



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **AC 42/2017**
AC 48/2017

Reportable

(Exercising its Admiralty Jurisdiction
In terms of Act No. 105 of 1983 as amended)

NAME OF VESSEL: MFV "POLARIS"

In the matter between:

SOUTHERN AFRICAN SHIPYARDS (PTY) LTD

Applicant

and

MFV "POLARIS"

First Respondent

THE CARGO ON BOARD THE

MFV "POLARIS"

Second Respondent

YELLOW STAR TRADING 1114 (PTY) LTD

Third Respondent

Date: 18 April 2018

JUDGMENT

BOQWANA, J

Introduction

[1] This matter raises an interesting issue which is yet to receive treatment before our Courts, that is, the interface between section 10 of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('AJRA') and section 133 of the Companies Act 71 of 2008 ('the 2008 Companies Act').

[2] In this application the applicant seeks leave to sell a motor fishing vessel (known as "mfv Polaris/the vessel"), her equipment, furniture, bunkers and her cargo in terms of Section 9 of AJRA and for the appointment of a Referee.

[3] The application was launched on 18 January 2018 and served on the respondents the same day. It was set down for 30 January 2018 on an unopposed basis. A *Rule Nisi* was granted by Davis AJ with a return date being 15 February 2018. The matter became opposed on the return day and an order was taken by agreement between the parties before Henney J, in terms of which the *Rule Nisi* was extended to 15 March 2018 and the respondents allowed to file their answering papers by close of business on 1 March 2018, with the applicant to file its replying affidavit by 8 March 2018. The matter was set down for 15 March 2018. The respondents, however, failed to file their opposing papers as provided for in the order of 15 February 2018.

[4] On the date of the hearing of the matter before me, i.e. 15 March 2018, a copy of an answering affidavit was handed up in Court by Mr Mayosi who appeared on behalf of the respondents. Mr Brown, who appeared for the applicant advised the Court that the applicant was opposed to the admission of the answering affidavit on the basis that it was clearly late and that the matter was urgent. The applicant as well as the Court had not had any opportunity to consider this late affidavit as well as the accompanying condonation application. Mr Brown pressed that his instructions were that the answering affidavit should be disregarded and the matter be argued on the papers that were already before the Court, namely, the

applicant's papers. The respondents had raised a point in *limine* which Mr Brown submitted the applicant was ready to argue.

[5] Having considered the matter I was of the view that it would be appropriate to postpone it to the following day to afford the applicant an opportunity to file its replying papers which it agreed to do. That postponement would also afford the Court an opportunity to consider the condonation application, the intended answering affidavit as well as the applicant's reply thereto.

The applicant's case

[6] The applicant conducts business as a shipyard and provides ship repair services in respect of vessels such as the mfv Polaris. It has its principal place of business in Durban, KwaZulu-Natal. The applicant's claim is premised on the fact that in February 2016, mfv Polaris was delivered by the third respondent to its shipyard in Durban in order for repairs to be effected to it.

[7] The mfv Polaris is a 37.5 meters fishing vessel with a gross tonnage of 412 tonnes and has on board facilities which are used for the processing of fish livers (usually shark livers) into fish oil. It apparently has approximately 10 to 12 metric tonnes of fish oil ('the Cargo') on board. It is alleged to be under the flag of the Republic of Cameroon. The vessel is currently under arrest, at the instance of the applicant and a number of other creditors, at the Port of Cape Town which is within the jurisdiction of this Court. The third respondent carries on business as ships agents at Table View in Cape Town and is the registered owner of the mfv Polaris.

[8] According to the applicant, it duly effected the requested repair services and between February 2016 and March 2016, submitted invoices to the third respondent in respect of such services. In or about April 2017, the third respondent communicated its inability to make payment to the applicant. As a result the applicant refused to release the mfv Polaris from its shipyard.

[9] During April to June 2017 various meetings took place between the representatives of the applicant and the third respondent and a number of emails were exchanged, the aim of which was to attempt to reach an arrangement in terms of which the vessel would be released from the applicant's shipyard.

[10] Representatives of the third respondent provided an undertaking to the applicant that should the applicant release the vessel from the shipyard, the third respondent would utilise it to procure a cargo of fish oil and that the applicant would be paid the outstanding amount from the proceeds of that Cargo.

[11] Pursuant to that undertaking and on 1 June 2017 the applicant and the third respondent entered into an Acknowledgement of Debt in an amount of R2 142 151.15. The Acknowledgement of Debt included payment obligation by which the third respondent undertook to discharge their indebtedness to the applicant. In terms of their Acknowledgement of Debt the third respondent would pay the applicant 50% of the outstanding debt, namely the sum of R1 071 075.57 within 70 days calculated from the commencement date of the Acknowledgement of Debt being 5 June 2017. 50% of the outstanding capital was accordingly due by no later than 16 August 2017. In the event of the payment not being made as undertaken, the full amount of the outstanding debt would immediately become due and payable; interest of 9% per annum would accrue and would be calculated on the full outstanding capital amount calculated from 5 June 2017 until date of payment and in the event of the applicant having to institute the proceedings to recover the debt, its costs would be recoverable on the attorney and client scale.

[12] The third respondent breached the terms of the Acknowledgement of Debt by failing to pay 50% of the outstanding capital on or before 16 August 2017 or to make any payment at all. The full outstanding amount and the interest stated above accordingly became due and payable. On or about 4 October 2017, the applicant arrested mfv Polaris together with equipment, furniture, stores, bunkers, and lubricating oils in an admiralty action *in rem* under case number AC 42/2017. On Monday 27 November 2017, the applicant arrested the Cargo on-board mfv

Polaris in a further admiralty action *in rem* case number AC 48/2017. Appearance to defend was not entered by any of the respondents in respect of the actions commenced against mfv Polaris and against the Cargo.

