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

REPORTABLE

Case no: A16/2014

Name of ship: MV 'DA QING XIA'

In the matter between:

LBH MOZAMBIQUE LIMITADA **APPLICANT**

~~and~~And

THE FUND CONSISTING OF THE PROCEEDS OF
THE SALE OF THE CARGO OF 4,904.78 TONS OF CHROMITE
ORE CONCENTRATES LATELY LADEN ON BOARD
THE MV 'RED FIN' **RESPONDENT**

CHINA CONSTRUCTION BANK **INTERVENING RESPONDENT**
CORPORATION

Judgment Date: 25 March 2015

PLOOS VAN AMSTEL J

[1] This matter concerns the distribution of a fund as contemplated in section 9(2) of the Admiralty Jurisdiction Regulation Act[1] pursuant to the sale of a cargo of

[1] Admiralty Jurisdiction Regulation Act 105 of 1983.

chromite ore concentrates. The cargo was attached by the applicant[2] in order to found or confirm jurisdiction for the purpose of an action *in personam*. No security was put up to secure its release and on 4 April 2014 this court directed that it be sold. It also appointed a referee to receive, examine and report to the court on the validity and ranking of claims in respect of the fund. The cargo was sold by private tender for a sum of USD 721 002.

[2] Four claims were lodged with the referee. The claimants were the applicant (LBH Mozambique Limitada), the intervening respondent (China Construction Bank Corporation), Oldendorff Carriers GmbH and Mushtaq Oosman, the liquidator of Metalmin Metals & Minerals Ltd, who owned the cargo. Metalmin is a company based in Mauritius and a peregrinus of this country.

[3] The referee recommended that the claims of the applicant and Oldendorff Carriers be accepted, and made a recommendation with regard to their ranking[3]. These recommendations are not challenged by anyone. He recommended that the claim by the liquidator not be accepted as he is in terms of the Act[4] entitled to the balance after all the claims have been paid, and did not have to claim against the fund. This recommendation is also not challenged by anyone.

[4] On 1 September 2014 this court made an order, by consent, confirming the undisputed part of the referee's report and directing that one of the applicant's claims and that of Oldendorff Carriers be paid from the fund, together with interest and certain costs. The applicant's remaining claim is not in issue but has not been paid because the issue regarding the claim by China Construction Bank Corporation has to be resolved first. For the sake of brevity I shall refer to it as 'the bank'.

[5] The referee recommended that the claim by the bank be disallowed on the ground that it is not a maritime claim as defined in the Act. He concluded that the claim was otherwise in order and properly documented. The only issue before me is therefore whether this claim is a maritime claim. If it is, then it ranks under section 11(4) (f), which is the same ranking as the applicant's remaining claim.

---

[2] In terms of section 3(2) (b).
[3] In terms of section 11.
[4] Section 11(13).

[6] The bank's claim is for a sum of USD 18 628 810 in respect of banking facilities granted to Metalmin to finance its trade in commodities. Part of this money was used to purchase the cargo which was attached and sold. The nature of the bank's claim against Metalmin is not such that it falls within the definition of a maritime claim in section 1(1) of the Act. The only basis on which the bank contends that its claim against the fund is a maritime claim is section 1(1) (x) of the definition, which refers to 'any claim for, arising out of or relating to the distribution of a fund or any portion of a fund held or to be held by, or in accordance with the directions of, any court in the exercise of its admiralty jurisdiction, or any officer of any court exercising such jurisdiction'. In other words, the bank contends that its claim is a maritime claim by virtue of the fact that it is a claim for a share of the fund. It accepts that, but for the existence of the fund, it would not have been a maritime claim which could have been enforced under the admiralty jurisdiction of this court.

[7] Counsel for the bank relied on the judgment of Thirion J in *Continental Illinois Bank National and Trust Co of Chicago v Greek Seaman's Pension Fund*[5] as authority for the proposition that any claim for, arising out of or relating to the distribution of a fund is a maritime claim in terms of section 1(1) (x). The problem which confronted Thirion J was the following. The Greek Seamen's Pension Fund lodged a claim with the referee in respect of contributions due in respect of the master and crew of the vessel to various funds operated by the claimant, which amounts it was obligatory for the shipowner to pay and, in regard to a portion thereof, to deduct from wages. Section 11(1)[6] provided that claims with regard to a fund 'shall be paid in the following order', which, in terms of subsection (1) (c) (i), included 'wages and other sums due to or payable in respect of the master, officers and other members of the ship's complement, in connection with their employment on the ship'. Although the claim fell within the wording of section 11(1) (c) (i), the applicant (who opposed the confirmation of the recommendation made by the referee) argued that it was not a maritime claim as defined in section 1 and therefore could not be entertained in the distribution of the fund. The respondent contended that its claim for a share of the fund fell within section 1(1) (ii) (u) of the definition, which read 'any claim with regard to the distribution of a fund or any portion of a fund paid or to be paid into or to or held or to be held by a court in the exercise of its admiralty

