IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

(EXERCISING ITS ADMIRALTY JURISDICTION)

CASE NO.: A18/2013

Name of Ship: **MV "HUA QIANG"**

In the matter between:

KALAHARI MINING LOGISTICS (PTY) LTD	First Applicant
BAOBAB HOLDINGS (PTY) LTD	Second Applicant
INDEPENDENT FREIGHT CARRIERS (PTY) LTD	Third Applicant
INDEPENDENT FREIGHT CARRIERS LOGISTICS (PTY) LTD	Fourth Applicant

and

WILEST INTERNATIONAL PVT CO. LTD	Respondent

IN RE:

WILEST INTERNATIONAL PVT CO. LTD	Plaintiff

and

A CARGO OF 16892.78 METRIC TONS OF IRON ORE LADEN ABOARD THE MV "HUA QIANG"	Defendant

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JUDGMENT:
Date delivered: 30 May 2013

SR MULLINS AJ:

1. On 6 January 2013, Wilest International PVT Co. Ltd (a Mauritian Company)

commenced an action *in rem* in which the defendant was described as "a cargo of 16,892.78 metric tons of iron ore laden aboard the mv "Hua Qiang". The *in rem* summons contained the allegation that "*the plaintiff is the owner of the defendant cargo*" and the prayer in the *in rem* summons was for "*delivery of the aforesaid Defendant cargo; alternatively, payment of R23,127,29.00, being the equivalent value of the Defendant cargo*", alternative relief and cost of suit.

2. The arrest was effected, but security was subsequently establishing the sum of R23,127,229.00 and the mv "Hua Qiang" was allowed to proceed on her voyage with the iron ore on board. The provision of security had the result that there remained a "deemed arrest" of the defendant iron ore cargo in terms of Section 3(10) of the Admiralty Jurisdiction Regulation Act ("the Act").

3. In due course the applicant companies (all part of the "IFC Group") brought an application, as a matter urgency, for the setting aside of the deemed arrest and return of the security and, in the alternative, an order reducing the quantum of the security to an amount of R3,800,875.78.

4. Before dealing with the basis of the challenge to both the arrest and the amount of the security, it is necessary to sketch the background to the *in rem* action. Wilest International PVT Co. Ltd (to which I refer hereinafter simply as "Wilest") had arranged to acquire bulk iron ore from the "Help-'n-Bietjie

mine in the Northern Cape Province which was operated by a company, Timasani (Pty) Ltd. Wilest negotiated with Baobab Holdings (Pty) Ltd (one of the companies within the "IFC Group") to collect quantities of ore from the mine, arrange for the iron ore to be transported to Saldanha Bay and retained there at an agreed contract price of R450.00 per metric ton. Once sufficient stocks were available in Saldanha, Wilest would sell the cargo and either it or an IFC Group company on its instructions, would secure a vessel to carry the cargo to its export destination.

5. It would appear that a formal written agreement was not concluded. The standard form contract of Baobab Holdings (Pty) Ltd was extensively amended by representatives of Wilest but it would appear that no agreement on the final terms was ever reached. Nevertheless the IFC Group uplifted from the mine and transported to its Saldanha stockpile the aforesaid quantity of 16,892.78 metric tons of iron ore. Wilest, however, did not make payment of the agreed charge of R450.00 per metric ton for the removal of the iron ore to Saldanha. This and similar issues surrounding the IFC Group companies' dealings with Manganese or on behalf of Wilest, led to an impasse by December 2012. By letter dated 13 December 2012, the Johannesburg based attorneys representing the IFC Group recorded "*You are furthermore advised that my client holds a lien over all materials in its possession and on which funds are owing. If payment is not made as contracted my client will bring an order to sell the materials in its possession to defray costs which are currently due and owing by Wilest. From the*

proceeds my client will deduct that which your client admits is due owing and any disputed balance can be held in trust pending resolution". By mid-January, the impasse had not been resolved. On 16 January 2013, the Johannesburg based attorneys of Baobab Holdings (Pty) Ltd addressed the attorneys of Wilest. They asserted that their client held and would not relinquish a *lien* over the cargo and requested payment "*within the next month*". They proposed further that, if payment could not be made, "... *my client sells the 16,892.9 mt together with other comparable stock to increase the current stockpiles to a sellable quantity*".

