



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: A69/2016
A70/2016

In the matter between:

**SEASPAN HOLDCO I LTD
SEASPAN CORPORATION
MV “SEASPAN GROUSE” (EX “HANJIN GDYNIA”)**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT**

and

**MS MARE TRACER SCHIFFAHRTS GMBH
& CO, KG**

FIRST RESPONDENT

**MS MARE TRAVELLER SCHIFFAHRTS GMBH
& CO, KG**

SECOND RESPONDENT

**Date of Hearing : 2 February 2018
Date of Judgment : 26 February 2018**

ORDER

- [1] The application to strike out is refused;
- [2] The application to set aside the arrests is dismissed;
- [3] The applicants are ordered to pay the respondents' costs of the application

inclusive of the costs of two counsel, jointly and severally, the one paying the other to be absolved.

J U D G M E N T

GYANDA J

[1]

By notice dated 15 September 2017 the applicants, who had an interest in the MV 'SEASPAN GROUSE' [EX "HANJIN GDYNIA"] and held a cession of the right to pursue the current litigation from the first and second applicants, brought an application against the respondents in which it sought an order:

- (a) THAT the arrests of the third applicant [MV 'SEASPAN GROUSE'] under case numbers A69/2016 and A70/2016 be and are hereby set aside;
- (b) THAT the first and second respondents are directed to return the original letter of undertaking issued as security for their alleged claims to the applicant's attorney of record within two [2] court days of this order; and
- (c) THAT the respondents should pay the costs of this application.

By the time the matter served before me the security in terms of para 2 was replaced by a cash amount paid into an account opened for that purpose by the Registrar of this Court.

[2]

The background leading up to the present application is set out in the respondent's heads of argument and are not in dispute. They are as follows:

- (a) MTS1 AND MTS2 [the first and second respondents] are German registered ship owning companies, each alleges a separate claim against HANJIN Shipping, arising out of the respective charters to HANJIN Shipping of the MV 'MARE TRAVELLER' and the MV 'MARE TRACER';
- (b) HANJIN Shipping was South Korea's largest container line and one of the world's top ten carriers in terms of capacity;
- (c) On 1 September 2016, the Seoul Central District Court [Korea] granted an order commencing rehabilitation proceedings in respect of HANJIN Shipping;
- (d) In response thereto, and so as to protect itself against a change of ownership or control of the vessels in HANJIN Shipping Fleet, the respondents caused *in rem* summonses [i.e. protective writs] to be issued out of this court [and also out of the High Courts in the Eastern Cape Province and the Western Cape Province] citing various allegedly 'associated ships' as defendants initially in respect of 72 vessels which was subsequently reduced to 64 vessels.
- (e) The vessels were alleged to be associated ships on the basis that: HANJIN Shipping was deemed to be the owner of the MV 'MARE TRAVELLER' and the 'MV MARE TRACER' in respect of the respondent's claims in terms of Section 3 (7) (c) of the Admiralty Act and the defendant vessels [i.e. the associated ships] were each owned by a company controlled by HANJIN Shipping at the time that the *in rem* summons were issued in terms of the Admiralty Act.
- (f) The *in rem* summons was issued on 2 September 2016 and the relevant warrants of arrests were issued by the Registrar on the same date.
- (g) The vast majority of the ships referred to above [all named with the

prefix 'HANJIN] were sold subsequent to 2 September 2016, which included, inter alia the MV 'HANJIN CAPE LAMBERT' which was acquired by TEBTALE MARINE INC. [TEBTALE'] and the vessel which was acquired by the first applicant;

