



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN
(Exercising its admiralty jurisdiction)**

Case No: A50/2017

Name of Ship: mv “Julian”

In the matter between:

MS“BONANZA”SCHIFFFAHRTGESELLSCHAFT mbH & CO,KG 1ST APPLICANT

FORTYSIXTH PHOENIX SHIPPING INC.

2ND APPLICANT

and

**DURBAN COAL TERMINAL COMPANY (PTY) LTD
t/a BULK CONNEXIONS**

1ST RESPONDENT

TRANSNET (SOC) LTD

2ND RESPONDENT

JUDGEMENT

MNGADI, AJ

[1] The applicants, proceeding in terms of s 1(1)(w) read with s 5(2) (a) of the Admiralty Jurisdiction Regulation Act 105 of 1983 claim, as a main relief, a declaratory order that the right of the applicants, if any, to limit their liability in respect of the claims of any parties that might have suffered loss arising from the collision of their ship mv 'Julian 'with the quay and ship loading appliance within the port of Durban on 30 April 2017 is to be determined in accordance with s 261(1) (b) of the Merchant Shipping Act 57 of 1951 (the Act) and that it be ordered that the liability of all loss be and is hereby limited to an aggregate amount not exceeding 66.67 special drawing rights for each ton of the ship's tonnage ; the applicants be authorized to establish with the Registrar of this Court a limitation fund in the South African Rand in an amount equivalent to the product of the ships gross register tonnage as certified by the South African Maritime Safety Authority in terms of s 262(4) of the Act; and that in the event that a respondent obtains a final and unappealable determination of liability against either or both the applicants from a competent court for damages arising from any claims pertaining to the loss arising from the said collision, such respondent on notice is granted leave to move for directions as to lodging of claims against the limitation fund and the distribution thereof. The application is opposed by the first respondent. The second respondent abides the decision of the Court.

[2] The first applicant is MS "Bonanza"Schiffahrtgesellschaft mbH & CO, KG a German limited liability partnership business entity that has corporate personality and registered in accordance with the laws of Germany with its registered office and place of business in Haren, Germany. The second applicant is Fortysixth Phoenix Shipping Inc., a company duly incorporated and registered in accordance with the Company Laws of Liberia with its registered office and place of business at Monrovia in Liberia. The first respondent is Durban Coal Terminal Company (Pty) Ltd t/a Bulk Connexions, a company duly incorporated and registered in accordance with the Company Laws of the Republic of South Africa which carries on business as, inter alia, terminal operator from its place of business within the area of the jurisdiction of this Court in Durban, KwaZulu-

Natal. The second respondent is Transnet (Soc) Limited which is a State owned company duly incorporated and registered in accordance with the provisions of the Legal Succession of the South African Transport Services Act 9 of 1989 and the Company Laws of the Republic of South Africa and which carries on business, inter alia, as Transnet National Ports Authority in terms of the National Ports Act 12 of 2005, having its registered office in Johannesburg, Gauteng, South Africa.

[3] The applicants are the parties bearing the risk in and to the vessel mv "Julian". The first applicant is the owner of the vessel and the second applicant is the bareboat charterer of the vessel in accordance with a charter party agreement subsisting all times material herein.

[4] The applicants seek a declaratory order confirming that the applicants are entitled to enjoy such limitation of liability as may arise on the facts in accordance with the provisions of s 261 and s 263 of the Act. The main reason for the application is that they are likely to be sued in the Hong Kong and German courts for damages arising from the collision. In those jurisdictions the limitation is far higher than the limitation stipulated in the Act. The applicants intend to use the declaratory order to force or persuade the foreign courts to apply the South African limitation as an issue that has been determined by the South African court and that it is part of the South African substantive law. The applicants state 'While the principle of limitation is almost universally accepted in international shipping, and the basic grounds for invoking limitation are broadly the same in different jurisdictions, the value at which a limitation is set differs from country to country both because of the limitation provisions set in domestic statutes or in consequence of reliance on various international limitation treaties'.