[13] According to the applicant, the vessel is also under arrest by a number of other creditors which are mentioned in its papers. A number of these creditors have already advanced claims and some seek to do so in the near future. It is also stated the majority of the crew members of mfv Polaris have repatriated mainly to Indonesia and a number of them have not been paid. The crew members intend on advancing claims against mfv Polaris in due course in respect of unpaid wages.

[14] The applicant alleges that with the passage of time mfv Polaris' condition would inevitably deteriorate, certificates will expire and her value will fall. The longer the vessel is under arrest the greater the risk of equipment failing or some other damage or harm befalling her. Because of the fact that no crew is currently on-board, routine maintenance is not being undertaken. It is further alleged that it is not in the interest of the general body of creditors or her owners and the Cargo on board, for the vessel to remain under arrest any longer than was necessary. This is because her diminishing value and raising preservation costs will result in a reduction in the equity in her.

Condonation Application

[15] The explanation given by the respondents for the late filing of the answering affidavit is that the third respondent had instructed Salvatore Puglia Attorneys to act on its behalf. Mr Andrew Barry Zurnamer of the third respondent, the deponent to the answering affidavit, alleges that he understood that the third respondent had to file its answering affidavit by 2 March 2018 (sic) but did not do so because CMB Attorneys, who are Mr Zurnamer's personal attorneys, advised him on 27 February 2018 that it would be best for the third respondent to begin with business rescue proceedings. The third respondent consequently adopted a resolution to that effect on 28 February 2018. This resolution was filed with the Company and Intellectual Properties Commission ("CIPC") on 7 March 2018 and the applicant's

attorneys were advised of this development the following day on 8 March 2018. Pursuant to having adopted the resolution, the directors of the third respondent instructed its erstwhile attorneys not to draft and file an answering affidavit. They did so because, in their view, business rescue proceedings placed an automatic moratorium on all legal proceedings against the third respondent.

[16] On 8 March 2018, CMB Attorneys who were not on record in this application at the time, addressed correspondence to the applicant's attorneys advising them that the third respondent had begun with business rescue proceedings and requested it to stay this application. In reply thereto the applicant's attorneys sent correspondence on 9 March 2018 to CMB Attorneys, wherein they referred to section 10 of the AJRA, stating that mfv Polaris and the Cargo, which had been subjected to a number of arrests, fell out of any judicial management, business rescue or insolvency proceedings and that the applicant was accordingly not obliged to place a moratorium on the legal proceedings and would proceed on 15 March 2018 with the application.

[17] In the meantime, Salvatore Puglia Attorneys withdrew as the respondents' attorneys of record stating in an email dated 12 March 2018 that they were doing so pursuant to their client's decision to go under business rescue.

[18] On 13 March 2018, the respondents' new attorneys, CMB, wrote a letter to the applicants attorneys requesting a postponement on the basis that their mandate to act in the proceedings set down for 15 March 2018 was only received on 12 March 2018, and thus they had not had an opportunity to consult with their client on the merits of the application and draft answering papers. The applicant's attorneys telephonically informed the respondents' attorneys that they were not amenable to a postponement.

[19] On the basis of the above, the respondents submit that good cause had been shown for non-compliance with the Court Order of 15 February 2018 and that there was no *mala fide* intention on their part as they notified the applicant, (within

the given time limits) as soon as they could, once the business rescue proceedings were instituted.

[20] The explanation given by the respondents for the late filing of the answering affidavit is, in my view, unsatisfactory. It is instructive that the decision to place the third respondent under business rescue was taken on 28 February 2018 in terms of the resolution of the directors (which was more than a week after the Order was granted by Henney J). The respondents, however, failed to instruct their attorney to file papers setting out that position before the expiry of the time in which to file the answering affidavit.

[21] In my view it is not sufficient for the respondents to simply state that they decided not to file answering papers because the business rescue proceedings had placed an automatic moratorium on all legal proceedings against the third respondent. This is because there was already an application before the Court in anticipation of which an Order was taken by agreement between the parties, that the respondents would file an answering affidavit on 1 March 2018. There was also a *Rule Nisi* in place. The respondents could not simply fold their arms and do nothing because they believed that the current proceedings were automatically stayed.

[22] That explanation is also contrary to the request that they made to the applicant's attorney to stay this application. In other words, if the reason for not filing an answering affidavit was based on the respondents' belief that the application was automatically stayed, there would have been no reason to ask the applicant to agree to the stay of this application. Furthermore, much of what is set out in the answering affidavit, particularly in relation to other defences, would have been known to the respondents long before the implementation of the business rescue proceedings. The business rescue decision could, therefore, not be used as a reason for failure to file the answering affidavit timeously.

[23] Notwithstanding the above, it is well known that even if the explanation tendered appears to be inadequate, such deficiencies maybe compensated upon by

other factors such as the prospects of success. It is therefore imperative, to deal with the merits of the case, so as to consider whether the late filing of the answering affidavit should be condoned. In any event, the issue raised in the answering affidavit is, in the main, a point of law; other issues follow on from that point.