6. Notwithstanding that communication, and on the same day, the IFC Group sold a quantity of some 25,000.00 metric tons of iron ore, including the 16,892.78 metric tons held on behalf of Wilest, to Metmar Trading (Pty) Ltd. Pursuant to that sale, the iron ore was loaded on to the mv "Hua Qiang" commencing on Monday 28 January 2013, loading being completed on 31 January 2013.

7. On 29 January 2013, that is whilst the iron ore was already in the process of being loaded on board the vessel pursuant to the sale to Metmar Trading (Pty) Ltd, the Johannesburg attorneys of the IFC Group wrote to the plaintiff's Johannesburg attorney advising that their client was prepared, in principal, to discuss a settlement of the claim, recording that Baobab Holdings (Pty) Ltd "*had no intention of giving up its lien and other rights*".

8. Wilest heard rumours to the effect that arrangements were being made by the IFC Group to dispose of some manganese held on its behalf and suspected that the same was true of the iron ore. It brought interdict proceedings in the South Gauteng High Court on 31 January 2013 and obtained an interim order, subject to a *rule nisi*, preventing the IFC Group companies from alienating or otherwise disposing of the ore and authorising the sheriff or his deputy to attach the ore. The *rule nisi* included a provision that the iron ore be redelivered to Wilest against payment of an admitted liability in the sum of R7,601,751.00 and the provision of security for a further R9,000,000.00. When the sheriff in Saldanha Bay sought to effect the attachment, it became apparent that the iron ore is no longer at the port, the mv "Hua Qiang" having sailed with it on board on 1 February 2013.

9. The mv "Hua Qiang", however, called at the port of Richards Bay en route to China. It was there that, pursuant to the *in rem* summons and an arrest warrant issued on 6 February 2013, the defendant "cargo" was arrested. The *in rem* summons alleged that Wilest was the "*owner of the defendant cargo*", referred to the terms of the order granted by the South Gauteng High Court on 31 January 2013 and alleged that the cargo had, without the authority of the plaintiff, been shipped on board the vessel for carriage to China. It was then alleged that "*the plaintiff is entitled to delivery of the defendant cargo, alternatively to payment equivalent to the value of the defendant cargo at the spot price of US$154/mt as at 4 February 2013, namely R23,127,229.00 and to any damages suffered by the plaintiff, which damages are claimable from*

one or more of the Respondents in the said application and possibly other persons at present not identified by the Plaintiff". The *in rem* summons had annexed to it copies of the order and the application papers in the application brought before South Gauteng High Court under Case No. 2013/03670. The vindicatory claim was alleged to be a maritime claim as defined in sub-sections 1(1)(aa), (dd) or (ee) of the Act.

10. Having provided security, the IFC Group companies brought this application to set aside the arrest with the alternative of a reduction in the amount of the security.

11. Mr Fitzgerald SC, who appeared together with Mr Wallis for the IFC Group, submits that the test to be applied in regard to the application to set aside the arrest is that set out in The Thalasini Avgi 1989 (3) SA 820 (A), adapted to acknowledge the fact that the "claim" asserted is vindicatory in nature. Mr Shaw QC, who appeared together with Ms Mills and Mr van Nieuwenhuizen for Wilest, contended in the heads of argument that, because the arrest had been made by virtue of a summons, this test was not relevant and the IFC Group was required to show that the summons was an irregular proceeding in terms of Admiralty Rule 20. The contention is to the effect that IFC Group accordingly had to demonstrate that the issue of the summons was procedurally defective or that there was no basis in law for its issue.

12. In my view, (although it may ultimately not make a great deal of difference in

this case) the test set out in The Thalassini Avgi (supra) is applicable. Whilst the judgment in The Thalassini Avgi related to an application to set aside a security arrest secured *ex parte* in terms of section 5(3) of the Act, the test was approved (at page 834) on the basis that it had been correctly applied in the context of applications to set aside *in rem* arrests procured in terms of section 3(4) and (5) of the Act in Transgroup Shipping SA (Pty) Ltd v Owners of the MV Kyoju Maru 1984 (4) SA 210 (D) and Transol Bunker BV v MV Andrico Unity and others 1987 (3) SA 794 (C). The test was first approved in relation to actions *in rem* (where the arrest is obtained *ex parte* and more often than not without the sanction of a judge) and then extended to apply to security arrests.