[5] Section 21(1) (c) of the Superior Courts Act 10 of 2013 provides that a Division of the High Court has jurisdiction over all persons residing or being in , and in relation to all causes arising and all offences triable within, its area of jurisdiction and in all other matters of which it may according to law take cognizance, and has the power in its

discretion , and at the instance of any interested person, to enquire into and determine any existing , future or contingent right or obligation, notwithstanding that such a person cannot claim any relief consequential upon the determination’.

[6] The litigation arises from the following incident. The vessel with a gross registered tonnage of 40 160 tons with permission granted by and under instructions of the second respondent’s Durban harbor master and under the control and command of a pilot employed by the second respondent entered the port to berth with two tugs crewed by employees of the second respondent made fast to the vessel by lines to the vessel. At the entrance of the port the vessel collided with a quayside and a bulk loading appliance adjacent to the quayside. It resulted in substantial damage to the vessel, the quayside and the bulk loading appliance. The damage to the bulk loader appliance is estimated at R269 million and the damage to the ship at US\$328,993.28 and to the quayside at R250,000. The collision has given rise to multiple claims. The second respondent has sued the applicants in South Africa for the damages to the quayside wall and for an indemnity in respect of claims brought against it by the first respondent. The first respondent has pursued actions against the applicants both in Germany and Hong Kong. The applicants have sued the second respondent in South Africa for payment in respect of the damages to the vessel and for an indemnity in respect of any claims the first respondent may have against the applicants.

[7] The first respondent is the terminal operator of of the bulk terminal of which the laoding appliance forms part and the operator of the specialised loading appliance and the party bearing risk in and to the ship loading appliance. The second respondent is the owner of the land and the quayside on which the terminal and ship loading appliance are located. There are no allegations of any connection between the respondents. They are sued as separate independent entities.

[8] The pilot in question was an employee of the second respondent and he was acting in the course and scope of his employment, The two tugs the vessel was made to fast were owned by the second respondent , operated by the second respondent and

crewed by the employees of the second respondent. The first respondent was the terminal operator of the bulk terminal of which the specialized loading appliance formed part and the operator of the said appliance and the party bearing risk to the said appliance.

[9] The first respondent has sought leave to file further affidavit. The supplementary affidavit seeks to take further the issue of proof of the correct German law applicable by means of expert opinion. During the hearing of the application no address in this regard was addressed to me by either party. It appears to me to be a rounding off of an issue that has been addressed by the parties. It is in the interest of justice that it be admitted and no prejudice has been shown, and the same applies to the rest of the averments in the supplementary affidavit. In due course I will revert to the application for the stay of proceedings in this matter by the first respondent pending the finalization of the action in Germany instituted by the first respondent against the applicants. It is premised on the basis that rather than this court deciding the matter against the first respondent, it stays these proceedings pending the decision of the German Court on the issue. The parties stood by their submissions in the papers and did not address me during the hearing on the application to stay. The Admiralty Jurisdiction Regulation Act 105 of 1983 , S 7 (1) (a) provides: 'A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted , if it is of the opinion that any other court in the Republic or any other court or any arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body.' The applicants contend in their papers that the case of the stay of the proceedings has not been made. The view I take of the matter it is not necessary to deal with the application of the stay of the proceedings.

[10] Section 261 (1) of the Act provides that the owner of a ship shall not, if damage is caused without his actual fault or privity, be liable for damage in respect of loss of or damage to property or rights to an aggregate amount of exceeding 66,67 special drawing rights for each ton of the ship's tonnage. In today's terms the maximum liability

of the applicants in terms of s 261 of the Act would be R45,677 million whereas in Germany in terms of the Convention on Limitation of Liability for Maritime Claims 1976 as amended by the Protocol of 1996 is ZAR 431 458 946.90 (approximately US\$32 343 249.39).

