

SOUTH AFRICA / JUDGMENT

Columbus Stainless (Pty) Ltd v Kuehne & Nagel (Pty) Ltd and Another (3580/2013) [2014] ZAKZDHC 19 (23 May 2014)

[2014] ZAKZDHC 19

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Ploos van Amstel

CASE / FILE NUMBER

3580/2013

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 3580/2013

In the matter between:

COLUMBUS STAINLESS (PTY) LTD.....APPLICANT

and

KUEHNE & NAGEL (PTY) LTD.....1ST RESPONDENT

NATIONAL PORTS AUTHORITY OF SOUTH AFRICA.....2ND RESPONDENT

And

CASE NO: 3583/2013

NATIONAL PORTS AUTHORITY OF SOUTH AFRICA..... APPLICANT

COLUMBUS STAINLESS (PTY) LTD.....2ND RESPONDENT

Order:

- (a) It is directed that the actions under case numbers 3580/13 and 3583/13 be proceeded with as admiralty actions in this court, exercising its admiralty jurisdiction, and the Registrar is directed to allocate case numbers to them in accordance with the admiralty practice in this Division.

- (b) The plaintiffs in both actions are given leave to amend the summonses and particulars of claim so as to bring them in line with Form 1 of the First Schedule to the Admiralty Rules and the order by Lopes J with regard to the claims being maritime claims.
- (c) The counter applications in both applications are dismissed with costs.
- (d) In each of the actions the plaintiff is ordered to pay the excipient's costs in relation to the exception which was upheld by Lopes J, on an unopposed basis.
- (e) In each of the applications the first respondent (Kuehne and Nagel (Pty) Ltd) is ordered to pay the costs occasioned by its opposition to the applications.
- (f) All the costs orders will include those occasioned by the employment of two counsel.
- (g) The remaining exceptions are to be heard by the court in the exercise of its admiralty jurisdiction after the pleadings have been amended as aforesaid.

Judgment

PLOOS VAN AMSTEL J:

[1]

There are two applications before me in which orders are sought in terms of section 7(2) (a) of the Admiralty Jurisdiction Regulation Act^[1] (the AJRA) directing that two actions pending in this court be transferred to this court exercising its admiralty jurisdiction.

[2] The two actions commenced in the South Gauteng High Court. They arise out of a fraud which was allegedly committed by an employee of Kuehne and Nagel (Pty) Ltd. The picture which emerges from the pleadings is as follows. Columbus Stainless (Pty) Ltd is a producer and exporter of stainless steel. It contracted with Kuehne and Nagel to provide it with clearing and forwarding services in respect of the exportation of stainless steel, in respect of which cargo dues had to be paid to the National Ports Authority of South Africa. The cargo dues payable in respect of stainless steel were higher than those payable in respect of other steel. It was part of Kuehne and Nagel's duties to prepare and submit the necessary documentation to the Ports Authority relating to the clearing of the shipments, including the tariff description of the goods and the applicable rate for the calculation of cargo dues. It also paid the cargo dues to the Ports Authority on behalf of Columbus. Kuehne and Nagel invoiced Columbus for the disbursements which it had made as well as a disbursement fee, which was expressed as a percentage of the disbursement. An employee of Kuehne and Nagel

misrepresented to the Ports Authority over a period of time that what was being exported was steel other than stainless steel, and paid the cargo dues at the lower rate. She however represented to Columbus that cargo dues for stainless steel had been disbursed and claimed from it the higher amount together with a percentage thereof as the disbursement fee.