13. The test is accordingly that described in The Thalassini Avgi. Wilest, as the party which obtained and seeks to sustain the arrest, must satisfy the court:

13.1 on a balance of probabilities (a) that its claim is a "maritime claim" as defined in section 1 of the Act which is enforceable in rem in terms of the Act and (b) that the defendant "cargo" is the property against or in respect of which its vindicatory claim lies;

13.2 *prima facie* (in the sense that there is evidence which, if believed, would establish the case) that it has a valid vindicatory claim, which is to say that it is the owner of the defendant "cargo" and entitled to delivery thereof.

14. Of course, reference to the nature of the onus is relevant only where the disputes between the parties are factual in nature. Where the question is a matter of law, Wilest must satisfy the court that its contentions are correct if it is to sustain the arrest.

The grounds upon the IFC Group rely in challenging the arrest

15. In challenging the arrest, the IFC Group initially contended that, since the iron ore claimed by Wilest had been comingled with other iron ore purchased by Metmar Trading (Pty) Ltd, the whole had become the property of Metmar Trading (Pty) Ltd (so that no claim to ownership could be advanced by Wilest) and, in any event, that because it was no longer identifiable as distinct from the other iron ore with which it had been comingled, it could not be subject to a vindicatory action. Those contentions could not be sustained and were ultimately not persisted in. If Wilest had been the owner of the relevant quantity of iron ore, it would have become a co-owner of the comingled whole once its iron ore was comingled with other iron ore. Mr Shaw referred in this regard to Grotius 2.8.8 in support of this proposition. See also Voet 41.1.23, which is clear authority for the proposition that where solids of the same class and owned by different persons are mixed together so as to form an inseparable whole, that whole is co-owned by the original owners in proportion to the share which belonged to each before the merger. As was pointed out by Mr Shaw, there could be no objection in principle to the arrest of property even if it is co-owned by some third party. See also

Bort Arresten 5.4. It is further not relevant that the defendant in the *in rem* action is described as a particular quantity of cargo rather than as an undivided share of the whole. The arrest is effectively directed at Wilest's divisible (as opposed to "separable") share of the whole. Gane's Translation of Voet 2.4.55 (v) reads as follows:

> *'(v) Common property may be arrested to extent of debtor's ownership. - Hence there can be no doubt that a creditor proposing to bring an action rightly arrests a thing that is common to his debtor with another, since the ownership of that thing is in the debtor at least to the extent of an undivided share. So much indeed is this so that arrest is not prevented even by the fact that perhaps the common thing is in its nature indivisible. In such a case the whole thing can appear to be burdened with the arrest. The other owner of the common thing can then get his damages in having lost the use of his share from the partner whose default gave cause for the arrest, in a partnership action or one for the division of common property.'*

See also The Wisdom (No 2) SCOSA B 201 (D) at 214-215.

16. The IFC Group's challenge to the arrest was based upon the contentions that:

16.1 Wilest was not the owner of the iron ore in question and was unable in evidence to establish ownership even *prima facie*;

16.2 The claim to ownership and the entitlement to vindicate the iron ore was not a recognised maritime claim as defined in Section 1(1) of

the Act, so that no admiralty proceedings, *in rem* or otherwise, were competent for the enforcement of the claim; and

16.3 In any event a vindicatory claim with regard to movable property other than a ship was not recognised as enforceable by way of an action *in rem* so that no *in rem* summons ought to have been issued and no warrant authorising the *in rem* arrest of the iron ore was permissible.

17. Additional allegations were made to the effect that there had not been proper compliance with Admiralty Rule 4(2) and that, at 6 February 2013, the allegations in the Gauteng application papers (annexed to the summons) were misleading and constituted "misrepresentations" which would justify the court setting aside the arrest in any event.

18. In the alternative, it was contended that the security which had been required and provided was excessive and that, if the arrest was maintained, the amount of the security should be reduced.