[11] The applicants' case against the first respondent is two fold. They claim that the first respondent is one of the claimants as envisaged in s 261 of the Act. As a result, they are entitled to raise the s 261 limitation against the first respondent. Secondly, despite the first respondent instituting action in the German court, the s 261 limitation applies in respect of its claim because the collision took place in South Africa and the first respondent is a South African entity subject to the law of South Africa. The s 261 limitation is a substantive law to be applied to the action by the German Court and, therefore, they are entitled to a declaratory relief to this effect. The first respondent opposes the application on the following grounds:

- a) It does not intend to institute an action against the applicants in a South Africa Court, instead as of right, it will institute such action in a foreign court with jurisdiction where a higher limitation applies than that contemplated in s 261 of the Act.
- b) The order sought by the applicants seek to impermissible to operate extra-territorially. The South African Court has no justification to make an order placing limitation on an action to be instituted in a foreign court.
- c) An order sought by the applicants seeks to bind persons not cited and beyond the jurisdiction of this court. Its effect is not limited to the respondents.
- d) It is premature to determine whether the collision caused any personal injury or loss of life.

- e) Its position is that there is in fact actual fault or privity on the part of the applicants.
The second applicant is a front of the first applicant and it will seek to hold him liable in the German court as such.
- f) It is improper to raise limitation as a cause of action. It is meant to serve as a defence.

[12] Section 261 of the Act states:

‘(1) The owner of a ship, whether registered in the Republic or not shall not, if any loss of life or personal injury to any person, or any loss or damage to any property or rights of any kind, whether movable or immovable, is caused without actual fault or privity-

(a) if no claim for damages in respect of loss of or damage to property or rights arises, be liable for damages in respect of loss of life or personal injury to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship’s tonnage; or

(b) If no claim for damages in respect of loss of life or personal injury arises , be liable for damages in respect of loss or damage to property or rights to an aggregate amount exceeding 66,67 special drawing rights for each ton of the ship’s tonnage; or

(c) if claims for damages in respect of loss of life or personal injury and also claims for damages in respect of loss of or damage to property or rights arise, be liable for damages to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship’s tonnage: Provided that in such a case claims for damages in respect of loss of life or personal injury shall, to the extent of an aggregate amount equivalent to 140 special drawing rights for each ton of the ship’s tonnage, have priority over claims for damages in respect of loss of or damage to property or rights , and, as regards the balance of the aggregate amount equivalent to 206.67 special drawing rights for each ton of the ship’s tonnage , the unsatisfied portion of the first - mentioned claims shall rank *pari passu* with the last-mentioned claims.

(2) The provisions of this section shall extend and apply to owners , builders, or other persons interested in any ship built at any port or place in the Republic, from and including the launching of such ship until the registration thereof under the provisions of this Act.

(3) The provisions of this section shall apply in respect of claims for damages in respect of loss of life, personal injury and loss of or damage to property or rights arising on any single occasion,

and in the application of the said provisions claims for damages in respect of loss, injury or damage arising out of two or more distinct occasions shall not be combined’.

Is first respondent a claimant in the South African jurisdiction ?

[13] It is common cause that the first respondent has advised the applicants that it has no intention of suing the applicants in the South African court but it intends to pursue its claims in the English and/or German Courts. The second respondent on the other hand has submitted itself to the jurisdiction of the South African Court. The applicants contend that the first respondent is a claimant in the South African jurisdiction because of its connection with South Africa, the collision taking place in South Africa and the fact that second respondent called for security for its claim and for the indemnity of the first respondent’s claim against it which security has been furnished. It is argued that the Merchant Shipping Act is a South African statute that is binding on the first respondent. The first respondent contends that it is within its rights to sue the applicants in a foreign court with jurisdiction. It is not connected to the second respondent and the second respondent is not its agent. It has not claimed anything in South Africa from the applicants. It has nothing to do with what is happening between the applicants and the second respondent. It admits that it gave notice to the second respondent of its intention to sue it for damages arising from the collision but the second respondent cannot rely on the provisions of s 261 as it is not the owner of the ship.

[14] In its founding affidavit the applicants aver that it is always open to the owners of ships or bareboat charterers of a vessel to select the jurisdiction in which they seek to limit claims. That choice is subject only to there being a reasonable connection between the jurisdiction in which the limitation is to take place and the events which giving rise to the claims and the court concerned having jurisdiction over the parties against which the limitation order operates. In my view, the applicants seem to overlook that s 261 limitation is not based on equity but on policy consideration. The question of fairness does not arise. As long as the statutory requirements are met, it becomes applicable. It does not take into account the actual damage nor does it seek

to protect South African citizens. On the contrary, even if the persons who suffered the loss at the hands of foreign ships are South Africans, it applies to the prejudice of the South Africans. It does not require that the accident should have occurred in South Africa. All that it requires is that the claims be instituted in South Africa. It arbitrarily on policy considerations deprives the claimant from recovering a portion of his actual loss. It must be subjected to a restrictive interpretation.