- [3] In the first action Columbus claimed damages from Kuehne and Nagel in respect of the money which Columbus had paid to it as a result of the misrepresentation, the penalties which the Ports Authority has claimed from Columbus and the rebates which it would have earned if the shipments had been recorded as stainless steel. The total claim is for some R20m together with an indemnity in respect of the claim against it by the Ports Authority. This was case number 45566/11 in Johannesburg. In the second action the Ports Authority claimed damages from Kuehne and Nagel and Columbus arising out of the misrepresentation relating to the nature of the steel which was exported. The total claim is for some R20,5m plus a 100% penalty on the amount under declared and underpaid. This was case number 20520/11 in Johannesburg.
- [4] Kuehne and Nagel delivered an exception to the particulars of claim in both actions, inter alia, on the basis that the claims were maritime claims as defined in section 1 of the AJRA, with the result that the South Gauteng High Court did not have jurisdiction to hear the action. On 28 September 2012 that court ordered, in terms of section 3(1) of the Interim Rationalisation of Jurisdiction of High Courts Act[2], that the proceedings be transferred to this court. That was done and the registrar of this court assigned case numbers 3580/2013 and 3583/2013 to the actions.
- [5] The plaintiffs then launched the applications which are now before me, in which they sought orders declaring that their claims are maritime claims and that the actions should be transferred to this court exercising its admiralty jurisdiction. Kuehne and Nagel opposed both applications and persisted in an exception based on the fact that the actions related to maritime claims and that this court has no jurisdiction to deal with them. On 28 November 2013 Lopes J made an order, by agreement, deciding that the claims in both actions were maritime claims and upholding the exception by Kuehne and Nagel on that ground. What remains in issue before me is what should happen to the actions in consequence of that decision, and the remaining exception.
- [6] Section 7(2) provides as follows:
- ‘When in any proceedings before a provincial or local division, including a circuit local division, of the Supreme Court of South Africa the question arises as to whether a matter pending or proceeding before that court is one relating to a maritime claim, the court shall forthwith decide that question, and if the court decides that-
- (a) the matter is one relating to a maritime claim, it shall be proceeded with in a court competent to exercise its admiralty jurisdiction, and any property attached to found jurisdiction shall be deemed to have been attached in terms of this Act;

- (b) the matter is not one relating to a maritime claim, the action shall proceed in the division having jurisdiction in respect of the matter: Provided that if jurisdiction was conferred by the attachment of property by a person other than an incola of the court, the court may order the action to proceed as if the property had been attached by an incola, or may make such other order, including an order dismissing the action for want of jurisdiction, as to it appears just’.
- [7] The Afrikaans text of the Act, which was the one signed by the State President, provides as follows in section 7(2): ‘...indien die hof beslis dat-
- (a) die aangeleentheid een is wat op ‘n maritieme eis betrekking het, moet die aksie voortgaan in ‘n hof wat bevoeg is om sy admiraliteitsjurisdiksie uit te oefen, en enige goed waarop beslag gelê is om jurisdiksie te vestig, word geag ingevolge hierdie Wet in beslag geneem te gewees het...’.
- [8] The question whether a matter pending or proceeding before a court is one relating to a maritime claim may arise in a court exercising its ordinary civil jurisdiction or in a court exercising its admiralty jurisdiction. In other words, a court exercising its ordinary civil jurisdiction may decide that the matter relates to a maritime claim and direct that it shall proceed in a court exercising its admiralty jurisdiction; or an admiralty court may decide that the matter does not relate to a maritime claim and direct that it shall proceed in a court exercising its ordinary civil jurisdiction.
- [9] The consequence of the decision by Lopes J that the matters relate to maritime claims is that the matters ‘...shall be proceeded with in a court competent to exercise its admiralty jurisdiction...’[3]. The parties before me were not ad idem as to how this should work in practice. In the application papers both Columbus and the Ports Authority sought orders transferring the actions to this court, exercising its admiralty jurisdiction. In argument it was contended on their behalf that there is no need for a transfer of the actions and that I should simply direct that they proceed before this court in the exercise of its admiralty jurisdiction. Kuehne and Nagel contends that the actions should be dismissed for a want of jurisdiction and that they have to start afresh in a court which is competent to exercise its admiralty jurisdiction. I think it will be useful to refer to the structure of our Superior Courts before I come to the interpretation of section 7 (2).
- [10] The courts of the Republic are the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrates’ Courts and any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates’ Courts.[4] The High Court of South Africa consists of a number of Divisions, including the KwaZulu-Natal Division, with its main seat in Pietermaritzburg.[5] The local seat of the Division is in Durban.[6] A Division 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 all other matters of which it may according to law take cognisance.[7] A Division also has admiralty jurisdiction. Section 2(1) of the AJRA provides that each provincial and local division, including a circuit local division, shall have admiralty jurisdiction to hear and determine any maritime claim, irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner. Section 3(3) contains a limitation on this general jurisdiction and provides that an action in personam may not be instituted in a court of which the area of jurisdiction is not adjacent to the territorial waters of the Republic, unless the claim is one of those referred to in subsections (a), (b) or (c).