Point in limine

[24] The respondents have raised two points in *limine* in their answering affidavit but they only persist with one, namely, that section 10 of AJRA is in conflict with sections 128 to 155 (Chapter 6 of the 2008 Companies Act) in that, in terms of the 2008 Companies Act business rescue proceedings place a moratorium on the pending application. Whilst not mentioned by the respondents, the specific provision of the 2008 Companies Act which places a general moratorium on proceedings against a company is section 133.

[25] It is argued on behalf of the respondents that the provisions of the 2008 Companies Act, as envisaged in section 5(4)(b)(ii), prevail, except to the extent provided otherwise in section 118(4) of that Act. It is further submitted that if it was the intention of the legislature for AJRA to have supremacy over the 2008 Companies Act, AJRA would have been included in the set of national legislation set out in section 5(4) of the 2008 Companies Act, which must be deferred to in the event of conflict, alternatively the Legislature would have included business rescue proceedings in section 10 of AJRA, in order to avoid any conflict between the two statutes.

[26] Furthermore, regard should be had to section 7(k) of the 2008 Companies Act, which points to the Legislature's intention, and wherein it is stated that the purpose of the Act is to "*provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.*"

[27] It is further contended on behalf of the respondents that the applicant's reliance on judicial management proceedings, as contemplated by the Companies

Act 61 of 1973 ('the 1973 Companies Act') is misplaced in that the latter Act has been repealed and along with it, judicial management provisions have been abolished. Hence, the 1973 Companies Act and/or judicial management cannot be applicable in this instance. In any event, so the respondents contend, business rescue proceedings are distinct from judicial management. The respondents consequently submit that this application should be dismissed on that ground alone and that the mfv Polaris and the contents thereof be released to the third respondent so that the business rescue practitioner can begin with his work.

[28] The respondents raise another defence of a counter-claim in which they state that the applicant owes the third respondent an amount of R1 200 000.00 in respect of a defective engine which was installed by the applicant onto the mfv Polaris. They deny that the vessel is deteriorating and contend that the claimants stand a better chance to get good value in business rescue proceedings than selling the vessel on auction.

[29] The applicant, on the other hand, denies the applicability of section 133 of the 2008 Companies Act to these proceedings, an issue dealt with shortly below. It also contends that the conduct of the respondents amounts to abuse of process in that they failed to take action when claims were lodged by various creditors leading to the arrest of the mfv Polaris since September 2017; they abandoned the vessel and her crew (who repatriated to Indonesia); they allowed the vessel to stand for a period of over five months during which time it has been falling into disrepair and devaluing; they failed to enter opposition at the provisional stage of this application; they entered notice of intention to oppose upon return day at the eleventh hour and failed to file any papers until the day of the hearing; they agreed to orders to file papers by 1 March 2018; and acted in contempt of such orders. The applicant further submits that the stay of these proceedings would in any event not release the mfv Polaris and the Cargo as they are under arrest.

Applicable issues before the Court

[30] The applicant has approached this Court seeking the sale of the vessel and other contents in terms of section 9 of AJRA. That section gives the Court a wide discretion to order the sale of the property arrested in terms AJRA. It reads as follows:

- “(1) A court may in the exercise of its admiralty jurisdiction at any time order that any property which has been arrested in terms of this Act be sold.
- (2) The proceeds of any property so sold shall constitute a fund to be held in court or otherwise to be dealt with, as may be provided by the rules or by any order of court.
- (3) Any sale in terms of any order of court shall not be subject to any mortgage, lien, hypothecation, or any other charge of any nature whatsoever.”

[31] The first issue to be determined in this case, however, is whether such a sale can be ordered when a company owning the property under arrest has been placed under business rescue in terms of the 2008 Companies Act. The respondents say it cannot because of the general moratorium placed on all legal proceedings by section 133 of the 2008 Companies Act. The applicant on the other hand, contends that the order for the sale of the vessel can be made by virtue of section 10 of AJRA which excludes property arrested in respect of a maritime claim from assets vesting in a trustee in insolvency or administered by a liquidator, judicial manager or any other person who might otherwise be entitled to such property.

How the Courts have applied section 10 previously?

[32] Section 10 of AJRA provides thus:

“Any property arrested in respect of a maritime claim or any security given in respect of any property, or the proceeds of any property sold in execution or under an order of a court in the exercise of its admiralty jurisdiction, shall not, except as provided in section 11 (13), vest in a trustee in insolvency and shall not form part of the assets to be administered by a liquidator or judicial manager of the owner of the property or of any other person who might otherwise be entitled to such property, security or

proceeds, and no proceedings in respect of such property, security or proceeds, or the claim in respect of which that property was arrested, shall be stayed by or by reason of any sequestration, winding-up or judicial management with respect to that owner or person.”

[33] In terms of section 11(13) “[a]ny balance remaining after the claims mentioned in paragraphs (a) to (e) of subsection (4) and the claims mentioned in subsection (11) have been paid, shall be paid over to any trustee, liquidator or judicial manager who, but for the provisions of section 10, would have been entitled thereto or otherwise to any other person entitled thereto”. (Underlined for emphasis)

[34] Section 10 of AJRA has been given little treatment by our Courts. What is apparent, though, is that the ring-fencing of the maritime claims as against maritime property has been recognised by the Courts which have previously been confronted with the application of that section, albeit in circumstances different from the one this Court is asked to grapple with. Cases where section 10 was considered include *Rennie NO v South African Sea Products Ltd* 1986 (2) 138 (CPD) at 144B-E; *The Nantai Princess Line Co Ltd v Cargo Laden on the Nantai Princess* 1997 (2) SA 580 (D) at 590I-J.