- (h) TEBTALE made application in the Cape Town High Court of the Western Cape Division to have the protective writs issued out of that court set aside, or at least to have the MV 'HANJIN CAPE LAMBERT' [by then renamed the MV 'MOUNT MERU'] deleted from the protective writs, inter alia, on the basis that the vessel had been acquired by it on an arm's length basis subsequent to the protective writs being issued, and as such was no longer susceptible to arrest *in rem pursuant to such writs*.
- (i) TEBTALE'S application was opposed and argued before Burger AJ who delivered judgment on 21 July 2017 in favour of TEBTALE and ordered the deletion of the MV 'HANJIN CAPE LAMBERT' from protective writs.
- (j) The respondents applied for leave to appeal the judgment of Burger AJ.
- (k) Thereafter on 23 August 2017, after having applied for and obtained an amendment of the protective writs from Sishi J in this court, the respondents caused the arrest of the third applicant at Durban.
- (l) The applicants secured the release of the vessel [the third applicant] from arrest by establishing security and the vessel is accordingly deemed to be under arrest in terms of Section 3 (10) of the Admiralty Act.
- (m) Although respondents obtained leave to appeal the TEBTALE judgment on 24 August 2017 they have decided not to prosecute the appeal further.
- (n) The applicants challenge the deemed arrests of the vessel MV

‘SEASPAN GROUSE’ on the same legal basis that they challenged the validity of the protective writs issued against the TEBTALE and which form the ratio of the judgment of Burger AJ in the TEBTALE matter.

[3]

It is common cause between the parties that the sole issue for determination by this Court in the present application is whether the relevant time for determining the requisite control / ownership of the vessel, as an associated ship and liable to be arrested as such, is the time of issue of the protective writs as contended for by the respondents, or both at the time of the issue of the protective writs and at the time of the arrest of the ship as contended for by the applicants.

[4]

For the purposes of this application it is common cause:

- (a) THAT the vessel MV ‘SEASPAN GROUSE’ is an associated ship of the MV ‘MARE TRACER’ and MV ‘MARE TRAVELLER’; and
- (b) That the sale of the vessel MV ‘SEASPAN GROUSE’ to the first and second applicants were an arm’s length sale.

[5]

The issue to be determined between the parties has also been defined by raising the question whether the decision in the “Monica S” is still good and binding law in South Africa in the light of the provisions of the Admiralty Jurisdiction Regulation Act 105 of 1983 [The Act]. The applicants argue that the ‘Monica S’ is no longer binding authority in South Africa whilst the respondent argues that it still is. The parties are in full agreement; however that immediately prior to the promulgation of the Act the “Monica S” was good and binding authority in South Africa. In the “Monica S” [1967] Vol. 2 *Lloyds List Law Reports* 115 at 132 Brandon J held that:

'Under s 3 (4) of the Act, two requirements are laid down for proceeding *in rem* against a ship in connection with a claim falling within para (d) to (r) of Section 1(1) arises. The first requirement is that the person who would be liable (my underlining) on the claim in *personam* and should have been the owner or charter of, or in possession or control of the ship when the cause of action arose. The second requirement is that, at the time when the action is brought the ship should be beneficially owned as respects all shares in it by that person. These are the express requirements, and the only express requirement, and I see no reason, as a matter of construction of the Act, for implying a further provision that, in cases where the claim does not give rise to a maritime *lien*, if there is a change of ownership after action (is) brought, but before service or arrest, the right which is given to proceed *in rem* against the ship is thereupon to lapse'.

[My underlining in this part of Brandon J's judgment is relevant to the construction to be given to certain words in Section 3 (4) (b) of the Act hereinafter].

[6]

It was, as I have said, common cause, or not in dispute that the Admiralty law which was applicable in South Africa, prior to the commencement of the Admiralty Act, was the English Admiralty law which the English Supreme Court would have applied *MALILANG & ORS v MV HOUDA PEARL*¹ and G HOFMEYER '*Admiralty Jurisdiction Law and Practice in South Africa* – 2nd Edition at p 5 – 6.

Therefore, South African law was on the issue concerned as agreed by the parties, the law as set out by Brandon J in the 'Monica S'.

[7]

(a) In this regard Section 6(1) of the Admiralty Act provides that a court in the exercise of its Admiralty jurisdiction shall:

'with regard to any matter in respect of which a court of admiralty of the republic referred to in the Colonial courts of Admiralty Act, 1890, of the United

¹ 1986(2) SA 714 @ 722 (j) to 723 C.

Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied’;

- (b) Section 6 (2) provides that the provisions of sub-section (1) shall not derogate from the provisions of any law of the Republic applicable to matters described in the sub-section. These sections confirm that the law applicable before the commencement of the Admiralty Act was the English law as it existed on 1 November 1983, therefore, the decisions of Brandon J in the ‘Monica S’ is still good and binding law unless that decision has in any way been altered, modified or even over-ruled by a later South African decision or is inconsistent with the provisions of the Admiralty Act or any other South African law and, in that case, the extent thereof. See: *MV SILVER STAR, OWNERS of the MV SILVER STAR v HILANE LTD*².

[8]

Both the respondents and the applicants addressed argument before me as to how certain provisions of the Admiralty Act were to be interpreted. I have been referred to various authorities in this regard *inter alia*:

*Natal Joint Municipal Pension Fund v Endumeni Municipality 2012*³ where Wallis JA set out the approach to be adopted in relation to interpretation and construction to be given to documents.

‘The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, 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

² 2015 (2) SA 331 (SCA) @ p 344 para 31

³ 2012 (4) SA 593 (SCA) @ para 18

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.'

This approach was followed and applied by Ploos van Amstel J in *Columbus Stainless (Pty) Ltd & Ors v National Port Authority of SA & Others*. Case no. 3580/2013 at p 10 para 18 where he said:

'The modern approach to the interpretation of Legislation and contracts is that the process of attributing meaning to words used, having regard to the context provided by reading the particular provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. 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. Wallis AJ said that where the language is ambiguous, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusiness like or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration'.

In the '*Heavy Metal*'⁴ Smalberger JA stated that:

'In construing the Admiralty Act regard must be had to the language used, the apparent purpose of the provision, its contextual setting, and the object of the Admiralty Act as a whole'.

⁴ 1993 (3) SA 1083 SCA @ p 1105 F

These are the same sentiments expressed by Wallis JA and Ploos van Amstel J subsequently in the judgments referred to above.

[9]

Mullins SC for the respondents, relying on the authority of the decision in the *Heavy Metal* at pages 1105 G – H; 1106 I submitted that the object of associated ship arrest provisions is to enable a plaintiff to arrest and recover from an alternate defendant, according to the plaintiff relief to which it would not otherwise be entitled. And that the principle purpose of the Admiralty Act is to assist the party applying for the arrest rather than the party opposing it.

Mr Mullins submitted further, on the basis of the sentiments expressed by Wallis JA in the *NYK ISABEL*⁵ regarding maritime defendants becoming mobile and transitory causing maritime claimants to become ‘wandering litigants of the world’ the provisions of the Admiralty Act fell to be given a generous interpretation consistent with its purpose of assisting claimants to enforce their claims.

[10]

Mr *Fitzgerald* for the applicant whilst agreeing with the above submissions by Mr *Mullin* on the issue of the interpretation of the Admiralty Act stressed that this court must interpret the Act in a constitutionally compliant manner and order that liability for claims should fall on the person responsible therefor and not an innocent third party who is totally unrelated to the transaction in question. He submitted that the Act should be interpreted in a manner that kept a balance between the competing interests.

[11]

The first issue to be determined is when does an action *in rem* commence?

- (a) The respondents contend that an action *in rem* commences when the summons is issued;

⁵ 2017 (1) SA 25 (SCA)

- (b) The applicants, on the other hand, contend that in the present case as we are dealing with an associated ship that action is instituted or brought in terms of Section 3 (6) of the Act by the arrest of the associated ship.

[12]

In the *JUTE EXPRESS*⁶ Howie AJA said:

‘In the first place, at the time the Act was passed, this Court had long since held that all actions commence with the issue of summons: *Marine & Trade Ins. Co. Ltd v Reddinger*⁷ and *Labuschagne: Labuschagne v Minister of Justice*⁸. There was therefore no need for the lawgiver to say anything in Section 3 (5) about when an action would commence. It was a matter of settled procedural law.’

At p 17 A – B Howie AJA went on to say:

‘And as already mentioned an action is not commenced by the service of the summons but by the issue of the Summons. Manifestly the Legislature intended to unify the moment of commencement in relation to prescription on the one hand and statutory time limitations on the other. One finds, therefore, that in the case of an action *in rem* the moment of commencement is deemed to be the issue of the process and, in the case of an action *in personam*, the service of the process [see Section 1 (2) (c)].’