[15] In my view, it is clear that s 261 of the Act does not prohibit a South African entity to do forum shopping. If it was, it would be a provision restricting the choice of a litigant to sue in any court with jurisdiction. Such a provision cannot be implied but it must be in express terms. It cannot be implied by giving the word claims/claimants an extended meaning. It must be established that the person who sought to be restricted is a claimant in the South African jurisdiction. Where there is doubt whether the person falls into a category of claimants but there is clear evidence that from inception, he made it clear that he is not going to claim within the South African jurisdiction and he has not so claimed, it would mean that he has not been shown to be a claimant in the South African jurisdiction for purposes of s 261 of the Act.

[16] There is no dispute regarding the dictionary meaning of the words used in s 261 of the Act. The Act has not assigned any specific definition to 'claim or claimant'. Further, by virtue of the collision taking place in South Africa, the claims arose in South Africa but it does not follow that the entities that suffered the loss are claimants in the South African jurisdiction. Each entity may pursue his or her claim before any court with jurisdiction. It matters not whether the entity itself is a South African entity. The s 261 limitation to be invoked requires that it be a person with a claim and the claim be instituted by proceedings in South Africa. Therefore, the first respondent, in a restricted sense, has not been shown to be a claimant in South Africa. There is no provision in the Act that if the claimant, as part of his claim claimed an indemnity for a claim against it, the entity that called for the indemnity, will itself be regarded as a claimant for purposes of the provisions of s 261 of the Act. The first respondent notified the second respondent of its claim. It was the second respondent's decision to pursue its claim

against the applicants in South Africa, not that of the first respondent. In my view, indemnity with its conditions and terms is an issue between the entity calling for indemnity and the entity the demand for indemnity is directed to. I have not been referred to or find any authority to the contrary. The authority dealing with when does a claim arise does not address the point. I agree with the applicants that it is not a requirement for one to be a claimant in the South African jurisdiction he must have commenced action in South Africa. A stage may be reached before the commencement of the action in South Africa that one has reached a stage where he is a claimant in the South African jurisdiction.

[17] Section 261 of the Act clearly envisages claims arising from the same collision in South Africa being dealt with together, but that must be confined to claims lodged in South Africa relating to the collision. Forum shopping is standard internal practice, if the Act intended to restrict it, it would have done so in clear terms. The establishment of a limitation fund in South Africa cannot be used to deprive a person who has no intention of suing in South Africa of his right to sue in any court with jurisdiction. *J Hare Shipping Law and Admiralty in South Africa* (2009) 2ed at 537 states that 'limitation of liability and its calculation is a statutory matter for the law of the forum. Any claim for damages, both contractual and delictual, brought in a forum of choice, of convenience, of commission or otherwise, is subject to limitation legislation ruling in the country of that forum. It is a remedy of the forum which is available to litigants in that forum, whether *incolae* or *peregrine*'. Therefore, a limitation fund in South Africa is for the South African claimants, namely; those who claimed in South Africa. It cannot be used to compel other persons to institute their claims in South Africa. Forum shopping may result in two or more competing limitation funds in different jurisdictions arising from one incident. See *Hare* at 146. The first respondent is not a claimant in South Africa and there are no legal basis to link it to the South African action(s). It is trite that the starting point in the interpretation of a statutory provision is that the words employed must be construed in accordance with their ordinary grammatical meaning provided an absurdity does not arise. The language of s 261 of the Act, read in context and having regard to the purpose of the provision, does

not permit the inclusion of an entity in the position of the first respondent as having instituted a claim in the South African Court.

Can the first respondent be declared to be subject to s 261 limitation in respect of actions instituted in foreign jurisdiction ?