[35] First, in *Rennie*, it was contended that a creditor of a ship-owning company whose claim is a maritime claim was in a unique position *vis a vis* that company on or after its liquidation as opposed to other creditors. The respondents’ contention, in that case, with which the court had no quarrel, was stated by the court at 144 to be that “the purpose and intent of the 1983 Act was, *inter alia*, to afford assistance to creditors with claims constituting maritime claims in obtaining full satisfaction therefor and also – to put it in simple terms – to have their minds set at rest when contracting with a shipowner a long distance away from the seat of his business, lest they be doing so in ignorance of his or its sequestration or liquidation.” The Court then confirmed its agreement with the submission by stating “[t]hat the 1983

Act was indeed designed to assist creditors having maritime claims cannot be gainsaid”.

[36] In *Gendor v Holdings Ltd v City Fishing Holdings (Pty) Ltd; Breemond Trust (Intervening Party)* [2007] 3 All SA 400 (C) at para 28, the Court held that “[w]hen arrest or attachment is followed by the establishment of a fund in court, the Admiralty Act envisages an orderly sequence for proof of claims against funds in court after ring fencing them from other claims. This procedure is set out in section 10 as read with section 10A (2) and 11 (13). Sections 10 and 11 (13) provide that the property arrested does not vest in a liquidator except after all claims have been paid in accordance with the preferences codified in sections 11 (5) and 11 (11).” (Underlined for emphasis)

[37] The Supreme Court of Appeal in *Commissioner, South African Revenue Service v Van der Merwe NO and others* [2017] 2 All SA 335 (SCA), although dealing with a different issue, acknowledged the uniqueness of section 10 of AJRA by making the following observation:

“[22] There is nothing in either the Customs Act or the Insolvency Act which expressly (or by necessary implication) provides that goods subject to a lien in favour of SARS do not fall to be dealt with under the laws of insolvency. This is to be contrasted with s 10 of the Admiralty Jurisdiction [Regulation] Act 105 of 1983 which excludes the vesting of certain property in the trustee on insolvency and s 90 of the Insolvency Act in terms of which the Land Bank retains its powers in relation to any property belonging to an insolvent estate. Such property is expressly excluded from the provisions of the Insolvency Act.” (Underlined for emphasis)

[38] From the above it is clear that the general purpose of section 10 is to exclude maritime property that is under arrest to vest in the control of a trustee in a sequestration or under administration of the liquidator in a winding-up, and a judicial manager. Secondly, it provides for a ‘no-stay’ of the proceedings in respect of such arrested property by reason of sequestration, winding-up or judicial management. This section is linked to other sections of the AJRA which isolate property that is under maritime jurisdiction and regulate the consequences flowing

therefrom. In other words there is statutory preference for creditors with maritime claims over other creditors.

[39] An important limitation in respect of the application of the section was highlighted in both the cases of *Rennie* (at 144I – 145H) and *Nantai Princess* (at 590J – 591B) where it was found that the language of the section 10 limits its application to an arrest of maritime property effected prior to the commencement of the debtor’s winding-up. In *Rennie* the Court said–

“it seems to me to be beyond doubt, and it is to my mind readily apparent upon grammatical analysis of the language in which that section is couched, that applicability of the section is limited to pre-winding-up arrests. Thus arrested property shall not form part of the assets *to be* administered by a liquidator - if *Mr Knight’s* submission is to be upheld, the relevant passage of the section would read ‘...to be administered or under administration by a liquidator’ And this view is reinforced when one has regard to the position where the insolvent debtor is a natural person, for the section provides that the arrested property shall not vest in his trustee, a state of affairs which presupposes that no vesting has yet taken place, whereas in law such vesting takes place immediately following the trustee’s appointment. I am further fortified in this view by the provision in this section for the staying of proceedings by reason *inter alia* of a winding-up, for it is proceedings which have already been instituted, ie before winding-up commences, which can be stayed by a supervening winding-up.” (Underlined for emphasis)

[40] Concurring with Berman AJ’s views in *Rennie*, the Court in *Nantai Princess* expressed the following:

“It seems to me that, manifestly, the section applies to a state of affairs before the commencement of the winding-up. In passing it may be observed that perhaps the Legislature in framing s 10 did not go far enough in the sense that it apparently ignored the far-reaching effect of the retrospective operation of winding-up orders. It may well be that given the special nature of the protection afforded to the holders of maritime claims, there is a strong argument for saying that an action in rem instituted by arrest prior to the making of a winding up order should not be hit by the retrospective operation of a *concurso creditorum*.” (Underlined for emphasis)

[41] It follows, therefore, that if property has already vested in a trustee (i.e. prior to the arrest), it cannot at the same time vest in the admiralty division or as Levinsohn J found in *Nantai Princess* (at 591B-C), which dealt with a liquidation scenario, “[t]he arrested property and the proceeds derived as a result of the sale ordered by the Court [in that case] fall to be administered by the liquidator in the winding-up of the second respondent.”

[42] One can, therefore, safely conclude from the above that the Courts interpreted the provisions of the 1973 Companies Act, the prevailing insolvency law and those of AJRA in such a manner that they could exist alongside each other without one trumping the others.

[43] It must be mentioned that the provisions of Chapter 14 of the 1973 Companies Act dealing with winding-up and liquidation have been retained, in the interim, in terms of Item 9 of Schedule 5 of the 2008 Companies Act while those relating to judicial management have not.