Further at p 17 he said:

‘Because this topic was not a matter of dispute between counsel it is unnecessary in this judgment to say more than that the primary purpose of an arrest in such an action is to give the action utility and effectiveness by affording the plaintiff pre-judgment security. See e.g. *The Dictator*⁹

⁶ 1992 (3) SA 9 AD @ P16 H-I

⁷ 1966 (2) SA 407 A - 413D

⁸ 1967 (2) SA 575 (4) at 584.

⁹ [1892] p 304 (1891 ALLER REP 360) AT 363 d - e

The Banco; *Owners of the M V MONTE ULIA v Owners of the ship BANCO & Ors*¹⁰

[13]

Mr *Fitzgerald* relied upon the opinion of Farlam AJA (as he then was) in *MV HEAVY METAL; BELFRY MARINE LTD V PALM BASE MARITIME SDN BHD*¹¹ where the learned Judge said at para 48 (p1089):

‘In my opinion an important indication of Parliament’s intention in this regard is to be found in Section 3 (7) (a) (i) of the Act which, it will be recalled, provides that an associated ship is a ship, other than the guilty ship, “owned at the time the action is commenced, by the person who was the owner of [the guilty ship] at the time when the maritime claim arose.” All that is required therefore for ships to be associated in terms of Section 3 (7) (a) (i) is that they should have a common owner (1) who was the owner of the guilty ship when the claim arose and (2) who is the owner of the associated ship when the action is commenced, i.e. when the associated ship is arrested.’

Mr *Fitzgerald* relied also on the authority of the judgment of Steyn J in the *INDIAN GRACE – Republic of India and Government of the Republic of India [Ministry of Defence] v India Steamship Company Ltd* (THE INDIAN GRACE) no. 2¹² where Lord Steyn said:

‘It is now possible to say for the purposes of Section 34 an action *in rem* is an action against the owner from the moment that the Admiralty Court is seized with jurisdiction. The jurisdiction of the Admiralty Court is invoked by service of the writ or where the writ is deemed to be served, as a result of the acknowledgement of the issue of the writ by the defendant before service: The BANCO [1971 1 LLOYDS REP [1971] P 137 from that moment the owners are parties to the proceedings *in rem*’. (my underlining).

[14]

In the “HEAVY METAL” Farlam AJA gave his opinion without regard to the decision,

¹⁰ [1971] 1 ALL ER 524 (Vacation Ct Adm & CA @ 531 (a) – (b), Thomas Maritime Liens British Shipping Law vol. 14 para 67 at 43

¹¹ 1999 (3) SA1083 SCA

¹² [1995] *Lloyds Law Reports* Part 1 Vol 1

in this regard, by Howie AJA in the *JUTE EXPRESS*, for if he did he would, in my view, most definitely come to the conclusion that an action *in rem*, like all other actions commence with the issue of the summons. I say so for the following additional reasons:

- (a) For an action *in rem* to commence with the arrest would imply that the issue of the summons or the writ had no legal affect whatsoever up until the arrest. This could never be the intention because the Act itself, s 1 (2) (b) provides for any action instituted in terms of s 1 (2) (a) (iii) if it is not served within twelve months of the issue thereof, to lapse.
- (b) With the commencement of the action *in rem* by the issue of a writ, a contingent right of security is created upon the ship which will be brought into effect by the arrest of the ship. *MANDRAKA – SHEPPARD – Modern Maritime Law*¹³
- (c) The plain language used in the Act given its ordinary meaning, without resort to any linguistic gymnastics, supports the proposition that the action *in rem* is commenced by the issue of the process (summons / writ). S 1(2) (a) (iii) provides that:

‘An Admiralty action shall for any relevant process commence:

(iii) by the issue of any process for the institution of an action *in rem*’.
- (d) It is common cause that the meaning to be ascribed to the adjective ‘any’ in the provision referred to have been reiterated in numerous decisions as a word of very wide import and, *prima facie*, the use of it excludes limitation.