[18] In the English case of *The 'Vovox 'Hollandia* [1988] 2 Lloyd's Rep 361 the following principles were restated: The right of shipowners to claim limitation is an ancient right and recognized internationally. Its classic form is an action by shipowners claiming a decree of limitation against all actual and potential claimants, commonly called limitation action. It is the right of shipowners alone to claim limitation, whether by action or defence and/or counter-claim. It is not necessarily unjust or inconvenient for liability and limitation to be tried separately and/or in different forums.

[19] In *Hare* para 11-4, it is stated 'Limitation of liability and its calculation is a statutory matter for the law of the forum. Thus, any claim for damages both contractual and delictual brought in the forum of choice, of convenience, of commission otherwise, is subject to the limitation legislation ruling in the country of that forum. It is a remedy of the forum which is available to the litigants in that forum whether *incolae* or *peregrine*. The forum's limitation, if there is such in place, will override a choice of law provision in a contract because limitation is a matter of procedural and not substantive law, regardless of what law created liability, in delict or in contract'.

[20] The applicants contend that limitation is a matter of substantive law. Both German and Hong Kong courts will apply substantive law of the *lex loci delicti* even if that is foreign law. It is argued that *Hare* is wrong, he relied upon the American case *The Titanic* which is a decision of the United States Supreme Court in respect of the United States Limitation statute. The proposition, it is argued, is wrong because it does not mention the South African case in which it was held that the limitation is a substantive right accruing to the party seeking to limit and that it does not accord with proper interpretation of section 261; it does not correctly reflect the position in the United Kingdom or other commonwealth countries with closer links to South African admiralty law regarding provisions similar to s 261; it does not accurately reflect the state of

United States law at the time of publication of the work.. In my view, it is clear that the issue is not as simple as stated in *Hare*. It is a complex issue and its resolution is far from predictable and different courts, even in the same jurisdiction, may come to different conclusions..

[21] The applicants have extensively and strongly argued that the correct position is that s 261 of the Act is a substantive law. It limits liability, and the nature and extent of delictual liability is determined by *lex loci*. A forum considering delictual liability applies *lex loci*. In my view, it is not necessary, for the reasons that appear below, to summarise in detail the arguments raised by the applicants. The first respondent contends that these arguments are arguments to be considered by the forum hearing the action or the forum before which limitation action is tried; it is not shown why the issue should be prejudged for the forum that shall hear the matter; the Act is a local statute applicable within the South African territorial jurisdiction; the issue raised is academic and it will not settle the dispute between the parties; and the decision of the this Court shall not bind the foreign court. This court ,it is argued,should exercise its discretion and refuse to determine the issue raised and dismiss the application.

[22] There is no dispute whether the s 261 limitation applies or not in the actions before the South African Court. Therefore, authority that limitation may be determined as a separate issue is not applicable. There is also no dispute that for an action instituted in a foreign court, if there is dispute whether limitation applies or not, that dispute may be subjected to litigation in a different forum. The dispute is whether the limitation that applies will be the limitation of the foreign jurisdiction hearing the matter or the limitation in the South African jurisdiction. In respect of all claims brought in South Africa, the South African court is the court to pronounce on the applicable limitation. Therefore, the actions instituted in the South African Court have no bearing on the question of whether it is desirable for the South African court to seek to determine for the foreign court the limitation to be applied by the foreign court. Such a dispute, in my view, appears to be a dispute that can appropriately be heard by the court hearing the limitation action and its decision, if it so wished, be appealed in the hierarchy of courts in

that jurisdiction. It is for the parties to prove the law applicable to the dispute including whether the issue in dispute is a matter of substantive law or procedural law. This may be a complex issue and the foreign court applying its own criteria will be better placed to determine the issue. See *Kuhne & Nagel AG Zurich v P A Distributors (Pty) Ltd* 1981 (3) SA 536 (W) p538-p540; *Society of Llyod's v Price*; *Society of Llyod's. v Lee* [2006] SCA 87 (RSA) para10-20.

[23] The applicants argue that they seek a decree against the world. The difficulty is that they seek a decree which might not be enforceable and therefore, constitute an academic exercise. A local court will naturally eschew deciding the issue that should be decided by another court. Courts generally, jealously guard against interference with their jurisdiction.

