

CASE NO: AC29/2018

IN THE HIGH COURT OF NAMIBIA
HELD AT WINDHOEK, THURSDAY, THE 22ND DAY OF JANUARY 2019
BEFORE THE HONOURABLE MR JUSTICE NDAUENDAPO

Name of vessel: mv "EMRE-T"

In the matter between:

DEUTSCHE BANK A.G.
(assignee of all the rights of DEUTSCHE BANK
NEDERLAND N.V., formerly known as NEW HBU II N.V.
and HOLLANDSCHE BANK-UNIE N.V)

APPLICANT

and

THE MOTOR TANKER "EMRE-T"

FIRST RESPONDENT

and

EMRE DENIZ NAKLIYAT SANAYI A.S .

SECOND RESPONDENT

*Application for leave to sell
the First Respondent vessel, its
equipment, furniture, stores,
bunkers and lubricating oils*

ORDER

HAVING HEARD Adv. Michael Fitzgerald S.C., and Ms de Bruin, Counsel for the Applicant, and having read the documents filed of record:

IT IS ORDERED:

1. THAT the mv "EMRE-T", including its equipment, furniture, stores, bunkers and lubricating oils as are on board at the time of the sale thereof, be sold, the said sale to be by public auction in accordance with the following terms:

1.1 DEFINITIONS

- 1.1.1 "Broker" refers to the person appointed by the Court in terms of paragraph 1.3 below;
 - 1.1.2 "Bunkers" refers to Intermediate Fuel Oil (IFO) and Marine Gas Oil (MGO) including lubricating oils, hydraulic oils and greases on board the Ship at the time of the Sale;
 - 1.1.3 "Claimants" refers to those parties who lodge claims with the Referee in terms of paragraph 6 and includes the owner of the Ship;
 - 1.1.4 "Conditions of Sale" refers to the conditions of sale annexed marked "A";
 - 1.1.5 "Crew" refers to any Master, officer and crew member employed on the Ship at any time;
-
- 1.1.6 "day" shall mean a day other than a Saturday, Sunday or public holiday in Namibia;

- 1.1.7 "Fund" refers to the proceeds of any property sold in terms of this Order;
- 1.1.8 "Objectors" refers to those parties who intend to lodge or lodge objections with the Referee in terms of paragraph 6 and includes the owner of the Ship.
- 1.1.9 "Referee" refers to the person appointed herein whose functions are more fully set out in paragraph 5;
- 1.1.10 "Sale" refers to the sale of the Ship by public auction as the Broker, in consultation with the Applicant and its attorneys, deems appropriate, and includes the sale of all the Ship's equipment, furniture, stores and Bunkers as are on board at the time of the sale thereof;
- 1.1.11 "Ship" is the mv "EMRE-T", bearing IMO number 9286475 and registered on the Turkish Register of Ships, including its equipment, furniture, stores and Bunkers as are on board at the time of the sale thereof.

1.2 The Ship shall be sold on the Conditions of Sale set out in Annexure "A" hereto.

1.3 Admiralty Ship Brokers and Consultants (Pty) Ltd, trading as Admiralty Ship Sales, is hereby appointed to act as Broker on behalf of this Court in respect of the Sale and to that end –

1.3.1 Is directed to make all the necessary arrangements for the Sale, including –

1.3.1.1 The fixing of a date for the Sale which shall be not less than 15 (fifteen) calendar days and not more than 60 (sixty) calendar days after the confirmation of the Rule;

1.3.1.2 Causing the Sale to be advertised once in an international shipping publication (being one of Lloyd's List, Tradewinds or Fairplay) not less than 10 (ten) calendar days prior to the Sale;

1.3.1.3 Causing the Sale to be advertised on the Broker's website;

1.3.1.4 Subject to the Applicant's written confirmation, co-operating and discussing with, and providing all details of the intended advertising and marketing of the Ship and the Sale to, an independent international ship sale and purchase broker, to assist with ensuring that the Sale is as widely circulated to prospective purchasers as is possible. Any amount payable as a result of such appointment shall be for the Bank's account;