[5] *Continental Illinois Bank National and Trust Co of Chicago v Greek Seaman's Pension Fund* 1989 (2) SA 515 (D).
[6] As it read then.

jurisdiction or an officer of such a court'. At 529D Thirion J said 'I find it difficult to think of any matter in respect of which para (u) would serve to confer Admiralty jurisdiction on the Court unless it be that contended for by counsel'. At 529G-H he said the following: 'The conclusion to which I come is that a maritime claim as defined in para (u) includes any claim which with regard to the distribution of a fund in terms of s 9 is made for a share of the money in the fund and in respect of which the claimant would on proof of his claim be entitled to participate in the distribution of the fund. In my view therefore respondent's claim is a maritime claim under para (u) of s 1(1) (ii) of the Act'. He in other words held that although the claim was not a maritime claim in its own right, it qualified as one when it was lodged against the fund.

[8] The Act was substantially amended on 1 July 1992.[7] Some new provisions were introduced which are relevant to a fund and its distribution, while others were amended and are now different from what they were when *Continental Illinois Bank* was decided.

[9] The answer to the bank's contention must be sought in the proper interpretation of the Act as it reads today. I must endeavour to attribute a meaning to the relevant provisions, having regard to the language used, and the context and purpose of the Act as a whole.[8]

[10] The purpose of the Act is to provide for the vesting of the powers of the admiralty courts of the Republic in the provincial and local divisions of the High Court, for the extension of those powers, and for the law to be applied by and the procedure applicable in, those divisions.[9] In Hofmeyr's *Admiralty Jurisdiction, Law and Practice in South Africa,*[10] the learned author says the following: 'The Act, and more particularly a series of amendments to the Act, have served to expand the boundaries of admiralty jurisdiction further than other jurisdictions which have inherited the philosophy of English admiralty law. This enthusiasm to extend the scope of admiralty jurisdiction must not, it is submitted, be allowed to result in the abrogation of principle and the inclusion of claims which do not properly fall within the purview of admiralty proceedings. If the boundaries of jurisdiction are stretched too

---

[7] By the Admiralty Jurisdiction Regulation Amendment Act 87 of 1992.
[8] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)
[9] See the preamble to the Act.
[10] 2nd ed at 21.

far, well-recognised principle will be diluted and the rationale for a separate admiralty jurisdiction will be undermined'.

[11] The High Court deals with maritime claims in the exercise of its admiralty jurisdiction and with claims which are not maritime claims in its ordinary civil jurisdiction. If the bank wished to institute an action against Metalmin in this country for payment of its claim, it would have had to do so in the ordinary civil jurisdiction as its claim is not a maritime claim as defined in the Act.

[12] A fund can arise in more than one way. When property which has been arrested in terms of the Act is sold pursuant to an order by the court, the proceeds shall, in terms of section 9(2), constitute a fund. Section 8(2) provides that the same applies to property which has been attached to found or confirm jurisdiction, as if it had been arrested in an action *in rem*. And section 3(11) (a) provides for a fund consisting of any security or undertaking given in terms of subsection (10) (a),[11] or the proceeds of the sale of any property mentioned in subsection (5) (a) to (e), either in terms of any order made in terms of section 9, or in execution or otherwise.

[13] Section 3(11) (b) in turn provides that a fund shall, for all purposes, be deemed to be the property sold or the property in respect of which the security or an undertaking has been given. The fund in other words takes the place of the property which had been attached or arrested. The question then arises why a claimant who was not entitled to proceed against such property in admiralty should be entitled to share in the fund which took its place.

[14] Section 11(1) (b) provides that property other than property mentioned in section 3(5) (a) to (e) may, in respect of a maritime claim, be sold in execution, and the proceeds thereof distributed, in the ordinary manner. No fund is then created in terms of the Act.

[15] The Act does not specify who may claim a share in the distribution of a fund. It does however specify the claims which shall be paid and the order in which they shall be paid.[12] In *The Kingston*[13] Bristowe J said section 11(1), as it read then,

---

[11] Subject to the proviso mentioned there.