[24] In *Cilliers et al Civil Practice of the High Courts of South Africa* 5th ed Vol 2 at 1438F it is stated: 'Courts will not deal with abstract, hypothetical or academic questions in proceedings for declaratory order. A court has a discretion whether to grant or refuse an application for a declaratory order. Some factors which could be taken into account are the utility of the remedy, and whether, if granted it will settle the question at issue between the parties, the existence or absence of an existing dispute, must appear to flow from the grant of the order sought, and that, despite the fact that no consequential relief is being claimed or could be claimed, yet justice and convenience demands that a declaration be made, or that the order will be of practical significance, the considerations of public policy, the availability of other remedies'. It may be added that the declaratory order sought by the applicants has a pre-emptive element in it. It seeks an order deciding an issue which has not, but is to be decided by the foreign courts. It is an endeavor to be discouraged rather than be encouraged. In *Oceanic Steam Navigation Co. v Mellor*, 233 U.S. 718 (1914) at Mr Justice Holmes said: 'We see no absurdity in supporting that, if the owner of the Titanic were sued in different countries, each having a different rule affecting the remedy there, the local rule should be applied in each case. It can be imagined that, in consequence of such diverse proceedings, the owner might not be able to comply with local requirements for limitation, as it also is conceivable that, if it sought the advantage of an alien law, it might as a condition have

possible difficulties is no sufficient reason for not applying the statute as it has been construed , on the whole, it would seem with good effect.

[25] The applicants, as stated above, have instituted action for damages in this court against the respondents. It is claimed the second respondent failed to adopt policies and procedures regulating the proper pilotage of vessels in the port of Durban and failed to ensure that its pilots were properly trained as well as the crew for the tugs. The second respondent has pleaded and countered that the cause of the collision was the negligence of the master and crew of the vessel. In their plea to the counterclaim, the applicants raise the issue that, if found liable , they are entitled to apportionment and that their liability is subject to the limitation prescribed in s 261 of the Act. Likewise, the first respondent has instituted action for damages in Germany against the applicants. The issue of whether it is the limitation in s 261 of the Act or the *German Convention of Liability in Maritime Claims* that applies is raised.

[26] The limitation of liability of the owner of a ship is a maritime claim as contemplated in the Admiralty Jurisdiction Regulation Act, 1983. Rule 23 of the Rules Regulating the Conduct of the Admiralty Proceedings of the Several Divisions of the Supreme Court. The Act provides;

‘(1) In order to avoid a multiplicity of actions the court may make an order that any action pending before it be regarded as a a test action and that any other action to which one or more of the parties to the action so pending are parties and in which the same questions would arise abide the result of the test action and may make any order as to the procedure and representation in the said action as the court deems fit.

(2) Where any person claims to be entitled to a limitation of liability referred to in paragraph (w) of the definition of maritime claim in section 1 (1) of the Act, the court may give such directions as it deems fit with regard to the procedure in any such claim, the staying of any other proceedings and the conditions for the consideration of any such claim, which may include a condition that such amount as the court may order to be paid to abide the result of the consideration of the said claim, or that the claimant be required to admit for all or any claims made against him or her, or any other condition which the court deems fit’ The sub rules regulate multiplicity of actions within the same jurisdiction or issue an order relating to

local proceedings in view of proceedings in foreign courts. . They have no direct application in actions instituted or pending in foreign courts. Section 7(1) (a) of the Admiralty Jurisdiction Regulation Act 105 of 1983 as amended provides that 'A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted , if it is of the opinion that any other court in the Republic or any other court or any arbitrator , tribunal or body else where will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body' The provision authorizes the court to decline rather than to force the court to hear the matter. The provision entrenches the doctrine of *forum non conveniens*. See *MT TIGR , Bouygues Offshore SA and Another v Owners of the MT Tigr and Another* 1998 (4) SA 740 C at p741-p742.