19. I deal with these issues below.

Ownership of the iron ore

20. There is no dispute with regard to the fact that the quantity of 16,892.78 metric tons of iron ore to which Wilest lays claim was arrested pursuant to

the *in rem* warrant. Wilest has accordingly demonstrated that the arrested property is that "against or in respect of which" its claim lies. The IFC Group submits, however, that Wilest has failed, even *prima facie*, to establish a claim to ownership of the iron ore in question. This challenge was advanced on two basis, namely:

20.1 it is contended that the evidence relied upon by Wilest to establish its ownership of the iron ore does not in fact provide a *prima facie* basis for concluding that it was at any time the owner of the iron ore; and

20.2 it is contended that the terms of the agreement between Wilest and Baobab Holdings (Pty) Ltd afforded the latter a *lien* and a contractual right of *parate executie* which it exercised, validly alienating the iron ore to Metmar Trading (Pty) Ltd.

21. With regard to the former proposition, Wilest relies upon the following documentary evidence as supporting the assertion that it had acquired ownership of the iron ore:

21.1 An "Irrevocable Holding & Title Certificate" dated 9 October 2012 issued by Timasani (Pty) Ltd and signed by a Mr André J Posthumus, a director Timasani (Pty) Ltd, which it is said demonstrates that the operator of the mine recognised that it held the iron ore on behalf of Wilest as the owner thereof prior to its

removal from the mine by Baobab;

21.2 Invoices issued by Timasani (Pty) Ltd to Wilest and payments made by Wilest to Timasani (Pty) Ltd in respect of iron ore; and

21.3 documents prepared by Timasani (Pty) Ltd recording the delivery of iron ore (identified as part of an ordered 20,000 metric tons) for the client Wilest to the haulier Baobab in October and November 2012.

22. IFC Group submits that the Irrevocable Holding & Title Certificate is not consistent with the notion that Wilest had become the owner of the iron ore and points to the failure on the part of Wilest to reconcile the invoices and the payments to the particular quantity of iron ore and to the Certificate.

23. The Certificate is not entirely free of ambiguity. It is addressed to "Dear Sirs" and reads as follows:

"Helpebietjie Mine, processed by Timasani (Pty) Ltd, hereby certifies that we have been instructed by Wilest International Pvt Co. Ltd to hold and transfer title of the goods described below (hereinafter referred to as "the goods") on your behalf and to your order.

The undersigned holds the 20 000mt of iron ore (Fe) listed on the Annex attached hereto on Helpebietjie Mine processed by Timasani (Pty) Ltd free of payment claims, liens and/or attachments by any third parties, including any and all creditors, and unencumbered to your order.

The stock listed on the attached sheet are pledged to Scipion LLP ... London ... who have full title to and immediate right of possession of the material

described below (free from adverse interests) and deliverable only in accordance with written instructions from Scipion LLP.

We confirm that the Iron Ore described below will be kept safe, secure, in good condition, and segregated from any other goods and clearly identified as your property. We will also comply promptly with your instructions and requirements so as to give full effect with the purpose and intent of this certificate.

You or your duly appointed representative(s) have full right of access to inspect and/or remove the goods and all rights necessary for that purpose. Helpebietjie Mine - Timasani (Pty) Ltd, remains bound by its delivery obligation in respect of such iron ore.

[Description and location of iron ore]

We are fully empowered and entitled to issue this certificate and to undertake the obligations contained herein.

This Irrevocable Holding & Title Certificate shall be governed by and construed by laws of Republic of South Africa and subject to the non-exclusive jurisdiction of the High Court of South Africa.

Any disputes arising out of or in connection ...."

24. The two invoices, addressed by Timasani (Pty) Ltd to Wilest, are (a) dated 25 September 2012, in the sum of R1,693,320.00 and described as relating to "Iron Ore Provisional payment" and (b) dated 12 October 2012 in the sum of R4,125.549.00 with the description "Iron Ore ... first provisional payment for 20 000mt ex Helpebietjie".

25. Payments were made by electronic fund transfer to Timasani (Pty) Ltd in the sums of R1,000,000.00 on 14 August 2012; R1,000,000.00 on 30 August

2012; R1,749,739.19 on 5 September 2012; and R1,693,320.00 on 24 September 2012. The payment on 24 September 2012 was clearly reflected in the invoice "Iron Ore Provisional payment" in the same amount dated 25 September, the day after the payment was made. The net result is that the payments totalled R5,443,058.19 whereas the two invoices totalled R5,818,869.00. The explanation provided, namely that there were exchange-rate fluctuations, is not entirely convincing, but then, at the level of establishing a *prima facie* case, it need not be.

