" as charterer of Company "A" – by a so-called "double deeming" application of the respective provisions ?

This was the scenario which presented itself in the Pacific Yuan Geng matter and the Cape High Court said no, section 1(3) did not permit this construction or avail the claimant and the arrest was set aside.

Now the South African court structure is federal in many respects and the decision of a single judge of one provincial division is not binding on a judge of another provincial division, although it can be persuasive. It is only a decision of the Supreme Court of Appeal which binds all High Courts in the Republic in all divisions or provinces. So the decision of the Cape court in the "Pacific Yuan Geng" was not binding on the court in the Kwazulu-Natal where Durban is situated.

Inevitably claimants in Durban, despite the Western Cape decision, sought to arrest demise chartered vessels relying on the same "double deeming" provisions of sections 3(7)(c) read with 1(3). This was the situation in two cases, the "Chenebourg" and the "Cape Gulf" arrested within a short space of each other on the same basis.

The facts and allegations as to common control between the original chartering company and the demise chartering company were in dispute and placed in issue in both matters by the respective owners of the vessels arrested, but the crisp legal

point was argued as a point *in limine* and a review process, in both matters before the same judge on the same day.

It appears to have been common cause between all of the parties before the court, that applying a literal interpretation of the respective sections, permitted an arrest of a demise chartered ship if the requisite "control" could be demonstrated between the original time chartering company of the deemed "guilty ship" alleged to be liable *in personam* and the demise chartering company of the ship arrested who would be deemed to be the owner of that ship as an associated ship in application of section 1(3).

However, what was argued was the apparent intention of the Legislature and in passing the provisions of the South African Constitution and Bill of Rights.

The Durban judge considered a number of leading cases on interpretation of statutes, the comments of authors of text books on Maritime Law and the Admiralty Act and of course the pronouncement of the Cape court in the "Pacific Yuan Geng".

Ultimately the Durban court adopted a similar approach to the Western Cape judge, construed section 1(3) restrictively and ruled that it could not have been the intention of the legislature for this provision to apply in conjunction with the associated ship and the deeming provisions of section 3(7) and set both of the arrests aside.

In effect the court ruled that the deeming provision of section 1(3) can only be relied on where the claim to be enforced arose in relation to the ship sought to be arrested and in respect of a liability of the demise charterer of that ship during that charter.

The law then on this point is therefore now consistent in the Cape and Kwazulu-Natal (but not the last coastal division of the Eastern Cape where it has not as yet been considered but it seems unlikely that a court there would decide differently in the face of the consistent decisions of the courts of the other two Admiralty jurisdictions). It remains to be seen whether in the fullness of time the matter is considered by the Supreme Court of Appeal, who could of course overrule the current decisions. .

Shane Dwyer

- **Genuine and reasonable need for security**

In another matter referred to in our June e-mail Flyer we drew attention to the Supreme Court of Appeal decision in the "Orient Stride" (decided at the end of 2008) where the test was set as being that the claimant must establish on the facts of the particular matter "the existence of a reasonable apprehension" by the claimant, that the respondent owner will not satisfy an award made in their favour, to discharge the burden of establishing that it has a genuine and reasonable need for security.

We commented that it seemed to us that in the current turbulent times, with owners and charterers defaulting on contractual commitments and even huge companies going insolvent or seeking protection of the courts from their creditors, most claimants will have a "reasonable apprehension" that an award to be handed down in a number of years hence when the arbitration or other legal proceedings are finally concluded, might very well not be satisfied.

The latest interpretation by our courts is set out in a recent judgment of the KwaZulu-Natal High Court, Durban in a matter related to the arrest of the vessel "CMA CGM Okapi and the bunkers on the "CMA CGM Capella" and "CMA CGM Yantian". The judgment was handed down by Patel J on 6 January 2010.

The Applicant had sought, and was granted, orders for the arrests to obtain security for its claim against the Respondent, to be determined in London arbitration.

On 23 December 2009 the Respondent brought an application in terms of Rule (6)(12)(c) of the Uniform Rules of Court, seeking the reconsideration of the three orders for arrest that had been granted. The application was brought on the sole ground that in all three cases the Applicant had failed to show a genuine and reasonable need for security. However the Respondent then sought an alternative or additional order that if the arrest of the bunkers were upheld, that the Sheriff be ordered to arrange that the bunkers be discharged ashore under arrest, so that the vessels could sail.

In support of its contention that it had a genuine and reasonable need for security, the Applicant had contended inter alia in its founding papers, in all three cases, that:

- the Respondent had admitted that it could not satisfy contracts similar to those in respect of which the alleged claim lay, because it "has no financing" and "is not expected to have it soon";
- the market condition is such that numerous other companies in the position of the Respondent are in financial difficulty;
- numerous reports in trade publications indicated specifically that the Respondent is in financial difficulty;
- no security had been lodged in respect of prior arrests.

