

Shipping & Transport - South Africa

Bareboat charter claims and judicial ship sales

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Background

Facts

Decision

In the recent *mv Tarik III* High Court case in Durban, the issue to be determined was whether it is lawful to deprive a shipowner of its vessel by way of a judicial sale where the claims lie against the bareboat or demise charterer of the vessel and not the owner.

Background

The starting point is Section 1(3) of the South African Admiralty Jurisdiction Regulation Act, which mirrors the provisions of the Arrest Convention in that a bareboat charterer is deemed to be the owner of the vessel under charter for the purposes of an action *in rem*. Put differently, a maritime creditor may pursue a claim against a bareboat charterer by arresting the vessel related to the claim. The question which arises is whether, having arrested the vessel, the creditor can then enforce the claim by obtaining an order for sale (in the absence of a settlement of the claim or the giving of security for the vessel's release).

Facts

In South Africa, Section 9 of the Admiralty Act affords the court wide discretion to order the sale of a ship (or any other maritime property) at any time after it has been arrested. In the arrest of the *mv Tarik III*, certain arresting creditors applied to court for the sale of the vessel in respect of claims against the bareboat charterer, a company which was subject to insolvency proceedings in Turkey and had effectively abandoned the vessel in Durban.

The registered owners (which had also financed the vessel on a sale and leaseback) stepped in to oppose the sale application. The thrust of their argument was that a sale of their property would offend the South African Constitution – in particular Section 25(1), which provides that "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

The owners did not contend that Sections 1(3) and 9 of the Admiralty Act are unconstitutional; they merely argued for an interpretation of the sections which did not offend against the Constitution. In this regard, counsel for the owners submitted that the provisions relating to the sale of the vessel must be interpreted in such a way that does not permit the sale of the ship which is being arrested, unless the arrest was based on a claim *in personam* against the owner of the ship.

Decision

Taking this argument into consideration, the nub of the court's decision was that the interpretation for which the owners argued was irreconcilable with the wording of the sections under consideration. The deeming provision in Section 1(3) is expressly stated to be for the purposes of an action *in rem*. In this context, a bareboat charterer is deemed to be the owner of the ship. The effect is that a maritime claim may be enforced by an action *in rem* if the bareboat charterer of the property to be arrested would be liable to a claimant in an action *in personam*. A finding that a court may not order that a ship which has been arrested in an action *in rem* be sold unless the claim *in personam* lies against the owner is inconsistent with these provisions and would negate the deeming provision in Section 1(3). As the judge stated: "What is the point in allowing an action *in rem* against the ship based on a claim *in personam* against the demised charterer if the ship cannot be sold?"

The court concluded that the interpretation which the owners sought to put on the provisions was not reasonable. Further, were the court to accept the owner's interpretation, it would amount to amending the Admiralty Act, which is not permissible in the absence of a constitutional challenge against the sections concerned.

Having dismissed the constitutional attack, the court went on to exercise its discretion on whether to order the sale of the vessel in light of the factual circumstances of the case, such as its value, the

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length of time under arrest and ongoing expenditure for its preservation and maintenance. Taken together, these factors led to a finding in favour of the creditors and an order for sale was duly granted.

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