1.3.2 Is authorised to –

1.3.2.1 Hire a suitable venue for the conduct of the Sale;

1.3.2.2 Appoint an independent international sale and purchase broker or such other suitably qualified valuer, for the purpose of appraising the value of the Ship;

1.3.2.3 Accept in lieu of payment consequent upon the Sale a bank guarantee issued by a Namibian or South African registered commercial bank and payable in Windhoek for the whole or any portion of the purchase price, such guarantee to be on such terms, including interest, terms of payment and currency, as to the Registrar, in consultation with the Applicant's attorneys, appears proper;

1.3.2.4 Take all other reasonable steps that the Broker, in consultation with the Applicant's attorneys, deems necessary to procure the Sale at the best possible price.

1.4 The Broker be entitled to and shall be paid –

1.4.1 All expenses incurred in terms of paragraph 1.3 and a commission on the purchase price of the Ship (as defined in clause 2.9 of the Conditions of Sale referred to in paragraph 1.2), which commission shall be deemed to have been earned upon the conclusion of the Sale and payment of the purchase price, plus value added tax thereon, if applicable, and shall be calculated as follows:

1.4.1.1 Three per centum (3%) on the first USD500,000 or part thereof; thereafter

1.4.1.2 Two and half per centum (2,5%) on the second USD500,000 or any part thereof; thereafter

1.4.1.3 Two per centum (2%) on the third USD500,000 or any part thereof; thereafter

1.4.1.4 One and a half per centum (1.5%) on the fourth USD500,000 or any part thereof; thereafter

1.4.1.5 One per centum (1%) on the fifth USD500,000 or any part thereof; thereafter

1.4.1.6 Half a per centum (0.5%) on any balance thereafter;

1.5 In the event of the Sale not proceeding:

- 1.5.1 The Broker shall be paid all of the expenses incurred in terms of paragraphs 1.3.1 and 1.3.2 above and shall be entitled to be remunerated at a rate of R800 per hour, excluding VAT, in respect of any time reasonably spent by it in implementing this Order; and
- 1.5.2 The Broker shall be entitled to proceed against any party responsible for the postponement or cancellation of the Sale or release of the Ship (as further provided in this Order), or against the Ship, or her owners, or the proceeds of any insurance policy, whichever may be appropriate, for the recovery of such expenses; and
- 1.5.3 The Applicant shall be entitled to the payment of its taxed or agreed attorney and own client costs and shall be entitled to proceed against the Ship or her owners or the proceeds of any insurance policy for the recovery of such costs.
- 1.6 The Ship shall be sold free of all liens, encumbrances, preferences and charges.
- 1.7 All arrests and attachments of the Ship shall be discharged on the passing of ownership to the Purchaser.
-

1.8 A copy of this Order (but without the Conditions of Sale, being Annexure "A" hereto), together with a bill of sale to the effect that the Ship has been sold and the purchase price paid or secured, shall be sufficient proof to the Port Captain of the port of Walvis Bay and the Namibian Revenue Service that the Ship is free of any arrests, attachments, encumbrances, preferences, charges and liens which arose prior to the Sale.

2. REMOVAL OF DOCUMENTS

THAT:

2.1 The Master of the Ship, or the person in charge of the Ship, is ordered and directed to deliver to the Sheriff, who is ordered and directed to take into custody, the following documents from the Ship, wherever they may be within the jurisdiction of this court:

2.1.1 All bunker and lube oil receipts for the last 24 (twenty four) months;

2.1.2 All receipts for stores and provisions for the Ship for the last 24 (twenty four) months;

2.1.3 All repair invoices for the last 24 (twenty four) months;

2.1.4 All records of port dues for the last 24 (twenty four) months;

- 2.1.5 All records of disbursements by the Master for the last 24 (twenty four) months;
 - 2.1.6 The Ship's articles;
 - 2.1.7 Any Master's general account
 - 2.1.8 With regard to the crew:
 - 2.1.8.1 All crew contracts;
 - 2.1.8.2 Any collective agreement/s, wage accounts, overtime and bonus records in respect of crew members;
 - 2.1.8.3 All communications received by the Master relating to the payment of crews wages, overtime and bonuses; and
 - 2.1.8.4 Records of all cash received on board for the last 18 (eighteen) months;
-
- 2.1.9 All other records, invoices and/or receipts in respect of any other goods sold and delivered or services rendered to the Ship within the last 24 (twenty four) months;

- 2.1.10 All correspondence between the Master or other officers, and owner, operators, managers and all charterers.
- 2.2 The Sheriff is ordered and directed to obtain a statement from the person referred to in paragraph 2.1 stating the reasons for the non-production of any documents so required in terms of paragraph 2.1.
- 2.3 The Sheriff shall deliver to the Referee legible copies of the documents referred to in paragraph 2.1, any statement referred to in paragraph 2.2, all of which shall be available to the Claimants and Objectors for inspection and copying during normal business hours. The Sheriff shall hold the originals of the documentation referred to in paragraph 2.1 for delivery to the Purchaser upon finalisation of the Sale.
- 2.4 The Sheriff shall be entitled to appoint any relevant person approved by the Applicant or Referee to assist him/her in the identification and collection of the documents and compilation of the statement referred to in sub-paragraphs 2.1 and 2.2 and to pay that person reasonable remuneration for his/her attendances, such remuneration to be recoverable by the Sheriff from the Fund in terms of paragraph 4.4.
-

3. THE SHERIFF

THAT:

3.1 In the absence of any duly appointed ships agent the Sheriff be and is hereby appointed and directed, in consultation with the Applicant's attorneys, to:

3.1.1 Employ such security personnel as may be necessary for the safeguarding of the Ship;

3.1.2 Provide fuel and oil to the Ship when necessary and to arrange for the provision of any necessary supplies, services or repairs requisite for the preservation and maintenance of the Ship and the well-being of any crew on board the Ship;

3.1.3 Make arrangements for the shifting or berthing of the Ship if so required in the exercise of the Sheriff's custody and preservation of the Ship or by any authority or at the request of the Applicant;

3.1.4 Repatriate any and all crew members currently on board the Ship that are not required for the preservation of the Ship pending its sale by judicial auction subject to the condition that:

3.1.4.1 No crew member shall be repatriated against his wishes;

- 3.1.4.2 Each crew member to be repatriated shall confirm to the Sheriff in writing that he has no objection to being repatriated and that he has been advised and understands the procedure for lodgement and recovery of any claim that he might have as detailed in paragraph 8 below, provided that such Crew members as may agree to be repatriated shall have had sufficient opportunity beforehand to consult with their attorney; and
- 3.1.4.3 The decision of a Crew member not to be repatriated in spite of the reasonable exercise of the Sheriff's powers to request such Crew member to leave the Ship shall not, subject to the terms of his contract of employment, and any right to claim severance (or retrenchment pay or damages in respect thereof) thereunder, entitle that Crew member to demand further remuneration by virtue of his or her continued presence on board the Ship.
- 3.1.5 Employ and pay any person, be they a member of the current crew or a suitable third party, to take such steps as are necessary to preserve the Ship pending her Sale.
- 3.1.6 Appoint a suitable port agent, in consultation with the Applicant's attorney, as the Ship's agent to assist in attending to the matters referred to in paragraphs 3.1.1 to 3.1.5;
-

- 3.1.7 Appoint any other suitably qualified person, in consultation with the Applicant's attorneys, to assist with the exercise of the Sheriff's powers and obligations herein so as to facilitate the Sale;
- 3.1.8 Establish full details of any hull and machinery insurance that is in place in respect of the Ship, and, if necessary, in consultation with the Applicant's attorneys, to insure the Ship's hull and machinery, including but not limited to port risks, on suitable terms against the loss of or damage to the Ship for the period up to and including the date of delivery of the Ship to the Purchaser;
- 3.1.9 Take only such other steps as the Court may order from time to time.
- 3.2 The Sheriff shall prepare a report in respect of all actions which he may have taken and expenses incurred in terms of paragraphs 2 and 3.1 and submit that report to the Referee not later than 10 (ten) days after the Sale.