The above information was supplemented by an affidavit filed on behalf of the Applicant at the hearing of the application for reconsideration, attached to which were further press articles which (in the words of Patel J) "paint a gloomy financial picture for the Respondent".

An affidavit was also filed on behalf the Respondent at the hearing of the application for reconsideration. In that affidavit reference was made to a certificate from the Respondent's auditors wherein they stated that a limited review of the Respondent's business had been undertaken without taking into account the Respondent's liabilities. A large "equity value" (how this was established was not clear) was however indicated.

In his judgment Patel J quoted the following passage (referred to above) from the decision of Scott JA of the SCA in MV "Orient Stride" 2009 (1) SA 246:

"What, I think, must be established is a genuine and reasonable apprehension [our emphasis] that the party whose property is arrested will not satisfy a judgment or award made in favour of the arresting party. That apprehension may be founded upon actual knowledge of the extent of the assets of the party whose property has been arrested, or, as would more likely be the case, it may be founded on factors giving rise to an inference either that the party in question will be unable to meet the

judgment or that it will seek to conceal its assets or otherwise prevent the judgment from being satisfied. The circumstances may also be such, whether for geographic reasons or otherwise, that it would be extremely difficult for the successful party to enforce the judgment. Whether a need for security has been shown to exist or not will depend therefore upon a consideration of the particular facts of each case."

However, Patel J went on to say that these dicta must not be read in isolation, and proceeded to quote a further passage from the Orient Stride decision, where Scott JA had observed that:

- one would have expected that if the Respondent (in that case) had assets, it would have given some indication of their nature and extent; and

- had it done so, its response may well have put paid to the application for security.

Patel J held that in the absence of any countervailing evidence, the Applicant had properly established a genuine and reasonable need for security both on the arrest papers and in the supplementary affidavit. The application for reconsideration of the three orders that had been granted for arrest was dismissed with costs.

In finding for the Applicant, the Judge noted that the Respondent had chosen not to file opposing affidavits detailing the nature and extent of its assets. He found that without details of the Respondent's assets and liabilities given on oath by the Respondent's representatives, the declaration of the Respondent's equity value by its auditors could not be given adequate weight. In any event, what the significance was of simply reflecting assets without taking into account liabilities, was not clear.

With regard to the alternative order sought by the Respondent for the discharge of the bunkers, the Judge found that it would not be appropriate to allow the discharge of the bunkers. He concurred with the arguments raised on behalf of the Applicant, which included that:

- there had been no indication of the practical arrangements required to discharge the bunkers;

- there is no known market for "second-hand" bunkers, and removal of the bunkers would reduce the amount of the security;

- separate storage in dedicated facilities would have to be arranged;

- discharge and storage of the bunkers ashore would be costly and the Respondent had not indicated any intention to secure such costs, which would burden any bunker fund that might be established by additional claims.

The Judge did however indicate that different considerations could have applied if the Respondent had indicated the value of the bunkers and tendered security, especially if the Applicant had refused to accept it.

We have previously expressed the view that with many owners and charterers in serious financial difficulty, most claimants will have a "reasonable apprehension" (as expressed in Orient Stride, and reconfirmed in this case) that an award to be handed down upon completion of arbitration or other proceedings, months or even years into the future, might not be satisfied. In the current environment we anticipate that it will remain relatively easy to satisfy the requirement for a security arrest of showing a "genuine and reasonable need for security". It appears from the recent decisions referred to in this commentary that an owner of arrested property seeking to challenge an arrest on the ground that this requirement has not been satisfied, would have to put up appropriate evidence of its assets and liabilities in order to succeed.

Tony Edwards

- **… and who exactly is a time charterer ?**

In another recent matter (the "Star of Nippon") the Durban court had again to consider the provisions of section 3(7)(c) of the Act, but more specifically the status of a guarantor of the obligations of a "principal" named time charterer. In issue was whether the terms of the specific guarantee given by a separate company, made that company a "co-charterer", so that the owner of the chartered ship could arrest another vessel as an associated ship, which was owned by a company said to be controlled indirectly by the same parties that controlled, not the time chartering company, but the guarantor company.

The facts were that a time charter party had been concluded between the owner of a vessel and a certain chartering company with a provision that the obligations of the chartering company would be guaranteed by a third company. The charter party was dated the 12th September 2007, and included with the Rider clauses a draft form of a guarantee, headed at the top with words stating that it is to be used by the guarantor company on their letterhead, signed and stamped by an authorized signatory, that it would form part of the charter party as an addendum and would be considered as an integral part of and duly incorporated into the charter party.