Interaction between s 10 of AJRA and s 133 of the Companies Act

[44] Mr Mayosi’s contention as I understand it is that with the introduction of business rescue proceedings, the 2008 Companies Act presents a new phenomenon of general moratorium by way of statute (section 133), which directly conflicts with section 10 of the AJRA. According to him, this is different from the previous dispensation (which was presumably harmonious in application) as it carries an object which, if section 10 were to apply, would undermine the whole fabric of business rescue. Apart from that, his argument is that the words ‘business rescue’ do not appear in section 10 and the absence thereof should indicate that the Legislature had intended for that section not to apply to a business rescue practitioner or business rescue proceedings. Furthermore, if business rescue is found to be implied in section 10, the stay of proceedings in section 133 supersedes the provisions of section 10.

[45] Section 133 of the 2008 Companies Act provides as follows:

“ General moratorium on legal proceedings against company. -

- (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except —
 - (a) with the written consent of the practitioner;
 - (b) with the leave of the court and in accordance with any terms the court considers suitable;
 - (c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;
 - (d) criminal proceedings against the company or any of its directors or officers;
 - (e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or
 - (f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.
- (2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.
- (3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company’s business rescue proceedings.”

(Underlined for emphasis)

[46] The applicant's argument is that section 10, properly construed, incorporates a business rescue practitioner and business rescue proceedings. Mr Brown submits that if regard is had to section 5(4)(a) of the 2008 Companies Act (which is dealt with below) there can be no conflict between sections 10 of AJRA and 133 of the 2008 Companies Act because it is possible to give an interpretation to AJRA which enables it to run concurrently with the 2008 Companies Act. In his view that being the case, no conflict arises. This is because, so he contends, the AJRA creates a separate and ring-fenced procedure for the advancement of maritime claims against arrested maritime property which has been consistently recognised by our Courts.

[47] Secondly, whilst the words 'business practitioner / business rescue proceedings' do not appear in section 10, our Courts have (generally in other instances) recognised that business rescue proceedings replaced judicial management, something the respondents contend not to be the case for the purposes of section 10.

[48] The applicant contends further that a similar stay of proceedings, as in section 133, commenced against a company placed under judicial management (See section 428(2)(c) of the 1973 Companies Act). Although such a stay was discretionary, in its view, it was standard procedure to order it. Mr Brown relies on *Henocheberg on the Companies Act, Meskin, Vol 1, fifth edition*, at 931, commentary on the 1973 Companies Act, to advance this proposition. There it is stated that "[i]t is usual for a judicial management order, provisional or final, to contain these directions. If it were not to do so the whole object of instituting the judicial management might be defeated and proceedings continued or instituted against the company in judicial management might precipitate its winding up."

[49] The applicant's point in this regard is that, judicial management routinely gave rise to stays of proceedings against companies. Notwithstanding that, the Legislature chose to bind the judicial manager's hands by removing maritime property under arrest from his or her control. If the stay of proceedings according to section 133 excluded business rescue proceedings from the application of

section 10, the same should have applied to the judicial management procedure, but it did not.

[50] Relying on the *eiusdem generis* principle, the applicant further submits that, in the event that it were to be found that business rescue did not replace judicial management, then the phrase “*or of any other person who might otherwise be entitled to such property*” in section 10 is wide enough to include business rescue practitioner and business rescue proceedings.

[51] It is evident that section 10 of AJRA still contains the phrase “judicial manager” and “judicial management”. The words “business rescue” or “business rescue practitioner” do not appear. It is also common cause that section 10 of AJRA predates the provisions of the 2008 Companies Act, as it was promulgated in 1983.

Approach to interpretation of statutes

[52] It is established that a document including a statute should be interpreted “*having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language*

of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.) (Footnotes omitted). Therefore, the language of the documents inevitably is the place from where to move, but that must be done within the context and the purpose of the document.

[53] In the case of *Ex parte: Nell N.O. and Others* 2014 (6) SA 545 (GP) where the Court had to balance the considerations between section 18 of the Superior Court Act 10 of 2013 ('Superior Courts Act') which suspends the operation and execution of a decision pending the outcome of the application for leave to appeal or an appeal and the consequences triggered by a sequestration or a liquidation order, the Court found at para 53:

"Over more than a hundred years a legal policy has been developed and operated in relation to the processes created by the Insolvency Act and the previous Companies Act for the administration of sequestrated estates and companies wound up for inability to pay their debts. Pursuant to that policy, these processes fall to be administered immediately by trustees and liquidators despite pending appeals. If the purpose of s 18 had been to undo all that, one would have expected that measures would have been put in place to deal with or mitigate such consequences and that s 339 of the previous Companies Act would either have been expressly repealed or amended. None of that was done."

[54] It is also worth observing the remarks of the Court in *Lindsay Keller & Partners v AA Mutual Insurance Association Ltd and Another* [1988] 3 All SA 362 (W) quoting *Ex parte Minister of Justice: In re R v Jekela* 1938 AD 370 at 377 with approval, the court observed that:

"One of the presumptions applicable to the interpretation of statutes is (Maxwell 7th ed at 71) 'that the Legislature does not intend to make substantial alteration in the law beyond what it expressly declares either by express terms or by clear implication'. The same authority dealing with this point in a later passage says (ibid at 136): 'The work of the Legislature is treated in the same manner as that of any other author, and

the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in *express* terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it.”

(Underlined for emphasis)

[55] Before determining how the two statutes, which are the subject of this matter, are to be interpreted *vis a vis* one another, it serves well to start with the question whether business rescue proceedings or business rescue practitioner are included in section 10 of AJRA.

Is business rescue incorporated in s 10?