[12] Section 11(1) (a) – '…the relevant maritime claims mentioned in subsection (2) shall be paid in the order prescribed by subsections (5) and (11)'.

merely described the order in which claims were to rank. He said one had to look elsewhere to ascertain what sort of claims came into consideration at all. This seems to me to apply also to the amended section 11(1), having regard to the last category in the prescribed order, which is 'any other maritime claim'.[14]

[16] In the present context two of the amendments to section 11 are significant. Before 1992 subsection (1) provided that '*Claims* with regard to a fund in a court in terms of this Act… shall be paid in the following order…' Section 11(1) (a) now provides that the '*relevant maritime claims*' shall be paid in the order prescribed by subsections (5) and (11). The second amendment relates to the order in which claims are to be paid. Before 1992 the preferent claims were listed in section 11(1) (a) to (e) and were followed in subsection (f) by 'all other claims". The preferent claims are now listed in section 11(4) (a) to (e) and are followed in subsection (f) by 'any other maritime claim'. This seems to me to mean that in order to share in the fund a claim has to be a maritime claim in its own right, and not merely on the basis that it is a claim against the fund.

[17] A new provision which was introduced in 1992 is section 10A (2) (a). This sub-section provides that if a court makes an order referring all claims against a fund to a referee then all proceedings in respect of claims which are capable of proof for participation in the distribution of the fund shall be stayed and any such claim shall be proved only in accordance with such order. The wording suggests to me that some claims are entitled to participate in the fund and some are not. It seems to me that the only sensible distinction is that the provision applies to claims which can be brought under the Act. In other words, it has to be a maritime claim vis-a vis the debtor. Were it otherwise all non-maritime claims against the owner of the property which had been sold will be stayed and shall be proved only in accordance with the order, irrespective of whether the plaintiff concerned intended to claim a contribution from the fund. This will include, for example, a claim based on an overdraft or a delict such as defamation. Such a result seems to me to be absurd.

[18] The effect of section 10 is that property arrested in respect of a maritime claim, security given in respect of it, or the proceeds of its sale in the present context, shall not, except as provided in section 11(13), vest in a trustee in insolvency and

---

[13] *MV 'Kingston' v Creditcorp Ltd* (1993) 14 ILJ 627 (D) at 633H.
[14] Section 11(4) (f). When The *Kingston* was decided this category was described as 'all other claims'.

shall not form part of the assets to be administered by a liquidator. Nor shall any proceedings in respect thereof, or the claim in respect of which that property was arrested, be stayed by reason of the sequestration or liquidation of the owner. This protection is afforded to persons who have maritime claims which can be brought under the Act. It is not available in the ordinary civil jurisdiction. It is difficult to see on what basis such protection should be extended to a non-maritime claimant who wishes to share in a fund.

[19] Counsel for the applicant pointed out certain anomalies which would exist if a non-maritime claim[15] could share in the fund. It would rank under s 11(4) (f), pari passu with maritime claims. In terms of s 11(11) it would rank above some associated ship claims (which are maritime claims) and in terms of section 11(13) it would be paid before the balance is paid to the trustee or liquidator of the owner's insolvent estate.

[20] The question remains what the purpose of the definition in section 1(1) (x) is. Why is a claim relating to the distribution of a fund classified as a maritime claim? Counsel for the bank submitted that the purpose could not have been to give the court admiralty jurisdiction with regard to the distribution of a fund as it already has that power in terms of sections 5(2) and 10A (1). He submitted that the purpose of the subsection is to make any claim relating to the distribution of a fund a maritime claim, whether or not it is a maritime claim in its own right. This was the argument in *Continental Illinois Bank*.

[21] Counsel for the applicant submitted that such a construction is not compatible with the current wording of the Act. He suggested that the purpose of the definition in s 1(1) (x) may be to enable a party who does not have a maritime claim and does not seek to share in the fund, for example a bank who holds the proceeds of the sale or the security, to approach the court for a declarator with regard to the distribution of the fund, or directions with regard to its obligations. I am not certain that the purpose of the subsection is as suggested by counsel for the applicant. It may be, but the suggested purpose may also be merely the fruit of counsel's ingenuity.

---

[15] The suggestion being that in terms of s1(1) (x) it then becomes a maritime claim when it is lodged against the fund.