26. It seems to me that the "Irrevocable Holding & Title Certificate" was intended to serve a dual purpose. It was intended to record that the iron ore was, at the time of the issue of the certificate, held for Wilest but it was also to serve as a "certificate of title" so that, at least whilst still held at the mine, the delivery of the certificate to a third party would have the result that Timasani (Pty) Ltd would hold the iron ore on behalf of the holder of the "title certificate". It is true that there is some confusion with regard to the reference to Scipion LLP having "full title to and immediate right of possession of" the iron ore which is said to be pledged to it, but it seems to me that the document is consistent with the notion that ownership in the iron ore in question had passed to Wilest.

27. There are two other pieces of evidence which I consider have a bearing on the question of Wilest's alleged ownership of the iron ore in question. It is common cause that Baobab Holdings (Pty) Ltd uplifted the iron ore from the

mine, clearly with the consent of Timasani (Pty) Ltd. There is nothing to suggest that the mine had any difficulty with Wilest dealing with the ore as its own property. In addition, in the replying affidavit, Mr Patrick Driscoll of the IFC Group referred to an e-mail of 29 November 2012 addressed by Mr Willie Hough (of Wilest) to *inter alia* Mr Patrick Driscoll, a representative of Scipion Capital and, apparently, a Mr André Postumus, a director Timasani (Pty) Ltd and the person who signed the "Irrevocable Holding & Title Certificate". In that e-mail Mr Hough referred to the "first batch of 20k mt mined and put forward for loading and shipping of which product was paid for by Wilest on presentation of stock holding certificate".

28. I am satisfied that there is evidence, which if believed, would justify the conclusion that Wilest had acquired ownership of the iron ore. Wilest has discharged the burden of establishing *prima facie* that it had acquired ownership of the iron ore.

29. The second argument, whilst set out in the heads of argument, was not ultimately advanced before me. The proposition that the IFC Group had alienated the ore relied, firstly, on the notion that the Baobab standard trading terms and conditions applied to the contract between Baobab and Wilest (because of reference to standard trading conditions in e-mail correspondence) notwithstanding that the standard terms had been extensively altered by Wilest and no final agreement had been reached with regard to those alterations. It was further dependent on the notion that the

IFC Group could legally transfer ownership to Metmar, which pre-supposes a valid exercise of the *parate executie* provision in its standard trading terms. Whilst such a clause is enforceable, it can only be enforced after resort to, and authority from, a court. (See in this regard Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division 2004 (5) SA 248 (SCA) at paragraph [11] and SA Bank of Athens Ltd v van Zyl 2005 (5) SA 93 (SCA)). The IFC Group had plainly not complied with the constitutional requirement for the exercise of the right to sell under the *parate executie* provision. It follows that a conclusion with regard to the incorporation of the relevant clause is not required.

A maritime claim enforceable *in rem* against the iron ore

30. It is convenient to approach the two related issues, namely (a) whether Wilest's claim is a Maritime claim and (b) whether, if so, it is enforceable *in rem* against the iron ore, in reverse order. I deal firstly therefore with the question as to whether the Act makes provision for a remedy in the form of a vindicatory action *in rem* against a plaintiff's own property consisting in goods or "cargo" on board a ship.

31. Sections 3(3) and (4) of the Act deal with actions *in rem*. The provisions read as follows:

"(4) Without prejudice to any other remedy that may be available to a claimant or the rules relating to the joinder of causes of action a maritime claim may be enforced by an action *in rem* -

(a) if the claimant has a maritime lien over the property to be arrested; or
(b) if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.

(5) An action *in rem* shall be instituted by the arrest within the area of jurisdiction of the court concerned of property of one or more of the following categories against or in respect of which the claim lies:

(a) the ship, with or without its equipment, furniture, stores or bunkers;
(b) the whole or any part of the equipment, furniture, stores or bunkers;
(c) the whole or any part of the cargo;
(d) the freight;
(e) any container, if the claim arises out of or relates to the use of that container in or on a ship or the carriage of goods by sea or by water otherwise in that container;
(f) a fund."