[56] It has been accepted in a number of decisions that the new regime of business rescue replaced the judicial management system in the 1973 Companies Act (See, for instance, *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (13/12406) [2013] ZAGPJHC 109 (10 May 2013) at para 12.). The scheme of business rescue denotes a complete break away from the past which is aimed at rehabilitating a company in financial distress by providing temporary management of its affairs; placing a temporary moratorium on the rights of the claimants; and the implementation of a plan to rescue it by restructuring its affairs with the view to enabling it to continue functioning as a solvent company and if that is not possible to achieve better returns for the creditors than they would have had had the company been immediately liquidated. (*Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012) at para 6; *Section 128 of the 2008 Companies Act – business rescue definition*).

[57] The significance of the business rescue phenomenon was pointed out by the Court in *Cloete Murray and Another NNO v Firststrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) at para 14 as follows:

“It is generally accepted that a moratorium on legal proceedings against a company under business rescue, is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs. This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process.”

(Underlined for emphasis)

[58] To place a company under business rescue does not require a court order, (although a court can still be approached), a resolution puts the process in motion and a business rescue practitioner is appointed to, inter alia, investigate the affairs of the company, prepare a rescue plan and oversee its implementation (*Merchant West* supra at para 12)

[59] Judicial management on the other hand was an extraordinary remedy which required an application to be launched in the High Court, in which an applicant had to satisfy the Court that a “reasonable probability” existed that the company, if placed under judicial management, would be able to pay its debts, and ultimately be restored to a successful business. The judicial manager appointed by the Court investigated the company’s affairs and reported on the likelihood of a successful restoration of the company, which views would be taken into account by the court when considering whether to grant a final order of judicial management. (*Merchant West* supra at para 11)

[60] The test of “reasonable likelihood” involved in the granting of a judicial management order was quite onerous as opposed to what a business rescue applicant has to show in obtaining an order, which is a “reasonable prospect”. (*Nedbank Ltd v Bestvest 153 (Pty) Ltd, Essa and Another v Bestvest and Another* 2012 (5) SA 497 (WCC) at para 27). One of the main shifts between the two dispensations, under the 1973 Companies Act is that, whilst a creditor was entitled to a liquidation order *prima facie*, a judicial management order would be granted in “exceptional circumstances” whereas under the 2008 Companies Act, business rescue is preferred to liquidation. (*Southern Palace Investments 265 (Pty) Ltd v*

Midnight Storm Investments 386 (Pty) Ltd 2012 (2) SA 423 (WCC) at paras 21-22).

[61] Whilst judicial management and business rescue differed in a number of respects, they both provided “*for the control by a third party of companies that are in severe financial difficulties and for their temporary reprieve from creditors’ claims.*” (*Merchant West* supra at para 10)

[62] Against this background as well as the fact that for all intents and purposes it was routine for a judicial management order to stay proceedings, as is the case in business rescue proceedings, albeit in the latter case, by operation of statute, it is sensible to hold that reference to ‘judicial manager’ in section 10 of AJRA should be interpreted to have been replaced by a ‘business rescue practitioner’ and ‘judicial management’ by ‘business rescue proceedings’.

[63] That interpretation is also sensible because with judicial management, in order to be considered successful, the company must be brought back to a state of solvency, whilst with business rescue even if solvency is not reached, improving the return to be received by creditors upon liquidation is also acceptable. In my view, if the Legislature saw fit to include a more onerous judicial management system in section 10, why would it exclude a less burdensome business rescue regime, in the instance where both were aimed at reviving an ailing company, notwithstanding in different ways?

[64] It will however serve the Legislature well to amend section 10 by expressly replacing reference to judicial manager / judicial management with business rescue practitioner and business rescue proceedings in keeping with the introduction of the concept of business rescue in the 2008 Companies Act.

How does one deal with the conflict between the two applicable statutes?

[65] Section 5(4) of the 2008 Companies Act regulates the general interpretation of that Act *vis a vis* other statutes. It provides the following:

“General interpretation of Act

...

- (4) If there is an inconsistency between any provision of this Act and a provision of any other national legislation-
- (a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and
 - (b) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second-
 - (i) any applicable provisions of the-
 - (aa) Auditing Profession Act;
 - (bb) Labour Relations Act, 1995 (Act No. 66 of 1995);
 - (cc) Promotion of Access to Information Act, 2000 (Act No. 2 of 2000);
 - (dd) Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);
 - (ee) Public Finance Management Act, 1999 (Act No. 1 of 1999);
 - (ff) Securities Services Act, 2004 (Act No. 36 of 2004);
 - (gg) Banks Act;
 prevail in the case of an inconsistency involving any of them, except to the extent provided otherwise in sections 30(8) or 49(4); or
 - (hh) Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003); or
 - (ii) Section 8 of the National Payment System Act, 1998 (Act No. 78 of 1998).
 - (ii) the provisions of this Act prevail in any other case, except to the extent provided otherwise in subsection (5) or section 118(4).” (Underlined for emphasis)

[66] As a starting point, section 5(4) requires of the courts to interpret the provisions of other statutes which are in conflict with the provisions of the 2008 Companies Act in a manner which allows for the inconsistent provisions of the respective statutes to apply concurrently to the extent possible without one contravening the other.

[67] It goes without saying that the provisions of section 10 of AJRA and section 133 of the 2008 Companies Act appear to be in conflict with each other. One

provides for a stay of proceedings whilst one does not. In my view, the two prevailing provisions are capable of being interpreted concurrently, in a manner suggested in section 5(4) (a) of the 2008 Companies Act. The answer, in my view, lies in the timing of the events sought to be protected by each of the statutes. In terms of section 10 of AJRA, once maritime property has been arrested, it is ring-fenced. It falls under the jurisdiction of AJRA and must be dealt with in accordance with that statute. That ring-fencing cannot be undone by subsequent proceedings, as mentioned in section 10.