[27] The issue is the determination of the appropriate forum to hear and determine the limitation proceedings pertaining to the first respondent. In my view, it is abundantly clear that it is undesirable to determine the issue of which limitation is applicable in separate local proceedings which will immediately result in a question whether the judgement is binding to the foreign court hearing the limitation action. The proper course is for the issue to be raised in an action before the forum hearing the action, and if a party is not satisfied with the outcome can appeal the decision of the particular court within the hierarchy of courts in that jurisdiction. There is nothing stopping the foreign jurisdiction applying the South African law to apply the South African limitation if it is found that it is the applicable limitation. But a local court should eschew to determine the applicable limitation for a foreign court. See *Caspian Basin v Bouygues Llyods* Law Reports Vol 2 p510. In *Bouygues* it was said the right to claim limitation whether by action or defence and/or counterclaim , is a right which belongs to the shipowner alone....there can be nothing surprising or inappropriate about a limitation action being commenced in the same forum as a claimant action to establish liability, but equally there is nothing unusual about a limitation action taking place in a different forum from that in which liability is being litigated'.

[28] In essence, the applicants seek a declaratory with the implication that arising from the collision, the s 261 limitation applies wherever the action may be instituted. The following is common cause:

- 1) For actions instituted in South Africa the s 261 limitation applies and there is no dispute relating thereto.
- 2) The South African court is asked to make a declaratory which has no relevance to the actions pending before it, if the first respondent is not a claimant in the South African court.
- 3) The determination of whether s 261 limitation applies is not necessarily connected to the establishment of the limitation fund. In other words the establishment of the limitation fund in a particular jurisdiction does not mean that limitation actions must be heard in that jurisdiction.
- 4) The crucial issue, whether s 261 limitation applies in foreign actions, is only if s 261 limitation is found to be substantive law and not procedural law. It is the issue for determination by the forum before which the limitation action has been lodged.
- 5) In the South African actions the issue of whether s 261 limitation is substantive law or procedural law does not arise at all.
- 6) The question is then on what basis is the South African court required to determine an issue which has no relevance for the actions before the South African court.
- 7) Even if the South African court would embark on determining whether s 261 limitation is substantive law or procedural law, such a decision might be of little or no value to the foreign court seized with the issue.
- 8) Lastly, it is common cause that the issue of whether s 261 limitation is substantive or procedural law may be raised and be determined by the foreign court.

[29] The crisp question is whether the South African court is clearly or distinctly shown to be the forum in which the identified limitation issue can suitably be tried for the interests of parties and for the ends of justice. See *Volvox Hollandia* at 373. In my view, it remains more appropriate that the question of whether s 261 limitation applies in respect of the first respondent's foreign claims, ought to be determined by the court for which such determination has significance and relevance.

[30] Lord Justice Dillion in *Volvox Hollandia* at 376 stated 'in a multiple claims case, where there are several claims of several claimants arising out of the occurrence, and the

question of whether the shipowner can limit his liability must be decided in an action in rem to bind all claimants, that the shipowner who alone can start such action can choose the forum in which to start it. But I do not see that it follows that the shipowner has an overriding or unchallengeable right to choose the forum in a single claim case where the issue of limitation and all other issues can be decided in proceedings in personam between the claimant and the shipowner. That would be to give the shipowner a special procedural privilege, of deciding the forum, which is not necessary to give effect to his right to limit in a single claim case and which other litigants involved in litigation in personam do not have'. In my view, the actions in South Africa are actions in rem and the South African limitation binds all claimants in that forum but not claimants instituting proceedings in personam in foreign courts.

[31] In *Caltex Singapore PTE Ltd and Others v BP Shipping Ltd* 1996 Vol 1 Lloyd's Reports 286 wherein the defendant, a British company, in respect of claims arising out of an incident in Singaporean waters, applied for a stay of the action in England on the grounds that the claim should be heard and determined in Singapore, the reason being that the limit of the defendant's liability is likely to be greater in England than in Singapore. The plaintiff, a Singaporean company, wanted to proceed in England where the limitation was greater than in Singapore. The court (Mr. Justice Clarke) stated at p289: 'Principles to be applied, derived from the speech of Lord Goff in the *Spiliada* at pp.10 to 12; pp.476 to 478, may be summarized as follows:

1. The Court will only grant a stay where it is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action; that is where the case may be tried more suitably for the interest of all parties and the ends of justice.
2. The problem should be approached in two stages. At stage one the burden is on the defendant to show both that England is not the natural or appropriate forum for the trial of the action and that there is another forum which is clearly and distinctly more appropriate than England.
3. If the defendant discharges that burden, it is necessary to move to stage two. It is then for the plaintiff to persuade the Court that there is some special circumstance which requires that the trial should take place in England.