4. THE FUND

THAT:

- 4.1 A Fund shall be established from the proceeds of the Sale which shall be dealt with as follows:

- 4.1.1 The Fund shall be held by and be subject to the control of the Registrar, or the Registrar's duly appointed agent, in such manner that it is available for distribution;
- 4.1.2 The Fund may, subject to any relevant exchange control regulations, be held in such currency and in such bank or deposit taking institution, whether in Namibia, South Africa, the United Kingdom, Europe or the United States of America, as the Registrar of this Court, in consultation with the Applicant's attorneys, may direct.
- 4.2 The Applicant or the Registrar's duly appointed agent is hereby authorised to make application on behalf of the Registrar for any necessary exchange control approval and to open the required bank account, and the Registrar shall provide all necessary assistance in this regard.
- 4.3 The Registrar shall pay out of the deposit (and, if the deposit be insufficient, out of the balance of the purchase price for the Ship when it is paid) the Sheriff's fees and expenses in terms of paragraphs 2 and 3.1 as authorised by the Referee.
-

- 4.4 The Sheriff shall compile a properly documented schedule of the fees and expenses in respect of the exercise of the powers referred to in paragraphs 2 and 3.1 which shall be submitted to the Referee who shall:
- 4.4.1 Advise all known creditors of the receipt of the schedule; and
- 4.4.2 Make the schedule available for inspection for 5 (five) days; and thereafter
- 4.4.3 Absent any written objection from any creditor or items disputed by the Referee, give written authority to the Registrar to pay the fees and expenses to the Sheriff. In the event of an objection, the claim of the Sheriff will be dealt with in accordance with the procedures set out in paragraph 6 below.
- 4.5 The Registrar shall thereafter pay out of the Fund all other claims which have been submitted to the Referee in accordance with the procedures set out in paragraph 6 or 8 below, and which the Court has so ordered may be paid out of the Fund.
- 4.6 A Claimant may, on written notice to the Registrar, obtain access to and copies of the bank account information and/or bank statements relating to the Fund, if applicable.
-

4.7 The Registrar shall authorise the bank to make payment of any claim in terms of an order of this court within 2 (two) days of receipt by the Registrar of a written request to authorise payment accompanied by the relevant order authorising such payment.

5. THE APPOINTMENT OF THE REFEREE AND THE LODGING OF CLAIMS

THAT:

5.1 Advocate Darryl Cooke, of the Cape Town Bar, be and is hereby appointed as Referee in respect of the Fund to receive, examine and report to this Court on the validity and ranking of claims in respect of the Fund.

5.2 The Referee shall be remunerated at a rate of R2000 (excluding value added tax) per hour of work reasonably spent on fulfilling his obligations plus reasonable disbursements.

5.3 The Referee shall, within 2 (two) days of date of the delivery of the Ship to the Purchaser following the Sale, notify known creditors and interested parties of such delivery by email.