See: *Asprint v Gerber Goldschmidt Group SA (Pty) Ltd*¹⁴; *R v Hugo*¹⁵; *S v Wood*¹⁶;

¹³ Vol. 1 (3rd Ed.) (2013) at p 104

¹⁴ 1983 (1) SA 254 A at p 261 A-D

*Clarke-Jervaise v Scutt*¹⁷; *Proctor & Gamble SA (Pty) (Ltd) v Carlton Paper of SA & Ano*¹⁸; *Kham & Ors v Electoral Commission & Ano*¹⁹.

Any relevant purposes, therefore, is to be loosely, and generally interpreted to mean all purposes relating to the Act in question.

[15]

In the argument between the parties the applicants have submitted, on the authority of the key holding in the JUTE EXPRESS AT P 19 H - J that the intention of the Legislature 'was in' my opinion, to lay down that an arrest is an essential element of the process whereby an action *in rem* is brought to court 'my underlining.' *Fitzgerald SC* is supported in his view by WALLIS JA in his book *The Associated Ship and South African Admiralty Jurisdiction* at pgs 339 and 340 who, in turn, is supported by *Hofmeyer 'Admiralty Jurisdiction'* 2nd Ed at p 129 especially at para v1.7. It is common cause in argument between the parties, or at least, not disputed by *Fitzgerald SC* for the applicants, that *Hofmeyer* initially supported the decision in 'Monica S', and, after WALLIS'S publication changed his stance to support the view of WALLIS. I, however, disagree with this view and agree with the argument of Mullins SC for the reasons given in this judgment.

[16]

As Mullins SC points out an action can only be commenced once, and this occurs when the summons is issued by the Registrar. He correctly points out that in s 1(2) of the Act, the Legislature is pertinently concerned with the moment of initiation of the action and uses the word 'commenced' and not as in s 3 (5) the word 'instituted'.

This contrast between the terms used by the Legislature, he submits, is more marked if one examines the signed Afrikaans text wherein in relation to s 1 (2) it uses the expression ' *n aanvang te geneem het*', whereas in s 3 (5) the term is 'word ingestel'. These, Mr Mullins submits, correctly in my view, are strong

¹⁵ 1926 AD 268 @ 271

¹⁶ 1976 (1) SA 703 (A) at 706

¹⁷ (1920) 11 Ch 382 @ 388

¹⁸ 1197 (3) SA 292 at p 296 E-J

¹⁹ 2016 (2) SA 338 (CC0 at pgs 356G to 357 G per Wallis AJ

indications that s 3 (5) was not intended to deal with the matter of commencement. Furthermore, by the use of the word 'instituted' (ingestel) in s 3 (2) and 3 (3) and the word 'brought' in s 3 (6), the Legislature was not referring to 'commencement' of proceedings in the latter instances but used the terms as having a broader meaning and intended to refer to the process of bringing the claim before court. It therefore, intended the word 'instituted' in s 3 (5) to have the same meaning.

I am of the view that this explanation is in conformity with the key holding referred to in the JUTE EXPRESS in paragraph [15] above and that the arrest is merely a means to give utility and effectiveness to the judgment that the plaintiff seeks in the court.

[17]

Wallis in his book *supra* at p 340 in relation to the provisions contained in s 3 (4) (b) which reads:

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

(a) ...

(b) If the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.'

Wallis, in support of his contention that the owner of the guilty ship and the associated ship must be personally liable both at the time that the action is instituted and at the time of the arrest of the associated ship, contends that the words 'would be liable' is couched in language of futurity. However, the same words were used by Brandon J in the 'MONICA S' (see para 5 *supra*). In my view the use of those words in s 3 (4) (b) and as used by Brandon J in the 'MONICA S' are used to denote simply that liability on the summons was yet to be determined. In most, if not all, of these typical situations, liability has not yet been determined and the Legislature, being aware of that would not have used the term 'is liable' in s 3 (4) (b).