The guarantee was then issued on 13th September 2007, i.e. the day after the charter party. It provided that the guarantor company was a primary obligor and that should the owners have any claims and/or complaints for the actual performance by charterers of their obligations and responsibilities under the charter party, “such claims may be made against us directly and in our own name as guarantors in the first instance without the need for recourse against [charterers].”

The guarantee then stated: “To this end, we agree to be bound unconditionally by, as though a party to, all of the clauses including the arbitration clause contained in the said Charter Party.”

Amounts were alleged to have become due for payment by the charterer which were not paid. The owners sought to enforce the claims by arbitration against both the charterer and the guarantor and in this jurisdiction sought to obtain security, not against the charterer but against the guarantor by the arrest of a vessel owned by a company said to be controlled by the same parties as controlled the guarantor company (in fact it was alleged that such control was exercised as to a majority by the members of a particular "family", which was a conceptual issue raised in argument

and challenged as a matter of law by the respondent, but ultimately not decided, as the arrest was set aside on other grounds).

The claimants obtained an ex parte arrest order for the "Star of Nippon" contending in their arrest application that the terms of the charter party and guarantee were such that in terms of English law the guarantor company had become a "co-charterer" and as such was deemed in terms of section 3(7)(c) to have been the owner of the original vessel chartered enabling the owners to arrest the "Star of Nippon" as an associated ship.

In support of the contention that in terms of English law the guarantor became such a "co-charterer" and therefore fell into the category of "a charterer" for the deeming provision of section 3(7)(c) the applicants provided an opinion from an eminent London silk, that in his view the terms of the guarantee resulted in the claimants being entitled to sue the guarantor not under the guarantee by separate proceedings, but under the charter party itself in the arbitration proceedings.

This, so the applicants argued, meant that the guarantor company had become a party to the charter party and stepped into the shoes of the charterer – hence they became a type of co-charterer and were deemed by section 3(7)(c) to be an owner of the "guilty ship" for purposes of an associated ship arrest.

The owner of the ship arrested denied that as between itself and the guarantor company any common control existed, but as a matter of law sought a reconsideration of the ex parte arrest order granted in terms of Rule 6(12)(c) of the High Court Uniform Rules which permits such an application where an order has been granted ex parte, usually only where there is a crisp point of law that can be decided or where it is contended an onus resting on the applicant has in fact not been discharged on the facts as alleged (if the facts are to be placed in dispute, this Rule for reconsideration is not appropriate and a substantive application to set aside has to be brought).

The owner argued that while it was correct that claimants (as owners of the original chartered ship) could claim against the guarantor under the charter party, rather than by way of separate proceedings under the guarantee, nevertheless the guarantee itself was a separate agreement from the charter party, as was reflected, inter alia, by its different date.

It was submitted that while the guarantor under the guarantee had agreed to be bound by the terms of the charter party including the charter party arbitration clause, this was no more than a type of incorporation of terms by reference. As such, a claim by the original ship owners against the guarantor using the mechanics set out in the charter party arbitration, was nevertheless still a claim under the guarantee.

Whilst therefore the guarantor had agreed to be bound to the terms of the charter party and to be liable as though they were charterers for the purposes of any claim by owners, that remained a liability as guarantor and did not make them a charterer, either principally or as a co-charterer – they could for instance not intervene and give the vessel orders as to her trading or rotation. Whilst they were bound to the terms of the charter party, this was expressly in the capacity of guarantors, not as charterers. It followed that section 3(7)(c) could not be relied on to deem the guarantor to have been the owner of the "guilty ship" for purposes of an associated ship arrest.

At the end of argument the judge set aside the arrest simply indicating that he agreed with the submissions made on behalf of the owners of the Star of Nippon and having reconsidered the original application and arrest, he was satisfied the arrest should not have been granted. He did not give reasons, but indicated if either party required reasons he would on application provide them. No reasons have been requested. Nevertheless it is clear that the courts will not easily be persuaded to give the already wide deeming provisions of the Act, unfettered application.

Shane Dwyer

3. Updates :

- **Radical Change to South African Customs Legislation**

The current Customs & Excise Act which has been in existence since 1964 is due to be repealed and replaced by three new Acts dealing with:

- Administrative issues in a new Customs Control Bill;
- Tariff determination and valuation in a new draft Customs Duty Bill; and
- Excise issues in a new Excise Bill, which has not yet been published.

The Customs Control Bill and Customs Duty Bill are out for comment to be made by 26 February 2010 and are intended to simplify administrative issues and make Customs clearing clearer and more predictable, while allowing for faster documentary process.

Although the Bills are likely to be substantially amended, they provide for the following changes:

- Penalties have been changed from a percentage to a fixed amount;
- The provisions dealing with classification and valuation have been substantially expanded on;
- Provision is made for private and class rulings and for publication of such rulings;
- The time periods for clearance and storage of goods are being substantially shortened,
- Provision is made for control through accredited status, which status will be good for three years and must then be renewed;
- Other registration and licensing must be renewable every three years;
- The revenue authorities will have even greater powers in terms of recovery of debt.