- [11] The separate courts of admiralty which we previously had in this country were abolished by the AJRA[8], which repealed Chapter 27 of the Colonial Courts of Admiralty Act of 1890 in so far as it applied in relation to the Republic, with one exception which is not relevant for present purposes. Unlike the Labour Court[9] and the Equality Court,[10] the courts which exercise admiralty jurisdiction are not separate courts which are distinct from the High Courts. The Divisions of the High Court exercise ordinary civil jurisdiction and admiralty jurisdiction.
- [12] The area of jurisdiction of this court is adjacent to the territorial waters of the Republic, with the result that the limitation on jurisdiction in s 3(3) of the AJRA does not apply to it. It has ordinary civil jurisdiction and admiralty jurisdiction, and the nature of the matter before it determines which jurisdiction it will exercise.
- [13] Section 7(2) (a) of the AJRA provides that once the court has decided that a matter pending or proceeding before it is one relating to a maritime claim, it shall be proceeded with in a 'court competent to exercise its admiralty jurisdiction...'. If the South Gauteng High Court (where the two actions were instituted) had decided that the actions related to maritime claims it would not have been competent to exercise its admiralty jurisdiction, having regard to s 3(3) of the AJRA. It would then have had the power to order that the actions be transferred to a Division competent to exercise its admiralty jurisdiction.[11] That court did not deal with the actions in terms of s 7(2) and did not make a decision as to whether they related to maritime claims or not. Instead it ordered that the matters be transferred to this court in terms of 3(1) of the Interim Rationalisation of Jurisdiction of High Courts Act.
- [14] As I have said, after the matters were transferred here Lopes J made a decision that the actions related to maritime claims. In terms of s 7(2) (a) they shall now be proceeded with in a court 'competent to exercise its admiralty jurisdiction'. This court is such a court. It is competent to exercise its admiralty jurisdiction. Hence the submissions by Columbus and the Ports Authority that there is no need to transfer the actions anywhere, all that is required is a directive that they should proceed in this court, exercising its admiralty jurisdiction and subject to the AJRA and the Admiralty

Rules.

- [15] Counsel for Kuehne & Nagel submitted that this court does not have the power to make such an order and that all it can do is to dismiss the actions for want of jurisdiction. His main submissions were as follows. Although this court has admiralty jurisdiction it can only exercise such jurisdiction in admiralty actions which were brought before it in the exercise of its admiralty jurisdiction. Section 7(2) does not contemplate a transfer of an action which was brought in the 'wrong court', in the sense that a maritime claim was brought in the ordinary jurisdiction, or vice versa. The words in subsection (2) (a) '...shall be proceeded with in a court competent to exercise its admiralty jurisdiction...' mean that the action has to start afresh in such a court. The language of s 7(2) is not the language of transfer and in the absence of a statutory provision to that effect this court, sitting in its ordinary jurisdiction, has no power to make any order where it has decided that the action relates to a maritime claim, other than to dismiss the action on the basis that it has no jurisdiction. Similarly, a court sitting in its ordinary jurisdiction has no power to convert an action before it into an admiralty action. Counsel referred to s 1(2) of the AJRA and submitted that an admiralty action can only be commenced in one of the four ways set out in the section, which does not include the conversion by the court of an ordinary action into an admiralty action.
- [16] I find the submissions on behalf of Kuehne & Nagel inconsistent with the wording and purpose of s 7(2). The result contended for seems to me to be technical, impractical and oppressive, if I may borrow a word from *Natal Joint Municipal Pension Fund v Endumeni Municipality*[12].
- [17] What is essentially in issue before me is the proper interpretation of s 7(2). In an article entitled 'Maritime Law in the Courts after 1 November 1983'[13] DB Friedman, who was then a judge of this Division and a respected admiralty lawyer, said the Act was, and was intended to represent, a pragmatic approach to the real problems of real people in the actual world of shipping. He said the Act and the Rules were designed to bring proceedings to court expeditiously and with a minimum of pre-trial technicalities, with the time-wasting posturing which they, in turn, often create. In discussing the issue whether a counterclaim in an admiralty action which does not fall within the definition of a maritime claim should be governed by the Admiralty Rules or the Uniform Rules he said the solution to the problem did not seem to be of much consequence, since, from a practical point of view, it mattered little whether the court was dubbed an admiralty court or a provincial or local division exercising its ordinary jurisdiction as the same judge could easily, and at one and the same time, adjudicate on both claim and counterclaim.
- [18] The modern approach to the interpretation of legislation and contracts is that it is the process of attributing meaning to the words used, 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.[14] 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 JA 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, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.