[18]

In the un-amended form of s 3 (7) (a) of the Admiralty Act the liability of an 'associated ship' to be arrested was determined as 'that time when the maritime claim arose'. Hence in *NATIONAL IRANIAN TANKER CO v MV PERICLES GC*²⁰ the Appellate Division held that on the un-amended s 3 (7) the relevant time for determining ownership or control of the associated ship was when the maritime claim arose.

Accordingly, any change of ownership subsequent to the issue of a writ of summons *in rem* but before service, to a third party, would not be able to prevent the arrest.

[19]

The 1992 Amendments to the Admiralty Act, more especially s 3 (7) (a) thereof, replaces the wording 'at the time when the maritime claim arose' with the words, 'at the time when action is 'commenced''. This is, as I have already said, at the time when the summons is issued.

[20]

The Legislature, by the promulgation of the Admiralty Act and the amendments thereto could not have intended to change the position postulated by Brandon J in the 'MONICA S'. I say so for the following reasons:

- (a) The Legislature is presumed not to intend to change the existing law more than is necessary, particularly when taking away existing rights.

*Cloete Murray & Ano NNO v Firstrand Bank t/a Wesbank*²¹

*L C Steyn 'Die Uitleg van Wette'*²²

*De Venish 'Interpretation of Statutes'*²³

²⁰ 1995 (1) SA 475 A at p 481 C

²¹ 2015 (3) SA 438 SCA at para 40

²² 5th Ed (1981) at pg 97 and 337

²³ (1992) at pg 159

On the interpretation contended for by the applicants, the plaintiff would no longer have the right to arrest an associated ship if the ownership thereof changed subsequent to the issue of the summons and protective writ but prior to the arrest in the case of an action *in rem* in terms of s 3 (4) (b) of the Act.

- (b) It is common cause that the purpose of the associated ship provisions was to benefit the party applying for the arrest by providing it with an alternate method of recovery and affording it relief to which it would not otherwise have been entitled. See: *The Heavy Metal*²⁴

The principle purpose of the Admiralty Act is to assist the party applying for the arrest rather than the party opposing it. *The Heavy Metal*²⁵

See also: *The NYK ISABEL*²⁶ where Wallis JA contended for the Act to be given a generous interpretation consistent with its manifest purpose of assisting maritime claimants to enforce maritime claims. This was especially so because maritime defendants are mobile and transitory in their presence in any one jurisdiction, and maritime claimants are compelled to become wandering litigants of the world.

Hofmeyer – footnote 121 page 17 justifies the generous interpretation of the Act on the basis of the difficulties which may face a maritime claimant in seeking to obtain satisfaction of his claim.

- (c) The provisions of the Admiralty Act fall to be interpreted against the background of the existing law at the date of its commencement as many provisions are modelled on or are declaratory of the existing Admiralty Law.

*National Iranian Oil Co v BANQUE PARIBAS (SUISSE)*²⁷

²⁴ At pg 1105 G-H

²⁵ At pg 1106 I

²⁶ 2017 (1) SA 25 SCA at paras 44-45

²⁷ 1993 (4) SA 1 (A) at p 8 A-E

*G Hofmeyer 'Admiralty Jurisdiction Law & Practice on South Africa'*²⁸

The existing Common Law in South Africa at the time of the promulgation of the Admiralty Act was the English Admiralty Law as at 1 November 1983 which emphasised the position adopted by BRANDON J in the 'Monica S' as set out in paragraph 5 (*supra*) hereof.

[21]

It is common cause that the provisions of the Act must be interpreted in a manner which promotes the spirit, object and purport of the bill of rights. The courts are obliged to interpret provisions in a manner that does not give rise to Constitutional inconsistency. A provision should, therefore, not be interpreted in a manner which results in a distortion of the meaning of the provision or places undue strain upon the language of the provision.

*National Coalition for Gay and Lesbian Equality & Os v Minister of Home Affairs & Others.*²⁹

[22]

The respondents submit that where the Act demonstrates the adoption of a particular policy, the validity of which policy has not been formally constitutionally challenged; this court cannot choose to adopt a different policy. I agree. However, what is contended for by the applicants is that the Act must be interpreted in a manner that upholds the values enshrined in the constitution. It is not an attack on the validity of any policy adopted in formulating the Act.