- 5.4 The Referee shall submit an account in respect of the Fund to the Claimants for approval.
- 5.5 On obtaining such approval, the Referee shall advise the Registrar, who shall then authorise payment out of the Fund.
- 5.6 Failing such approval, the Referee's accounts shall be submitted to the Registrar of this court for taxation.
- 5.7 The Referee shall compile an index of the documents delivered to him by the Sheriff in terms of Paragraph 2.3 of this Order and shall circulate this to the Claimants.
- 5.8 The Referee shall be entitled to:
- 5.8.1 Call for further information, representations, replies or rejoinders with regard to any claims or any objections to claims;
- 5.8.2 Require any information or representations to be provided or made within such time as he may decide;
-
- 5.8.3 Engage and remunerate any person, on reasonable notice to the Claimants, to perform any function or to render such assistance to the Referee as he may reasonably require;

5.8.4 Extend the time within which any claim, objection, reply, rejoinder and representations shall be filed for a further period of 5 (five) days on good cause shown, provided that this shall not entitle the Referee to file his Report with this Court at a later date than that provided for elsewhere in this Order, save with the leave of the Court.

6. CLAIMS

THAT:

6.1 Save as otherwise provided in this Order, all claims shall be filed with the Referee within 15 (fifteen) days of notification from the Referee in terms of paragraph 5.3 above;

6.2 The Referee shall, as soon as possible, but after no more than 5 (five) days) after the closing date for the delivery of claims or, in the event of an extension of time in terms of paragraph 5.8.4, after the last such extended time period, notify all Claimants:

6.2.1 Of the identity of each Claimant;

6.2.2 Of the nature and value of each claim;

- 6.2.3 Of the ranking claimed for each claim or, if different rankings are claimed, then the ranking claimed for different parts of the claim and the nature of the different parts;
- 6.2.4 Of the identity of the party representing each Claimant and the email address thereof for service;
- 6.2.5 Whether any claim has already been paid.
- 6.3 Any person wishing to object to or make representations with regard to any claim shall, within 10 (ten) days of the notification of claims by the Referee as referred to in paragraph 6.2 above:
- 6.3.1 Deliver such objections or representations to the Referee;
- 6.3.2 Serve such objections or representations on the relevant Claimant or its legal representative.
- 6.4 The Referee shall, as soon as possible, but after no more than 5 (five) days after the closing date for the delivery of objections or representations or, in the event of an extension of time in terms of paragraph 5.8.4, after the last such extended time period, notify all Claimants of such objections or representations.

6.5 Any Claimant wishing to reply to such objections or representations shall within 5 (five) days of the date of notification by the Referee referred to in paragraph 6.4 above:

6.5.1 Deliver such reply to the Referee;

6.5.2 Serve a copy of such reply on the person objecting or making representations or their attorney of record.

6.6 The Referee shall, as soon as possible, but after no more than 5 (five) days after the closing date for the delivery of replies or, in the event of an extension of time in terms of paragraph 5.8.4, after the last such extended time period

6.6.1 Notify all Claimants of such replies; and

6.6.2 Call for delivery any rejoinder to any reply within 5 (five) days, provided that the right to file a rejoinder shall, unless the Referee indicates to the contrary, be confined to new matter raised in the reply.

6.7 All claims submitted to the Referee shall contain full details of the claim, when it arose and how it is made up, shall be signed by or on behalf of

the party submitting it and shall have annexed to it copies of all relevant documents relating to the claim.

6.8 All claims shall contain full details of any interest claimed, stipulating the rate of interest claimed, the period for and the basis on which it is claimed and whether it is compound, simple or any other form of interest.

6.9 All documents filed with the Referee shall be delivered in the following manner:

6.9.1 The original document shall be scanned and sent by email to dcooke@capebar.co.za by midnight Namibian time on the applicable day;

6.9.2 The original document shall be served on the Referee at Floor 2, Bank Chambers, Corner of Bloem and Keerom Streets, Cape Town, South Africa, or to Koep & Partners, 33 Schanzen Road, Windhoek, Namibia, marked for the attention of Ms Wilmili Koep, within 10 (ten) days of the applicable day;

6.10 All documents delivered to a Claimant or objecting party shall be delivered in the following manner:

6.10.1 The original document shall be scanned and sent by email to the Claimant or objecting party or their appointed attorneys by midnight on the applicable day;

6.10.2 The original document shall be served on such Claimant or objecting party at its nominated address for service, within 5 (five) days of the applicable day.