[68] The same is true with insolvencies and windings-up, on the other side of the coin, once those proceedings have commenced, the assets would vest on the trustee or under the administration of the liquidator. So is the case when business rescue proceedings commence, property is placed under the control of a business rescue practitioner and out of the reach of any other persons including creditors and business rescue places a moratorium on all legal proceedings. That should, however, exclude property that has already been isolated and made a subject of another jurisdiction. To interpret section 10 as argued by the respondents will emasculate the section and render it ineffective.

[69] The approach I advocate, in this regard is, in my view, consistent with that which was adopted by the Courts in *Rennie* and *Nantai Princess*, which read the language of section 10 to limit its application to maritime property arrests which occurred prior to the winding-up. In this case, the application of section 10 would be limited to pre-business rescue arrests. In other words in keeping with the manner in which that section has been applied by the Courts in the cases I have referred to, only proceedings in respect of maritime property, whose arrest occurred prior to the property owner being placed under business rescue would not be stayed.

[70] Those proceedings that do not involve maritime property belonging to the company under business rescue or maritime property arrested post business rescue

would be unaffected by section 10 of the AJRA. They would be stayed by operation of section 133 of the 2008 Companies Act.

[71] In my judgment that interpretation is sensible and it resolves the conflict between the two statutes, without disregarding the other. It allows section 133 to continue in respect of all conventional claims instituted against the company and those other claims excluded from the operation of section 10 referred to above, whilst recognising that maritime assets under arrest and maritime proceedings fall within the purview of section 10 of AJRA and outside of section 133 of the 2008 Companies Act. This is a sensible contemplation of what would have been the Legislature's intention, at all times. This approach will not hinder the objectives that come with the business rescue regime.

[72] Stay of proceedings in the Companies Act is not a new occurrence. In terms of section 359(1) of the 1973 Companies Act legal proceedings were suspended when a Court had made an order for the winding-up of a company. They could also be stayed by a Court before the winding-up order was granted in terms of section 358 of that Act. It has also been mentioned that in judicial management Courts regularly directed that proceedings be stayed.

Comparative jurisdictions

[73] In establishing its business rescue system South Africa learnt from other countries that already had such similar practices in place. It appears that the United States, Canada, the United Kingdom have corporate rescue mechanisms, with Australia having a system with features similar to the South African business rescue regime, though with some differences. (See *Exploring Various Business Rescue Practices in South Africa*, 2017 Southern African Accounting Association, Naidoo Patel & Pachia.)

[74] All these countries provide for appointment of third parties to take control of the companies in question.

[75] As to maritime law, Binnie J, in the Canadian judgment of *Holt Cargo Systems Inc. v ABC Containerline N.V. (Trustee of)*, [2001] 3 S.C.R 907 at 923-924

referred to this area of the law as one of the earliest that required international cooperation in the regulation of the rights and obligations of its participants. He held the following:

“Seamen, salvors, ship chandlers, repairers and other supplies of goods and services to the ship in foreign ports required some assurance of payment. They looked to the ship. Common rules were essential because suppliers dealt with ships from many countries and Masters found themselves in distant ports where communications with distant shipowners were slow and unreliable. In maritime commerce ‘rules of practical convenience commanding general assent are a virtual necessity’ *Loane and Baltser v Estonian State Cargo* [1949] S.C.R 530 per Rand J. Practicality required an *in rem* proceeding against a ship as distinguished from an *in personam* action against the ship owner. The need for predictability and uniformity was so strong that even the common law courts, ever protective of their own ways, ceded jurisdiction to specialised courts of admiralty applying a largely international law of maritime commerce.” (Underlined for emphasis)

[76] Most jurisdictions seem to allow for *in rem* proceedings by way of arrest. The *in rem* interest took many forms, one of which is maritime *lien*. A *lien* goes with the ship everywhere. According to Binnie J, in *Holt* supra at 925, “*the reason for this privileged status for maritime lien holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships (as indeed was the case here, where initially Holt named the wrong corporation as ship owner). Merchant seamen will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage. The Master may be embarrassed for lack of funds, but the ship itself is assumed to be worth something and is readily available to provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence. The appellant Trustees’ claim to “international comity” in matters of bankruptcy must therefore be weighed against competing considerations of a more ancient and at least equally practical international system — the law of maritime commerce.*”

[77] It appears to be common amongst jurisdictions with similar dispensations as South Africa for insolvency proceedings not to remove assets under maritime arrest. It also seems to be the norm that an arrest would serve to remove the arrested asset both from any stay of proceedings arising as a result of the insolvency and from the general ranking accorded in insolvency, keeping the asset for ranking in accordance with the arresting jurisdiction's admiralty ranking. (See *Arrests, Maritime Liens and Cross-border Insolvency* 3 November 2017, presented at the World Congress of Ocean 2017 Shenzhen, China. See also *The Ship "Sam Hawk" v Reiter Petroleum Inc* (2016) 246 FCR 337 (Australia); *Re Atlas Shipping A/S* (S.D.N.Y 2009) (US); and *Holt Cargo Systems Inc. v ABC Containerline N.V. (Trustee of)*, [2001] 3 S.C.R 907 (Canada)).

[78] As in South Africa, maritime property which has been arrested falls outside of stay provisions in the relevant insolvency and/or liquidation laws.