[23]

²⁸ 2nd Ed JUTA p 17

²⁹ 2000 (2) SA 1 (CC) at para 23

The applicants support the argument by Wallis in his book. The argument by Wallis regarding the constitutional interpretation of the Act is based on the provisions of s 25(1) of the Constitution. He concludes in his book at page 210 and 211 that it would lead to an arbitrary deprivation of property for the Act to be interpreted as contended for by the respondents. Wallis submits that it is unconstitutional and an arbitrary deprivation of property if an innocent person who has no contractual relationship with the plaintiff and is blissfully unaware of the protective writ issued, or action instituted by the plaintiff against a former owner of a ship that he (the innocent third party) purchased in a legitimate arm's length deal, to have that ship arrested for the former ship owners debt.

[24]

This situation complained of by Wallis prevails in respect of maritime *liens* in England and South Africa and other commonwealth maritime jurisdictions which are based on the English Common Law and in those jurisdictions even in respect of the Common Law or Statutory *liens*. The fact that a ship may be arrested, whether or not a sister ship or an associate ship for the alleged debts of a former ship owner has been recognized for a long time and is a fact of maritime industry. This fact gave rise to contracts to purchase ships having clauses in them recognizing the fact that claims can survive the change in ownership of the vessel.

The examples of the Norwegian sale form and Nipponsale form given by the respondents (Greiner answering affidavits para 74-76 at page 343-344, annexures ECG 25-27) containing clauses warranting sales of ships free of pre-existing maritime *liens* and claims and undertaking to indemnify purchasers against such

actions based on such claims.

[25]

As a result of the pre-existing claims, and/or *liens* purchasers also take out indemnity insurance against such risks. This is a common occurrence in the shipping industry. The applicants had such insurance in respect of the 'MV SEASPAN GROUSE' at the time of its arrest.

Moreover, buyers perform writ searches in prominent arrest jurisdictions, particularly when acquiring a vessel out of what the respondents refer to as a distressed fleet like the HANJIN fleet. Both the attorneys for the applicants and the respondent are aware of this practice and conduct such writ searches for their clients.

See: *Mandaraka- Sheppard – Modern Maritime Law*³⁰ where the learned author opines:

'On balance Brandon J preferred to protect maritime claimants, because a purchaser would be able to rely on the contractual indemnity obtained from the seller, if he had not become insolvent by the time it was discovered that ship bought was encumbered by maritime *liens* or other maritime claims giving cause for arrest of the ship. As far as statutory rights *in rem* are concerned, a purchaser can carry out a search in the admiralty register'.

³⁰ Volume 1 (3rd Ed) (2013) at p 104

[26]

Although the practice appears to amount to an arbitrary deprivation of property it is apparent that it is an accepted practice in most, if not all, of the major maritime countries to which the respondents' expert witnesses have referred in their answering affidavits. It is an accepted fact in keeping with the accepted purpose of the Admiralty Act, namely to assist maritime claimants in realizing their claims.

[27]

It is a known fact that the Registrar of the Court keeps a register of the writs that are issued which makes it possible for all to ascertain what writs have been issued in respect of certain vessels. [See: *MANDARAKA – SHEPPARD – MODERN MARITIME LAW* p 104 *supra*]. It would defeat the stated purpose of the Act if a ship owner was able to avoid an arrest by selling a ship to a third party upon ascertaining the existence of a writ in respect of his ship. The issuing of the writs and recording their existence in the Admiralty register is as public an act as the arresting of a ship.

[28]

I have read the judgment of Burger AJ in the *TEBTALE* matter referred to above and I respectfully disagree with the conclusion he reached. He seemed to be extremely doubtful as to which way he should rule on the issue (to use his words whether to support proposition A or B) and was, in my view, swayed by the view adopted by Wallis in his book in reaching his conclusion in spite of him expressing certain doubts in this regard.

