

IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

PORT ELIZABETH, FRIDAY, 23<sup>RD</sup> FEBRUARY 2018

BEFORE The Honourable Madam Justice BESHE

Case No. 11/2018  
Referred to case no. 1487/2017

In the matter between:

<b>FURNESS WITHY (AUSTRALIA) PTY LTD</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>THE OWNER OF THE MV "NM CHERRY BLOSSOM"</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>THE MASTER OF THE MV "NM CHERRY BLOSSOM"</b>	<b>3<sup>RD</sup> APPLICANT</b>
<b>AND</b>	
<b>THE SAHARAWI ARAB DEMOCRATIC REPUBLIC</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>THE POLISARIO FRONT</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>OCP SA</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>PHOPHATES DE BOUCRAA SA</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>BALLANCE AGRI-NUTRIENTS LIMITED</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>THE SHERIFF OF THE HIGH COURT SOUTH AFRICA DISTRICT OF PORT ELIZABETH NORTH</b>	<b>6<sup>TH</sup> RESPONDENT</b>
<b>THE MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION</b>	<b>7<sup>TH</sup> RESPONDENT</b>

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Having heard Advocate Cooke, Counsel for the Applicants and Advocate Wragge SC, Counsel for the First, Second and Third Respondents and having read the documents filed of record,

IT IS ORDERED:

1. That **Part A: maritime claim**

This application be transferred for determination by the Court exercising its admiralty jurisdiction.

2. That **Part B: The sale of the cargo by sealed tender process and related relief**

Further defined terms:

**"bidder"** refers to each person who or which submitted a bid in the sale process.

**"the broker"** refers to the person appointed by the Court in terms of paragraph 5 below to arrange and conduct the sale.

**"the cargo"** refers to the 55,000MT of phosphate rock laden on board the vessel, consisting of a parcel of 45,000MT of Boucraa high grade 36% phosphate, loaded in holds # 1,2,4 and 5, and a parcel of 10,000MT of PB3 reactive phos/rock loaded in hold #3.

**"the charterparty"** refers to the time charterparty concluded between the owner and FWA in respect of the vessel on 14 March 2017.

**"the commercial terms of the contract of affreightment"**

refers to the freight rate(s) for the carriage of the cargo on board the vessel to the purchaser's nominated discharge port(s), the discharge port(s) lay time, based on discharge rates published by the port(s) and obtained via local port agents, and the demurrage rate(s).

**"the conditions of sale"** refers to the conditions applicable to the sale, attached hereto marked "A", and includes the annexures thereto.

**"the confirmation of sale"** refers to the confirmation by the broker in accordance with clause 21 of the conditions of sale.

**"the contract of affreightment"** refers to the contract concluded or deemed to have been concluded between the purchaser and FWA in relation to the

procurement of the carriage of the cargo on board the vessel to the purchaser's nominated discharge port or ports in accordance with clauses 32 to 35 of the conditions of sale.

**"Howe Robinson"** refers to the brokers, Howe Robinson Partners (UK).

**"Integer"** refers to Integer Research Ltd.

**"prospective purchasers"** refers to persons interested in purchasing the cargo by the sale process.

**"the purchaser"** refers to the person who or which acquires the cargo pursuant to the sale process, either as confirmed by the broker as the purchaser of the cargo in terms of the confirmation of sale issued in terms of clause 21 of the conditions of sale, or as declared by the broker to be the purchaser in terms of clause 27.2.2 of the conditions of sale.

**"the purchaser's nominated discharge port(s)"** refers to the discharge port or ports for the cargo nominated by the purchaser in conformity with the conditions of sale, which shall be within the geographical range of the ports prescribed by, and otherwise not be a port which is for whatever reason excluded by, the Gencon voyage charterparty attached to the conditions of sale, unless otherwise agreed to by the broker in writing upon the direction of FWA.

**"the Registrar"** refers to the Registrar of the Court.

**"the SADR"** refers to the first and second respondents.

**"the sale"** refers to the sale of the cargo pursuant to the sale process.

**"the sale process"** refers to the sealed tender process conducted by and under the exclusive control of the broker pursuant to this order.

**"the vessel"** refers to the motor vessel "NM Cherry Blossom".

3. That the cargo shall be sold by the sale process, subject to the conditions of sale, including the condition that FWA shall procure and the owner shall perform the on-carriage of the cargo to the purchaser's nominated discharge port(s), pursuant to the contract of affreightment, and a contract or contracts of carriage to be concluded between the purchaser and the owner, on the respective bases and terms described in the conditions of sale.
4. That the sale process shall run for a period of 30 calendar days from the day the broker opens the sale process in accordance with clause 5.1.12 below, provided that such opening date shall be no earlier than 21 calendar days from the date of this Order. The broker may extend the sale period, as it in its sole discretion deems necessary, up to a maximum aggregate extension of 10 calendar days.
5. That the Clear Asset (Pty) Limited shall be appointed to act as the broker on behalf of the Court in respect of the sale, and is to that end:

5.1 Directed to make all the necessary arrangements for the sale, including:

- 5.1.1 Appointing a suitably qualified cargo surveyor to conduct a pre-sale survey of the cargo, to take samples of the cargo for analysis, and to report to the broker, as soon as is reasonably possible, on the condition of the cargo.
- 5.1.2 Appointing a suitably accredited and certified independent analytical laboratory to analyse the samples taken by the cargo surveyor, and to report to the broker, as soon as is reasonably possible, on the chemical composition of the samples, or on any other relevant properties or characteristics of the cargo as might be requested by the broker.
- 5.1.3 Making copies of the aforesaid survey and laboratory reports available to the prospective purchasers, and to the applicants and respondents, if required by them.
- 5.1.4 Instructing the aforesaid cargo surveyor to procure further samples of the cargo which might be required by any prospective purchaser,

and to make those samples available to the relevant prospective purchaser, at his, her or its cost.