7. REFEREE'S REPORT

THAT:

7.1 The Referee shall file a report with regard to the Fund with this Court within 10 (ten) days after expiry of the time period provided for the delivery of the last set of documents, whether that be representations and objections replies, or rejoinders, and shall notify all persons who have lodged claims, objections or representations that he has reported to the Court.

7.2 Any person shall be entitled, at his own expense, to obtain a copy of any claim, objection, representation, reply or rejoinder and of any report by the Referee.

7.3 Any person shall be entitled to make application, on an urgent basis and on notice to all Claimants, for an appropriate order with regard to the recognition of any claims and payment of claims from the Fund.

7.4 The Referee may file with the Registrar an interim report with his recommendations with regard to the validity, ranking and payment of any claim in respect of which he has received no objection within the stipulated period, or any extended period allowed by the Referee in terms of paragraph 5.8.4.

8. CREW CLAIMS AND PRESERVATION COSTS

THAT:

8.1 Notwithstanding any other provision of this Order, the Referee is hereby directed to deal with the claims of any Crew and any person having a claim for preservation costs, as properly vouched and submitted to the Referee within 5 (five) days of the return date, as a matter of urgency and without regard to the time limits set out above, with a view to finalising and paying such claims with the least possible delay;

8.2 In order to give effect to paragraph 8.1 above, the Referee is hereby authorised and directed to:

- 8.2.1 Follow such procedure and set out such time limits as he deems appropriate to enable him to consider the claims referred to in paragraph 8.1;
- 8.2.2 To advise all other known Claimants of the identity of each Claimant in terms of paragraph 8.1 and of the nature and value of each such Claimant's claim, to afford such other Claimants an opportunity to make representations with regard to any claims made in terms of paragraph 8.1;
- 8.2.3 To determine the time periods for the filing of such representations and any replies thereto, with a view to finalising and paying such claims with the least possible delay.
- 8.2.4 Take all such steps as may be reasonably necessary to ensure that all known Claimants are advised timeously of the procedure he proposes to adopt in terms of 8.2.1 are given reasonable opportunity to make representations thereon and on the claims in question;
- 8.2.5 File with the Registrar an interim report containing his recommendations with regard to the validity, ranking and payment of the claims referred to in paragraph 8.1 above.
-

9. COSTS

THAT:

- 9.1 The costs of the Applicant be allowed on an attorney and own client basis and be paid from the Fund such costs to include two instructing and one instructed counsel.
- 9.2 in the event of the Sale not proceeding, the Applicant shall be entitled to payment of its taxed or agreed attorney and own client costs and shall be entitled to proceed against the Ship or the Second Respondent for the recovery of such costs.

10. SERVICE

10.1 service of any final Order will be effected by –

10.1.1 The Applicant's attorneys, by:

10.1.2 Publishing an abbreviated version thereof in the form set out in Annexure "C" hereto once:

10.1.2.1 In The Namibian newspaper; and

10.1.2.2 In an international shipping publication (being one of Lloyd's List, TradeWinds or Fairplay);

within 5 (five) days of the granting of the final Order;

10.1.3. Serving a copy of this Order and the Conditions of Sale on the Second Respondent by Emailing the same to its Turkish lawyers, Sarikaya + Sahin, using the email address sarikaya@sarikayasahin.com;

10.1.4. Delivering a copy of this Order and the Conditions of Sale, by email, to any other attorneys identified by the Applicant's attorneys as representing interested parties.

10.2 The Sheriff, by:

10.2.1 Delivering by hand a copy of this Order and the Conditions of Sale to:

10.2.1.1 The Port Captain for the Port of Walvis Bay;

10.2.1.2 The Master of the Ship or any person apparently in control of the Ship;

BY ORDER OF THE COURT


REGISTRAR