32. It has been held that section 3(4) does not create a *numerus clausus* of actions *in rem* and that a vindicatory claim by an alleged owner of a ship may be enforced by action *in rem* against the ship in question. That was the conclusion reached by Bristowe J in Dias Compania Naviera SA v mv Al Kaziemah & others 1994 (1) SA 570 (D) and by Howie J in Great River Shipping Inc v Sunnyface Marine Ltd 1994 (1) SA 65 (C) (decided in 1989 and 1991 respectively).

33. It has, however, been held, by Blignault J, in The Atlantic Pride SCOSA B224 (C) that the remedy of an action *in rem* to enforce a vindicatory claim is limited to an action *in rem* against a ship.

34. In Great River Shipping Inc (Supra), Howie J concluded that:

34.1 The provisions of section 6(1)(a) of the Act, in rendering English Law applicable in regard to "*any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act ... in so far as that law can be applied*" imported all aspects of English Admiralty Law not repugnant to the Act, and so included a vindicatory action *in rem* in respect of a ship; and

34.2 In any event, section 3(6) of the Act (which relate to proceedings *in rem* against an associated ship) in the form in which it appeared prior to its amendment in 1992, recognised the existence of the remedy of an action *in rem* in respect of a claim relating to ownership of a ship.

35. In the Atlantic Pride, the plaintiff, alleging that it was the owner of sonar equipment installed on the fishing vessel sought to vindicate the equipment by way of an *in rem* action in which the equipment was cited as the defendant. Blignault J concluded that, whilst English law afforded the remedy of an action *in rem* in respect of a vindicatory claim, the remedy of an *in rem* action was available only in respect of a claim to ownership and possession of a ship.

36. Mr Fitzgerald argues that, even if Wilest's claim can be categorised as a martime claim, it is nevertheless not enforceable by action *in rem* against the iron ore and that, in those circumstances, the arrest falls to be set aside. In support of that argument, Mr Fitzgerald argues that the available authority makes it clear that the vindicatory action *in rem* in English Admiralty law was expressly restricted to an action against a ship. It did not extend to any other movable property. He refers, *inter alia*, to Roscoe: Admiralty Jurisdiction and Practice (1987) 5th Edition at pages 37 and 38, which reads as follows:

"Under ordinary circumstances, when the owner of a personal chattel is wrongfully deprived of it, his only remedy is a personal action against the wrongdoer, but where a ship is wrongfully detained, the ship itself, by Admiralty process, may be at once arrested and proceeded against, and a specific decree obtained, restoring it to the owner's possession. This jurisdiction is of a highly beneficial nature, for unless it were exercised, a shipowner might in many cases sustain serious injury, and be without remedy. If the shipowner could only sue the wrongdoer, the latter might be unable to pay the value of the ship, and might, pending the suit, send it out of the country. Where then the owner is deprived of the possession of his ship he may institute proceedings in Admiralty to have her delivered over to him and on application at the Admiralty Registry, he may at once obtain a warrant for her arrest."

37. An important footnote to the above passage (relating to the "ordinary circumstances" in the opening portion of statement) is to the effect that:

"The plaintiff in an action at common law for the detention of any chattel could not before the passing of a modern statute obtain execution for the

return of the chattel, without giving the defendant the option of retaining such chattel upon paying its value. The Common Law Procedure Act 1854 s 78.

38. It is not suggested by Mr Shaw for Wilest that the above quoted statements from Roscoe do not reflect the English Admiralty Law as referred to in section 6(1)(a) of the Act. Mr Shaw contended, however that (a) the iron ore in question was "cargo" and therefore to be distinguished from "a personal chattel" as referred to in Roscoe; (b) as is evident from section 3(5) of the Act, actions *in rem* are permissible against cargo as opposed to "any chattel". In support of the proposition that English Admiralty practice recognised the availability of the procedure of an action *in rem* in respect of vindicatory proceedings with regard to property other than a ship, Mr Shaw referred to a passage from Coote's Admiralty Practice (1860). At page 12 of that work the author, in dealing with warrants of arrest, said:

"*The action having been entered, and the plaintiff's affidavit filed, as I have shown, a warrant will be granted under the seal of the Court to arrest the res.*

In causes of possession and bail for safe return, the warrant is moved for by counsel before a surrogate. The warrant is addressed either to the Marshal or ... It directs and authorises them to arrest or cause to be arrested the res (wherever it may be), and the same so arrested to keep under safe and secure arrest until they shall receive further orders, and also to cite at the premises all persons in general having or pretending to have any right, title or interest therein, to appear on a day named to answer to the plaintiff in his cause."