[29]

With regards to the application to strike out the expert testimony in relation to the law in other maritime jurisdictions referred to in the affidavits of the respondents, it is important to bear in mind the following:

- (a) Mr *Fitzgerald* in his heads of argument refers to the Australian decision of *Comondate Marine Corporation v The Pou Australlia Shipping (Pty) Ltd*³¹ where Justice Allsop said:

‘The utmost respect of course must be paid to the reasoning of such eminent court, and the need for consistent doctrine in international shipping as far as possible must be recognized’.

Similar sentiments were expressed by Farlam AJA (as he then was) in the *HEAVY METAL* at paragraph 43 where he said:

‘It follows that where our legislation goes further than that of other maritime nations their case law can obviously provide no guidance as to the interpretation of our provisions. Where, however, provisions in the Act are clearly modelled upon articles in the Arrest Convention and the legislation of other countries which have adopted it, it is appropriate, in my opinion for our courts to have regard to the convention and the case law of those countries in order, *inter alia*, to help bring about that degree of consistency among maritime nations to which I referred earlier’.

³¹ [2006] FCAFC 162

- (b) I agree fully with the sentiments expressed by Allsop J and Farlam AJA. The modern world has become a global village with the advances in science and technology and in the field of maritime law; there is a greater need for uniformity in its enforcement and application.

In this regard the respondents reference to the law in the various Commonwealth countries, Canada and the USA have been of great assistance in understanding the seemingly incongruous and arbitrary deprivation of property that results in the application of the 'Monica S' principle. It is also indicative of an almost uniform application of the principle in the jurisdictions referred to in one guise or another.

- (c) The reference to the other jurisdictions was of great assistance to this court and, for these reasons the application to strike out these paragraphs cannot be acceded to.

- (d) Mr *Fitzgerald* submitted that the reference to the law in the foreign jurisdictions in the respondents' affidavits was unnecessary as they were all contained and easily ascertainable by reference to; *inter alia*, Derrington and Turner QC '*The Law and Practice of Admiralty Matters* – 2nd ed. However, Mr Mullins, showed in argument that the book in question did not cover all the aspects referred to in the affidavits more especially, there is no reference to the issue of whether the 'MONICA S' is followed in any other Commonwealth jurisdictions or Hong Kong. Moreover, the book reflects the state of the law in October 2015 and is not current.

- (e) Mr Greiner in his answering affidavit (para 56) confirmed that MTS's South African legal representatives attempted to research the position in Singapore, Hong Kong and Australia as to whether the 'MONICA S' has been followed in those jurisdictions, independently, but were unable to obtain clarity on the prevailing positions. I ask the question why the respondents would go to the extent of obtaining the expert testimony if all such authority was available and 'readily ascertainable with sufficient certainty' as argued by Mr *Fitzgerald* and as held in *IMPERIAL MARINE*.³² I accept the respondents' argument that recourse to the expert testimony was necessary to bring to the courts attention the current position in each of the jurisdictions in relation to the issue in question.

[30] The applicants also apply to strike out all those allegations in the respondents' affidavits relating to the ownership and financial structure of the HANJIN Shipping fleet as irrelevant. The purpose of the Admiralty Act has been stated, it is common cause, to assist maritime claimants in effecting payment of their claims. The efforts of certain ship owners to evade payment to creditors by the use of separate corporate personality and purported sale of vessels are sought to be overcome by provisions of the Act. In my view, the respondents were entitled to show to the court the commercial realities that maritime creditors face. I am satisfied that the reference to the ownership and finance structure of the HANJIN Shipping Fleet and the foreclosure by the banks which followed HANJIN Shipping's bankruptcy are all matters relevant to the present application in spite of the respondents concession that the purchase of the MV SEASPAN GROUSE by the applicants was a legitimate arm's length sale. I would accordingly refuse the application to strike out.

³² 2012 (1) SA 58 SCA AT PARA 27

In the circumstances I make the following order:

[1] The application to strike out is refused;

[2] The application to set aside the arrests is dismissed;

[3] The applicants are ordered to pay the respondents' costs of the application inclusive of the costs of two counsel, jointly and severally, the one paying the other to be absolved.

GYANDA J

Case Information

Application heard on: 2 February 2018

Judgment handed down on:

Appearances

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