- 5.1.5 Causing the sale to be advertised on the broker's website.
- 5.1.6 Causing the sale to be marketed in such other manner or manners as the broker regards as being reasonably required to bring the sale to attention of prospective buyers, both locally and internationally.
- 5.1.7 Causing the conditions of sale to be placed on the broker's website.
- 5.1.8 Ensuring that the advertisements placed in respect of the sale refer to the availability of the conditions of sale on the broker's website, and reflect the relevant URL.
- 5.1.9 Causing a copy of the judgment of the Court dated 14 June 2017 in the application commenced by the SADR against *inter alia* the third and fourth respondents, under case number 1487/17, a copy of the letter dated 13 July 2017 addressed to the Registrar of the Court by or on behalf of the third and fourth respondents, and the press release of the third and fourth respondents of the same date, to be placed on the broker's website.
- 5.1.10 Ensuring that prospective purchasers are made aware of the background to the sale by referring them to the aforesaid judgment, letter and press release, the latter two reflecting the third and fourth respondents' attitude to the judgment.
- 5.1.11 Providing prospective purchasers with reasonable assistance required by them to register on the broker's website.
- 5.1.12 Opening the online sealed tender process for the submission of bids.

## 5.2 Authorised:

- 5.2.1 To the extent that the broker in its sole discretion considers it to be necessary, appoint an expert to advise in relation to the physical, chemical and other properties or characteristics of the cargo are likely

to be relevant to potential buyers, and hence to the cargo's marketability.

5.2.2 To the extent that the broker in its sole discretion considers it to be necessary, appoint suitably qualified and experienced independent expert(s) to advise it further in relation to the marketing of the cargo, and/or to provide the broker with any further advice or assistance reasonably required.

5.2.3 To take all other reasonable steps that the broker deems necessary to procure the sale at the best possible price.

5.2.4 To extend the 30 calendar sale period if it deems it necessary, up to a maximum aggregate extension of 10 calendar days.

6. That the broker shall be entitled to and shall be paid:

6.1 In the event of the cargo being sold:

6.1.1 All expenses reasonably incurred by it in implementing this order, as authorised pursuant to paragraph 14 below.

6.1.2 A commission of 5% on the purchase price of the cargo, which commission shall be deemed to have been earned upon receipt by the broker of the full purchase price, plus value added tax thereon, if applicable.

6.2 In the event of the cargo not being sold, and provided that the failure to sell the cargo is in no way attributable to the broker, payment by FWA of:

6.2.1 All expenses reasonably incurred by the broker in implementing the terms of the order; and

6.2.2 A fee based on the recorded time spent in implementing the order, calculated at R1,500.00 per hour;

6.2.3 in both instances, as authorised pursuant to paragraph 14 below.

7. That following the closure of the sale process the broker shall issue a confirmation of sale in accordance with clause 21 of the conditions of sale, and shall in addition to placing the confirmation of sale on its website, email a copy thereof to the Registrar, the applicants' and the SADR's attorneys, to the sheriff (if not represented by an attorney), and to each bidder.
8. That FWA, the purchaser and the owner shall thereafter proceed to agree the commercial terms of the contract of affreightment in accordance with the procedure described in clause 32 and following of the conditions of sale.
9. That the cargo shall be sold free of all liens, encumbrances, preferences and charges.
10. That all arrests and attachments of the cargo shall be discharged on the passing of ownership to the purchaser.
11. That a copy of this order (without annexures), together with a copy of the sale confirmation and a certificate from the broker to the effect that the purchase price has been paid or secured, shall be sufficient proof to SARS, or any other interested person, that the cargo is free of any arrests, attachments, encumbrances, preferences, charges and liens which arose prior to the sale.
12. That the proceeds of the sale of the cargo shall be paid into the broker's bank account and as soon as reasonably possible thereafter transferred, and, subject to any relevant exchange control regulations, held in US dollars in the applicants' attorney's CFC bank account, in such manner that such proceeds shall be available for distribution in due course.
13. That the applicants' attorneys shall upon receipt of the full purchase price, make payment out of the proceeds of the sale of the commission payable to the broker in terms of paragraph 6.1.2 above (to the extent applicable, at the exchange rate prevailing at the date of payment).