- [19] A problem which s 7(2) seeks to address is that a plaintiff with a maritime claim finds himself in a court which is not competent to exercise its admiralty jurisdiction, having regard to the nature of the claim and the limitation on jurisdiction in s 3(3) of the AJRA. Or a plaintiff finds himself in a court exercising its admiralty jurisdiction but it turns out that his claim is not a maritime claim. Both subsections provide that the matter should proceed ('voortgaan') – if it is a maritime

claim in a court competent to exercise its admiralty jurisdiction, and if it is not, in the division having jurisdiction in respect of the matter.

- [20] In the phrase 'it shall be proceeded with' the word 'it' refers to the matter which is 'pending or proceeding before that court' and which the court has decided 'is one relating to a maritime claim'. The Afrikaans text says 'moet die aksie voortgaan'. The purpose of the section seems to me to be to ensure that the matter proceeds in the court where it belongs, depending on whether or not it relates to a maritime claim. The applicable definition of the word 'proceed' in The New Shorter Oxford Dictionary is 'carry on' or 'continue'. The word 'voortgaan' is translated in the Tweetalige Woordeboek[15] as 'continue, go on, proceed, go ahead'. In the Verklarende Handwoordeboek van die Afrikaanse Taal[16] 'voortgaan' is said to mean 'verder gaan, aangaan, voortsit'. [17]

- [21] I find nothing in section 7 which supports the contention on behalf of Kuehne and Nagel that if the court decides the matter relates to a maritime claim it has no jurisdiction to make any order other than to dismiss the action. If that were the case there would have been no need to provide in subsections (2) (a) and (b) that the matters shall proceed in the courts mentioned there. Specific provision is made in subsection (b), in the case where an attachment had been made, for the court to order the action to proceed as if the property had been attached by an incola, or to make such other order, including an order dismissing the action for want

of jurisdiction, as to it appears just. Mr Harpur SC submitted that the court referred to in the proviso to subsection (b) is the court in which the action has started afresh. I do not think this is so. It is a reference to the court which has decided that the matter before it is not one relating to a maritime claim. Where jurisdiction was conferred by the attachment of property by a person other than an incola (which is only permissible in admiralty) it is given the power to order the action to proceed as if the property had been attached by an incola or to make such order as to it appears just, including an order dismissing the action for want of jurisdiction. These provisions are inconsistent with the submission that the only power a court has in the circumstances under consideration is to dismiss the action for want of jurisdiction.

[22] The provision at the end of subsection (2)

- (a) ‘... and any property attached to found jurisdiction shall be deemed to have been attached in terms of this Act...’ also seems to me to be inconsistent with the submission that the action must start afresh. An attachment to found jurisdiction lapses when the action is dismissed. If the attachment is somehow kept alive

by the deeming provision in subsection (2) (a), for how long may this continue before the new action is instituted? And if it is not instituted, does the attachment eventually lapse or does it have to be set aside on application? None of this makes sense to me. The meaning of the proviso is in my view that property attached to found jurisdiction in the matter which was instituted in the ordinary jurisdiction shall be deemed to have been attached in terms of the AJRA when the matter is proceeded with (continued) in the court competent to exercise its admiralty jurisdiction.

