

High Court clarifies effect of arrest *in rem* pending appeal

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Until the recent Cape Town High Court decision in *The mv Asturcon v Afriline Denizcilik*, there had been uncertainty about the effect of an application for leave to appeal the setting aside of an arrest *in rem*.

For those affected by an arrest, notably shipowners and charterers, the issue has important practical effects. For example, if an arrest is lifted by order of the court, can the vessel leave the jurisdiction even if the arresting party immediately files a notice of appeal? Similarly, if security has been put up for the release of the vessel from an arrest which is later set aside, can one insist on the immediate return of the security notwithstanding an appeal? In both instances the financial repercussions of continued detention of the vessel or withholding of security can be considerable.

On considering the matter, Acting Justice Van Rooyen took as his starting point Section 18(1) of the Superior Courts Act 2013 and Uniform Rule 49(11), which provides that "the operation and execution of a decision" which is the subject of an application for leave to appeal or of an appeal is suspended pending the decision on the application or appeal.

In light of this, the main issue for determination is whether an order setting aside an arrest *in rem* which is issued by the court registrar and obtained without notice is a decision which is susceptible to execution. The court found in *The mv Asturcon* that such a decision is not susceptible to execution and accordingly ordered Afriline Denizcilik and its attorneys, Norton Rose Fulbright, to return the Gard LOU to the applicants within 24 hours of the order.

In reaching this conclusion, the judge considered a number of similar cases and the views of leading South African shipping law authors. One such case was *The mv Snow Delta*, in which there was an attachment of a time charterer's right, title and interest in the vessel for the purpose of giving the court jurisdiction to hear an underlying *in personam* damages claim against the charterer. The judge discharged the provisional order for attachment, which prompted an appeal to the Supreme Court of Appeal. The applicants contended that the vessel had to remain under attachment pending finalisation of the appeal and the sheriff refused to release it. However, an urgent application for a declaration that the ship was no longer under attachment succeeded on the grounds that once an interim order is discharged, it cannot be revived by the noting of an appeal. The ship then sailed from the jurisdiction.

The court in *The mv Asturcon* concluded that an order setting aside the arrest should be treated as analogous to the arrest of the vessel being "unsuccessfully sought...for the first time", and that it amounts to the dismissal of an application for a warrant authorising such an arrest. Consequently, as a setting-aside order is a "negative order" which cannot "be carried into execution", there is nothing to be suspended by filing a notice of appeal.

This decision will be welcomed by shipowners and other parties that are adversely affected by an arrest, as it provides comfort that if a challenge to an arrest succeeds, the vessel should be allowed to sail from the jurisdiction (or security should be returned), regardless of the threat of an appeal.

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