[79] It is clear therefore that the admiralty jurisdiction is built upon a privilege conferred upon maritime claims. If it were to be found that business rescue proceedings are not part of section 10 at all, that could have undesirable consequences. In view of the relatively easy manner in which to place a company under business rescue, companies whose properties have been arrested and who in many instances encounter financial difficulties, would easily place themselves under business rescue proceedings, with the hope of avoiding the AJRA consequences. This, in my view, may lead to absurdity particularly in cases where the vessels have been arrested for months, thus eroding the very essence of section 10 in particular and the core edifice of AJRA in general. This could lead to abuse of process by ship-owners who have no hope of rehabilitating the company but wish to stall the process entailed in AJRA.

[80] I am alive to the fact that unlike judicial management, here we are dealing with business rescue which is invoked before insolvency, it is however widely recognised that it replaced judicial management which was seen to be less effective. It seems to me, as I have found, the outcome is the same insofar as it places property of a company in the hands of a third party. It is worthy to note that

Hofmeyr, G in *Admiralty Jurisdiction Law and Practise in South Africa*, 2nd Edition at pages 78-79, seems to have taken it as foregone that business rescue has “automatically” replaced judicial management for the purposes of section 10.

[81] I therefore find that section 10 of AJRA applies to a business rescue practitioner/business rescue proceedings in the same extent, *mutatis mutandis*, as it did to a judicial manager/judicial management.

Should the sale of mfv Polaris be authorised?

[82] Returning to whether the sale should be authorised: Considerations that the Court looks at in deciding whether the arrested property should be sold vary from case to case. It has been held that where property to be sold is a vessel, relevant considerations would include factors such as: “*the duration of time the property would remain under arrest if the order for its sale is not made; any deterioration which the vessel would likely to suffer during that period; the risk of harm to the vessel while under arrest; the value of the vessel in relation to the amount of the claims against it; the prospects that the claims would be successful; the costs and expenses which would have to be incurred to maintain and preserve the vessel while under arrest; the loss of revenue due to the enforced idleness of the vessel; the state of the market for second hand vessels and the prospects that a realistic price would be obtained at a forced sale.*” (See *Bouygues Offshore and another v MT “TIGR”, her owners and all other parties interested in her, and others* [1996] 2 All SA 176 (C) quoting at 178 with approval an unreported judgment of *Dias Compania Naviera SA v MV Al Kaziemah and Others* Case No. A77/89 – D and CLD).

[83] The applicant has advanced for the sale of the mfv Polaris by public auction. The facts in this regard were set out earlier in this judgment. The respondents have not given any good reason why the sale should not be authorised. The vessel has been under arrest since 28 September 2017, without it being maintained, without a crew and undoubtedly costs are continuously being incurred to maintain it for preservation. The applicant provided the Court with recent photographs of the vessel in reply showing some rust on the outside. In my view, it is without question

that a vessel that has been stationary for months is susceptible to erosion which ultimately may affect its value. The value of the claims, excluding the erstwhile crew members' portion is said to be almost 60% of the lowest estimated value of the vessel. The vessel is no longer insured which poses a significant risk to the Port where it is kept. It is to the advantage of all concerned that it be sold as contended for by the applicant.

[84] It must be stated that even if I were to find that these proceedings were stayed by operation of section 133 of the 2008 Companies Act that would not result in the release of the ship from arrest. The ship will remain under arrest and the result would be its further deterioration. This also supports the view that this Court has taken in its interpretation of the relevant statutes. The vessel will not be available to be used to fish and no proceeds would be available to pay the creditors. A number of creditors including employees intend advancing their claims. There is a likelihood that the third respondent might end up being placed in liquidation.

[85] The respondents, in any event, have not demonstrated any reasonable prospect of turning the business around. They are hoping to get an arrested ship into the hands of a business practitioner (something they cannot do without it being released), whom it is hoped would get it trading again. How they would do that is not shown. Why they could not do so previously is also not explained. The applicant's view that the third respondent's conduct, by placing itself under business rescue shortly before the hearing of the final application, smirks of abuse is not implausible.

[86] I thought about whether this Court should have rather disposed of this matter only on the basis that the business rescue decision was not *bona fide*, my sense was that that was not sufficiently canvassed before me and that that was not the focus of the case presented by the parties *per se*. The case was argued mainly on the point *in limine*.

[87] Returning to the condonation application for the late filing of the answering affidavit, the explanation given in respect thereof is sorely inadequate. It has also

not been compensated for by the merits of the case. There is, therefore, no point in condoning its lateness, although much of it rested on the point *in limine* which I have extensively dealt with.

[88] The applicant seeks costs on attorney and client scale on the basis that it is practise to do so in these kinds of matters. It relies on the decision of *Brooks v the Taxing Master* [1960] 3 All SA 160 at 165, where the Court considering what scale costs should be awarded in judicial management proceedings as a matter of statutory interpretation addressed instances of insolvency and sequestration generally, and found that a person approaching a Court for such an order did so not only in their own interest, but in the interest of all creditors and it seemed “*equitable that such person should, subject to the limits of attorney and client taxation, receive a full indemnity for his costs.*” I see no reason why same should not be found in the instant matter.

[89] For all these reasons, the application should succeed.

[90] I therefore make the following order:

1. Condonation for the late filing of the answering affidavit is refused.
2. The application succeeds with costs on attorney and client scale.
3. The *Rule Nisi* granted on 30 January 2018 by Davis AJ and duly extended is made final.

N P BOQWANA

Judge of the High Court

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