[23] I think this is consistent with what Nestadt JA said in *Weissglass NO v Savonnerie Establishment*[18] with regard to section 7(2). He said: ‘In particular the section applies to the case where the Court is seized with an action. That is clear from the reference in subpara

- (b) to “the action shall proceed”. And if one has regard to the signed Afrikaans text, the same applies to “it shall be proceeded with” in subpara (a). The “it” is given as “die aksie”. Where in such an action there is a dispute as to whether the claim sought to be enforced is a maritime claim, the Court must forthwith “decide” the issue. It has to classify the claim... If the claim is a maritime one the action proceeds in the admiralty Courts. Otherwise the division of the Supreme Court having jurisdiction will consider the claim in the exercise of its ordinary jurisdiction (unless the action is dismissed in terms of the proviso to subpara (b) [19]). And in order to achieve finality s 7(4) precludes an appeal. In this way protracted litigation on a jurisdictional issue is avoided.’

[24] Section 7(4) militates against the submissions advanced on behalf of Kuehne & Nagel. It provides that no appeal shall lie against any decision or order made under subsection (2). It is easy to understand why there should be no appeal against a decision as to whether or not the claim is a maritime claim. In *The Wave Dancer*[20] Scott JA said it is apparent from the provisions of s 7(2) that the Legislature sought to avoid protracted disputes as to whether a claim was properly one for adjudication by a Court exercising its ordinary or admiralty jurisdiction. Once the question is raised and the matter decided, that decision is final. It is a procedural matter. The action will proceed in the one jurisdiction or the other. The matter takes on a different complexion if the only power which the court has, pursuant to a decision contemplated in subsections (2) (a) and (b), is to dismiss the action for want of jurisdiction. It is difficult to imagine why an order with such drastic consequences should not be appealable. A consequence of the dismissal may mean the end of the plaintiff’s claim if the prescriptive period has run its course.

- [25] Section 7(2) must be interpreted in the context of the AJRA as a whole, and having regard to the purpose of the section. Jurisdiction means the power vested in a court to adjudicate upon, determine and dispose of a matter.[21] The Wave Dancer casts an interesting light on the question of jurisdiction with regard to maritime claims. Olivier JA held[22] that it is not peremptory that maritime actions be heard by an Admiralty Court.[23] He points out that in terms of s 7(1) (a) a court may decline to exercise its admiralty jurisdiction if it is of the opinion that any other court in the Republic or any other court or arbitrator, tribunal or body elsewhere can more appropriately hear the matter. He also makes the point that if the question whether the matter before the court is one relating to a maritime claim is not raised before such court, and it therefore fails to make a decision, it is not precluded from exercising its ordinary jurisdiction. Hence the proceedings in such court may then not be attacked on appeal. This may give rise to an interesting debate with regard to prescription where an action which relates to a maritime claim is instituted in the ordinary jurisdiction of the High Court, which then directs in terms of s 7(2) that it be proceeded with in a court competent to exercise its admiralty jurisdiction. Did the court in which the action was instituted only lose its jurisdiction to adjudicate on the matter when a decision was made as contemplated in s 7(2)? Can it be said that the action was instituted in a court which did not have jurisdiction?
- [26] Counsel's submission that an admiralty action can only commence as set out in s 1(2) of the AJRA is misplaced. Section 1(2) does not prescribe the manner in which admiralty actions are instituted. That is done in the Admiralty Rules.[24] The purpose of s 1(2) is to determine the date of commencement of an admiralty action 'for any relevant purpose'. Such date of commencement may for example be relevant to a time bar or the ranking of the claim[25]. I think this is well illustrated by s 1(2) (a) (iv), which refers to the giving of security or an undertaking as contemplated in s 3(10) (a). The giving of security or an undertaking does not fall within the definition of an admiralty action in s 1(1). If an admiralty action is instituted pursuant to the giving of such security the date of commencement of the action will, in terms of s 1(2) (a) (iv), be the date on which the security was given.
- [27] I am satisfied that on a proper interpretation of s 7(2), and in the light of the decision that the actions relate to maritime claims, I must make an appropriate order for the continuation of the actions in a court competent to exercise its admiralty jurisdiction. This is such a court. I therefore propose to make an order directing that the actions proceed in this court, exercising its admiralty jurisdiction. As Mr Singh SC pointed out, if any procedural lacuna becomes apparent, the court may in admiralty proceedings give any directions which it considers proper for the disposal of the matter before it.
- [28] The costs of the proceedings before Lopes J were reserved for my determination. By then the parties were ad idem that the actions related to maritime claims and an order to that effect was made by agreement. The exception by Kuehne & Nagel, based on the fact that maritime claims were involved, was upheld by agreement. Whether or not that was the correct approach may be debateable, as it may be said that the court was only deprived of its