[22] I am nevertheless of the view, in the light of the matters to which I have referred, that it is not the purpose or effect of section 1(1) (x) to turn a non-maritime claim, which cannot be enforced under the Act, into a maritime claim when it is lodged against a fund.

[23] In *The Olympic Countess*[16] it was pointed out that the definition of 'maritime claim' is a gateway provision into admiralty jurisdiction, and its object is to set the outer limits of jurisdiction; the claims listed are accordingly couched in wide terms and may overlap.

[24] The position may well be that the definition in subsection 1(1) (x) is superfluous. The Act has been hailed as innovative and designed to give effect to the underlying philosophy of the admiralty, namely, the avoidance of unnecessary formality and the promotion of expedition.[17] I accept that this is so, but I should add that I am not aware that the Act has ever been hailed as a model of clarity or draftsmanship. While the purpose of section 1(1) (x) is not clear, I am satisfied, having regard to the Act as a whole and the amendments which were introduced in 1992, that the proper meaning of the subsection is not as contended for by the bank. I conclude therefore that the bank does not have a maritime claim and is not entitled to share in the distribution of the fund.

[25] There is some support for the conclusion to which I have come. In *Erasmus v Michael James (Pty) Ltd (t/a The Michael James Organisation) and Others; (Standard Bank of SA Ltd Intervening); Erasmus, Nel and Standard Bank of SA Ltd Intervening: Sashwood (Pty) Ltd and Another v The Fund Constituting the Proceeds of the First and Second Judicial Sales of the MV Nautilus*[18] Scott J said: 'The claim which he seeks to recover…is a claim arising out of the reconstruction of the vessel; it is a maritime claim and hence a claim which the Act contemplates will participate in the fund created by the sale of the vessel'. The clear implication is that not all claims can participate in the fund – it has to be a maritime claim. And Hofmeyr, *Admiralty Jurisdiction, Law and Practice in South Africa,*[19] says the 1992 amendments to the

---

[16] *MV Olympic Countess: Fortis Bank (Nederland) NV v Orient Denizcilik Turizm Sanayi VE Tricaret AS* 2008 (1) SA 376 (SCA) at 381I.
[17] Gys Hofmeyr *Admiralty Jurisdiction, Law and Practice in South Africa*, 2nd ed.
[18] 1994 (2) SA 528 (C) at 558E-F.
[19] 2nd ed at 288.

Act make it clear that only persons who have maritime claims can participate in the distribution of a fund.

[26] The order which I make is as follows:

(a) The referee's report dated 28 July 2014 is confirmed.

(b) The registrar of this court is authorised and directed to effect payment to the applicant from the Respondent Fund ('the fund'), in accordance with the referee's recommendations, as follows:

(i) payment of the amount of USD 277,331.10 in respect of its claim for cargo agency services, such claim to rank in terms of section 11(4) (f) of the Admiralty Jurisdiction Regulation Act ("the Act");

(ii) payment of interest on the amount of USD 277,331.10 at the rate of 15.5% per annum from 22 March 2014 until date of payment from the fund, such interest to rank in accordance with section 11(4) (f);

(iii) payment of the applicant's legal costs of lodging the aforementioned claims, on a party and party scale, as taxed or agreed, such costs to rank in accordance with section 11(4) (f).

(c) Once the amounts set out in paragraph (b) and the costs referred to in paragraph (d) have been paid in full, the registrar is authorised to pay the balance remaining in the fund, if any, over to the duly appointed liquidator of the erstwhile owner of the attached cargo, Metalmin Metal and Minerals Limited.

(d) Save as provided in paragraph (f) hereunder, the applicant's costs of this application, on the scale of attorney and own client, as taxed or agreed, shall be paid by the fund, such costs to include the costs of two counsel.

(e) The application by the intervening respondent for a variation of the referee's report and payment of its claim from the fund is dismissed.

(f) The intervening respondent is ordered to pay the costs of the application to intervene, the costs occasioned by its opposition to the application for confirmation of the referee's report and the costs of its application for payment from the fund, including the costs occasioned by the applicant's employment of two counsel.

PLOOS VAN AMSTEL J

Appearances:

For the Applicant	**:**	Adv. S Mullins SC, with Adv. L Mills
Instructed by	**:**	Bowman Gilfillan Inc. Durban
For the Intervening Respondent	**:**	Adv. M Fitzgerald SC
Instructed by	**:**	Edward Nathan Sonnenberg Durban
Date of Hearing	**:**	13 March 2015
Date of Judgment	**:**	25 March 2015