[32] Mr Justice Clarke at p289 proceeded : ‘As limitation of liability , no question arises under English law because the limitation fund is greater than the plaintiff’s claim. Thus the question whether BP is entitled to limit its liability under the law of Singapore will arise in Singapore, but will only arise in England if BP is entitled to rely upon the law of Singapore as the *lex loci delicti*. As will be seen below , I have reached the conclusion that the Singapore law of limitation of liability should be characterized under English law as procedural and not substantive. If that is correct, it follows that the question whether BP is entitled to limit its liability will not arise in England and that Singapore is the only forum in which that question can arise’. In our case, as stated above, the question is which courts are better placed to determine which limitation applies in the claims before those courts. The answer is, in my view, the German and Hong Kong courts. These courts applying their own law will determine whether it is their limitation of liability that applies or the South African limitation. If they find that South African limitation is substantive law they will apply it as *lex loci delicti*.’

[33] The applicants,correlty, relying on *Akai Pty People’s Insurance Co. Ltd.*[1988] 1 Llyod’s Rep 90 at 108; *Sesmic Shipping Inc & Anor v Total E & P UK Plc* [2005] EWCA Civ 985 at 50-51,contend that ‘no court can bind another independent court situated in a foreign and sovereign jurisdiction. The recognition and enforcement of foreign court orders is always a matter for the foreign State to permit or disallow as a matter of policy, and for a court in such foreign State to apply or not, depending on the factual circumstances and the application of the law of such State. The position is accordingly that a German or Hong Kong Court is at liberty, in the application of its own law, to determine whether it will apply a South African limitation decree or not’. The contention begs the question, is there really any need for the South African Court to determine the issue or is it a futile exercise ?. Section 261 of the Act has nothing in it justifying a construction that it was intended to apply extra-territorially. Therefore, it is subject to the presumption against extra-territorial application.

Conclusion

[34] I have found that the first respondent is not a claimant before the South African forum and therefore the s 261 limitation does not, on those grounds, apply to it.

Secondly, the critical question in the second inquiry, is whether s 261 limitation is substantive law or procedural law. If it is found to be substantive law, it may justify the granting of the declaratory relief. In my view, the German and the Hong Kong courts are the forums better placed and it is in the interest of justice that they be the forums that determine the issue. Taking into consideration the above-mentioned factors, it appears to me that there is no basis to exercise my discretion in favour of deciding the issue raised. I find, therefore, that there is a compelling case to exercise my discretion against granting the declaratory order. The first respondent submitted that if the outcome of the main application is in its favour, its application to stay falls away and need not further be considered. There were no arguments addressed to me whether the costs relating to the granting of leave to file supplementary affidavits and the stay application should be treated differently from the costs of the main application, and I see no reason to do so.

[35] As stated above, the second respondent has not taken part in these proceedings. It filed a notice to abide. It means the second respondent is not opposing the granting of the relief as claimed in the notice of motion. There is no indication that the second respondent, at any stage, resisted that its claim against the applicants in South Africa is subject to the s 261 limitation. The second respondent has instituted action against the applicants in South Africa. It has not, and it appears to have no basis, to claim that its claim against the applicants is not subject to s 261 limitation. Of concern is the wide terms of the relief sought which may result in unintended consequences. Without prejudging the issue, it has not been shown that it is necessary to issue the relief as claimed against the second respondent. The focus of the applicants is the first respondent. In the circumstances, I see no reason to make any order against the second respondent. However, if it is found necessary, the applicants are granted leave on the same papers, supplemented as it may be necessary, to seek an appropriate order against the second respondent.

[36] I, accordingly, make the following order.

The application is dismissed with costs including the costs of two counsel.

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MNGADI, AJ

APPEARANCES

Case Number : A 50/2017

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Matter argued on : 23 March 2018

Judgement delivered on : 29 March 2018