jurisdiction to adjudicate on the matter when the decision was made that it related to a maritime claim and that the procedure in s 7(2) was then triggered. I need not go into this as the orders were taken

by agreement. In the final analysis Columbus and the Ports Authority were successful with their applications in terms of s 7(2), Kuehne and Nagel was successful with its exception but unsuccessful with its counter application in which it sought the dismissal of the two actions.

[29] I make the following orders:

(e) In each of the applications the first respondent (Kuehne and Nagel (Pty) Ltd) is ordered to pay the costs occasioned by its opposition to the applications.

(g) The remaining exceptions are to be heard by the court in the exercise of its admiralty jurisdiction after the pleadings have been amended as aforesaid.

Date reserved: 9 May 2014.

Date delivered: 23 May 2014

Counsel for: National Ports Authority – Mr N Singh SC and Ms MA Ngqanda

Instructed by: Mdlulwa Nkuhlu Attorneys

Ref: S. Tshangana

Counsel for: Columbus – Ms A Annandale SC and Mr M du Plessis

Instructed by: Cox Yeats attorneys

Ref: A Clark/ps/09 C387004

Counsel for: Kuehne & Nagel – Mt G Harpur SC

Instructed by: Shepstone & Wylie

Ref: PP/mn/ Kuen17441.6

[1] Act 105 of 1983.

[2] Act 41 of 2001.

[3] Section 7 (2)(a) of the AJRA.

[4] Section 166 of the Constitution of the Republic of South Africa, 1996.

[5] Section 6 of the Superior Courts Act, 10 of 2013.

[6] Section 50(1) (f) of the Superior Courts Act.

[7] Section 21 of the Superior Courts Act.

- [9] Section 151 of the Labour Relations Act 66 of 1995.
- [10] *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape, and Others (No 2)* 2009 (6) SA 589 (SCA).
- [11] In terms of s 3(1) of the Interim Rationalisation of Jurisdiction of High Courts Act, and after its repeal in terms of s 27 of the Superior Courts Act.>
- [12] 2012
- (4) SA 593 (SCA) para 18 and further.
- [13] *South African Law Journal*, vol 103, 1986, at page 678.
- [14] *Endumeni Municipality*, note 12, para 18 and further.
- [15] *Bosman, Van der Merwe and Hiemstra*, 8th ed.
- [16] *Odendal, Schoonees, Swanepoel, Du Toit and Booysen*, 3rd ed.
- [17] Also see *Verklarende Afrikaanse Woordeboek*, 8th ed, Labuschagne and Eksteen.
- [18]
- [1992] ZASCA 95; 1992
- (3) SA 928 (A) at 940 E-H.
- [19] My emphasis. This is a reference to the court which made the decision contemplated in s 7(2) (b).
- [20] *The Wave Dancer: Nel v Toron Screen Corporation (Pty) Ltd and Another* 1996 (4) SA 1167 (A) at 1177.
- [21] *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA) para 6.
- [22] *The Wave Dancer: Nel v Toron Screen Corporation* at 1188J – 1189C.
- [23] Although we no longer have ‘Admiralty Courts’ this expression is still used by some to refer to the High Court exercising its admiralty jurisdiction. There is no harm in this as admiralty proceedings are subject to different rules and procedure.
- [24] An action in personam is instituted by the issue of a summons and an action in rem by the arrest of property.
- [25] See s 11(4) (c) of the AJRA.

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