39. whilst the general reference to the "*res*" in the above quoted passage may be regarded as lending support for Mr Shaw's contention, it seems to me that it cannot be regarded as overriding the clear statement of the position as contained in Roscoe. There is, of course, also the absence of any evidence that a vindicatory action *in rem* has been successfully instituted in England and Wales (or any of the jurisdictions in which in which Colonial Courts of Admiralty were established) in relation to cargo. The position appears to be that, in English Admiralty Law, a vindicatory action *in rem* against property alleged to be owned by the claimant was expressly restricted to an action *in rem* against a ship. Blignault J in the Atlantic Pride apparently approached the matter on the basis that the "exception" allowed in English law with regard to a vindicatory claim enforced *in rem* against a ship should be construed narrowly, so that it would not extend to the "equipment" of a ship (which is property which is also capable of being arrested *in rem*, as distinct from the ship, in terms of section 3(5)(b) of the Act).

40. In those circumstances, the remedy of a vindicatory action *in rem* against cargo cannot be found In section 6(1)(a) of the Act. No other source for such a remedy is apparent and I accordingly conclude that an action *in rem* was not a remedy available to Wilest as a means of vindicating the iron ore in question. It follows that the arrest was not authorised by the Act and cannot stand.

41. It is consequently not necessary to deal with the (ultimately complex)

question as to whether Wilest's vindicatory claim is a maritime claim, or the other issues which were argued before me.

42. The only remaining issue relates to costs. The applicants (the IFC Group of companies) have plainly been successful. Ordinarily that fact would entitle the applicants to an order that the respondent pay the applicants' costs, and in this case of the costs consequently upon the employment of two counsel.

43. The applicants go further and contend that costs should be awarded in their favour on the punitive scale as between attorney and client. They complain, *inter alia,* that the security demanded in order to permit the vessel to sail was excessive and that the respondent's unreasonable demands were designed to compel a commercial settlement. For the reasons set out below, I consider that it is more appropriate that no order is made as to costs.

44. I have a limited discretion to deprive the applicants of their costs and, in my view, that is a discretion which I ought properly to exercise. My reasons are briefly the following.

45. The respondent could, adopting a different procedure, have secured the attachment of the iron ore. The applicants have succeeded on the basis of a challenge to the procedure adopted by the respondent. The applicants had no right to dispose of the iron ore and had plainly acted unlawfully in doing so. The iron ore was being held on behalf of the respondent and, as dealt

with above, the applicants' disposal thereof was accompanied by misleading statements and proposals communicated to the respondent's attorneys. The unavoidable conclusion is that the applicants' representatives did not wish the respondent to become aware of the fact that the iron ore was being sold and shipped out of the country. I naturally do not suggest that the applicants' attorneys were aware of the position.

46. The applicants chose to take the law into their own hands. Their surreptitious behaviour suggests that they knew, or at least must have suspected, that the respondent could secure a court order preventing their actions had it obtained knowledge thereof in time. The amount of the security sought by the respondent may well have been overstated (although not to the extent to which the applicant suggest), but I do not consider that this alters the approach which I should adopt. I consider that I am fully justified in depriving the applicants of their costs. I refer in this regard to the decision in Abbott v von Theleman 1997 (2) SA 848 (C) at 854B-D.

47. In the circumstances, the order I make is the following: The deemed arrest *in rem* under case number A 18/2013 be and is hereby set aside.

S.R. Mullins AJ

APPEARANCES:

APPLICANTS' COUNSEL:	M J Fitzgerald SC P J Wallis Instructed by Shepstone & Wylie (Q van der Merwe)
RESPONDENT'S COUNSEL:	D J Shaw QC J F Nicholson H P van Nieuwenhuizen Instructed: by van Velden Pike (A Govender)
Date of hearing:	25 March 2013.
Date of judgment delivered :	30 May 2013.