Once the Bills have been finalised, Rules will need to be drafted. That is going to take the draftsmen some time.

It is probable that this process is still going to take a year or two and for the foreseeable future Customs matters will still be regulated under the existing Act.

Quintus van der Merwe

- **Aviation Law – Recent Developments**

The Civil Aviation Act 13 of 2009 (the New Act"), was assented to on 25 May 2009, however, the date of commencement is yet to be proclaimed. Its purpose is to repeal, consolidate and amend existing aviation laws giving effect to certain international aviation conventions, with an emphasis on safety and security in airports and aircraft.

Although the New Act will repeal the Civil Aviation Act No. 74 of 1962 ("the Old Act") in its entirety, transitional arrangements under the new Act provide for any proclamation and regulation made under the Old Act to remain in force until replaced by an act of Parliament or regulation made in terms of the New Act.

Therefore, any licenses or other forms of authorisation issued under the Old Act will remain valid for the period specified in such authorisation or license unless specifically terminated, cancelled or suspended by the New Act.

Despite the introduction of the New Act, the Convention on the International Recognition of Rights in Aircraft Act No. 59 of 1993, will remain largely in tact and, accordingly, aircraft finance and mortgages will continue to be regulated in terms thereof.

Patrick Leyden

- **Shipping - Occupational Casualty Reporting**

Section 259 of the Merchant Shipping Act No 57 of 1951 imposes an obligation on ship owners, masters and shore contractors to report casualties, accidents and serious injuries that occur in the territorial waters and ports of South Africa and onboard South African registered or licensed vessels, wherever they may be.

Such accidents must be reported, on the prescribed Casualty / Accident Report form, to the South African Maritime Safety Authority ("SAMSA") within 24 hours of a ship's arrival in a South African port, or, if the event occurred in a South African port, within 24 hours but before the ship sails from that port.

SAMSA has issued Marine Notice No. 23 of 2009 concerning the introduction of their "Occupational Casualty Reporting Form" as an addendum to the existing Casualty / Accident Report. According to SAMSA it is aimed at the stevedoring industry, ship repair and ship building industries and all other shore contractors. In the event of a death or injury to stevedores, repairmen or any other shore based personnel working on board ships, the Occupational Casualty Reporting Form is to be completed in conjunction with the existing SAMSA Casualty / Accident Report and returned to SAMSA.

The new form contains a list of documents which are to be provided to SAMSA in cases of death or injury to stevedores, repairmen or other shore based personnel We would like to draw the attention of our clients and friends who are engaged in stevedoring, ship repair and any other businesses requiring attendance on board ships, to the nature of the documents which are to be provided. Apart from copies of the injured or deceased person's identification document, medical reports and death certificate, the documents which must be provided to SAMSA include:

- Copy of the Daily Safety Inspection
- Copies of Machinery Operators Certificate of Competence
- Proof of safety induction training provided
- Copy of recorded Safety Talk
- Copy of the Injured / Deceased Certificate of Medical Fitness
- Copy of Machinery Operator's Certificates of Medical Fitness
- Copy of Companies Risk Assessment.

It appears from the nature of the documents which are to be provided that following a reported death or injury to stevedores, repairmen or any other shore based personnel working on board ships, the onus may well be on the employer to demonstrate to SAMSA inter alia that the deceased or injured employee was medically fit and properly trained/certificated and that appropriate safety training had been provided.

Failure to comply with section 259 of the Merchant Shipping Act No 57 of 1951 is a criminal offence and may upon conviction lead to a fine or imprisonment for a period not exceeding 3 months. Increased penalties apply to a failure to report loss of life or serious injury, in which case the punishment upon conviction may be a fine or imprisonment not exceeding 3 years

Tony Edwards

- **High Cube Container Dilemma**

The pre-Christmas delivery of containers via the port of Durban was thrown into disarray in early December 2009.

The debacle began when the road authorities started enforcing legislation prohibiting the carriage of high cube containers because of certain height restrictions.

It seems that the existing transport fleet of trailers utilised for the carriage of such containers conformed with earlier specifications, but became "illegal" when legislation was passed amending the height restrictions for non-abnormal loads. Numerous vehicles and containers were detained by the authorities. This gave rise to storage costs, container demurrage and many unhappy customers concerned that they would not receive Christmas stock on time.

Numerous submissions were made to the road authorities and eventually on 23 December 2009 the Department of Transport of KwaZulu-Natal agreed to place a moratorium on the enforcement of the height restrictions on the carriage of high cube containers, provided the vehicles met with all other requirements of the law.

Quintus van der Merwe

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