14. That the broker and the sheriff shall within ten days of the payment of the full purchase price, or ten days of the collapse of the sale process, as the case may be, compile a properly documented report of their respective attendances and services provided in implementing this Order, which shall include a schedule of the relevant expenses incurred and/or fees claimed, and be accompanied by relevant vouchers and other supporting documents, which shall be submitted to the applicants' attorneys , who shall
  - 14.1 Advise the SADR's attorneys of the receipt of the reports, schedules and supporting documents;
  - 14.2 Make the reports, schedules and supporting documents available for inspection for five days;
  - 14.3 In the event of the SADR lodging any objection within three days of the expiry of the aforesaid five day period, consult with the SADR's attorneys in order to deal with any such objection;
  - 14.4 Thereafter, following due and proper consideration of the claims lodged by the broker and the sheriff, together with any objection, following agreement with the SADR's attorneys, or failing such agreement as directed by the Court, pay such fees and/or expenses to the broker and sheriff in terms of this Order.
15. That the applicants' attorneys shall thereafter pay from the proceeds of the sale the applicants' costs of the sale application, as taxed, or agreed with the SADR's attorneys, or ordered by the Court, such costs to include the amounts paid or to be paid to Integer in respect of its report as annexure "ECG23" to the founding affidavit of Mr Edmund Christian Greiner, and any amounts paid or to be paid to Howe Robinson (in Howe Robinson's case up to a maximum of USD4,000.00).
16. That in the event that the proceeds of the sale are not sufficient to satisfy the authorised claims of the broker and the sheriff, such claims shall be paid by FWA.



17. That the balance of the proceeds of the sale shall thereafter be paid out by the applicants' attorneys in the following manner:

17.1 50% of the balance of the proceeds to the SADR's attorneys, up to a maximum amount of USD400,000.00;

17.2 The balance of the proceeds, after payment of the amount referred to in paragraph 17.1, to a bank account nominated by FWA.

**Part C: The sale of the cargo by private treaty and related relief**

18. That the parties are given leave to approach the Court as a matter of urgency, on the same application papers, supplemented as necessary, for an order suspending the sale process, and for the cargo to be sold by way of private treaty, provided that such application must be commenced before the commencement of the sale period as described in paragraph 4 above.

19. That in the event of an application for the sale of the vessel by private treaty being dismissed, or in the event of such sale not taking place, the suspension of the sale process referred to in the preceding paragraph shall be uplifted.

20. That the proceeds of the sale by private treaty shall be paid into the applicants' attorney's CFC bank account, described in paragraph 12 above, and, to the extent applicable, distributed in accordance with the provisions of paragraphs 14, 15 and 17 above, save that FWA shall, as part of the costs described in paragraph 15, be entitled to recover any amounts paid to the broker in terms of paragraph 14 following the collapse of the sale process.

**Part D: The accomplishment of the contracts of carriage**

21. That in the event of the cargo being sold, the contract(s) of carriage concluded between owner and the fourth respondent in respect of the carriage of the cargo from the load port of Laayoune to the New Zealand discharge ports, as evidenced by CONGEN bills of lading no's 1 and 2, both dated 13 April 2017, issued at

Laayoune by the master on behalf of the owner, are declared to have been accomplished, and the owner released from any further obligations thereunder.

**Part E: The failure to sell the cargo**

22. That in the event of no bids having been received for the cargo by the end of the sale period, as described in paragraph 4 above, the applicants are granted leave to approach the court, on these papers, supplemented as may be necessary, for further relief in relation to the cargo.

**Part F: The discharge of the interdict and return of documents**

23. That all of the respondents in the interdict application brought by the SADR under case number 1487/2017 shall, upon payment, or security being provided, to the broker off/for the full purchase price of the cargo, be released from the interdict described in paragraph 1 of the order contained in the judgment of the Full Court dated 15 June 2017, granted in case number 1487/2017, which interdict shall be discharged, and the sheriff shall forthwith return to the vessel's agents the vessel's registration documents and trading certificates which he removed from the vessel.

**Part G: Costs**

24. That the applicants shall be paid the costs of the sale application from the proceeds of the sale, as described above, such costs to include the costs occasioned by the employment of Integer and Howe Robinson (in Howe Robinson's case up to maximum of USD4,000.00), and the employment of two counsel.

**Part H: Service of the Order**

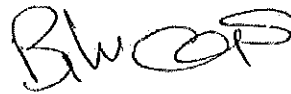
25. That service of this order shall be effected by:

25.1 The applicants' attorneys causing a copy thereof to be emailed to:

25.1.1 Werksmans Attorneys (for the attention of Mr Driman), on behalf of the third and fourth respondents.

- 25.1.2 Mr Otmane Bennani Smires on email address [o.bennani@ocpgroup.ma](mailto:o.bennani@ocpgroup.ma)
- 25.1.3 Edward Nathan Sonnenberg (for the attention of Mr Tucker), on behalf of the fifth respondent.
- 25.1.4 The sixth respondent.
- 25.1.5 The State Attorney (for the attention of Ms Swartz), on behalf of the seventh respondent.
- 25.2 The sheriff serving a copy of the order on the Harbour Master for the port of Port Elizabeth.

BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read 'B Lucas', written in a cursive style.

B LUCAS (MS)  
pp REGISTRAR

PAGDENS