

SOUTH AFRICA / JUDGMENT

Jacobs v Blue Water and Others (11755/2005) [2016] ZAWCHC 17 (1 March 2016) [2016] ZAWCHC 17

COURT

Western Cape High Court, Cape Town

BEFORE

A.G. Binns-Ward

CASE / FILE NUMBER

11755/2005

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
Case
number: 11755/2005

Before: The Hon. Mr Justice Binns-Ward

Hearing: 29 February 2016
Judgment
delivered: 1 March 2016
In

the matter between: GILIAM
JOHANNES
JACOBS.....Plaintiff
And
BLUE
WATER.....First
Defendant
SA
FIVE ENGINEERING (PTY)
LTD.....Second
Defendant
ARTISAN
SERVICES
&ENGINEERING.....Third
Defendant

JUDGMENT

BINNS-WARD J:

- [1] The plaintiff instituted an action in this court in which he claimed compensation in damages in delict for injuries allegedly sustained while he was descending a gangplank from the Glasdowr to go ashore. The Glasdowr is a 'ship', as defined in s 1(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act').
- [2] The plaintiff, who is a boilermaker/welder, had been carrying out 'fitment work' on the vessel. It is alleged that the slope of the gangplank was hazardously precipitous at the time as a consequence of the vessel having been inappropriately ballasted.[1] The relevant allegations in the particulars of claim were summarised in the stated case (at para 13) as follows:

The plaintiff avers the incident was caused by the causal negligence, alternatively the breach of duty of care, of the First Defendant, alternatively, the Second Defendant further alternatively the Third Defendant further alternatively the three Defendants jointly, in that they:

1. Deballasted the Glasdowr excessively, alternatively deballasted the Glasdowr inappropriately given the prevailing circumstances.
2. Failed to warn, adequately or at all, the Plaintiff and other persons working on the Glasdowr of the extent to which the Glasdowr had been deballasted.
3. Failed to warn, adequately or at all, the Plaintiff and other persons working on the Glasdowr that the gangplank was very steep due to the extent to which the Glasdowr had been deballasted.

4. Failed to erect signs warning, alternatively adequately warning, the Plaintiff and other persons working on the Glasdowr that the gangplank was very steep due to the extent to which the Glasdowr had been deballasted.
 5. Failed to ensure the safety of any person disembarking from the Glasdowr by way of the gangplank.
 6. Failed to take all necessary steps to avoid the incident.
 7. Failed to ensure that any person or entity employed, alternatively contracted, to carry out any of the steps or duties referred to hereinbefore, would do so speedily, properly and effectively.
- [3] The plaintiff has brought his claim in terms of the procedures directed at obtaining its adjudication by the court in the exercise of its ordinary civil jurisdiction. The third defendant has pleaded that the plaintiff's claim qualifies as a 'maritime claim' as defined in s 1(1) of the Act and falls to be proceeded with in terms of the court's admiralty jurisdiction. The point taken by the third defendant implicates s 7(2) of the Act.
- [4] Section 7(2) of the Act provides:
- (2) When in any proceedings before a provincial or local division, including a circuit local division, of the [High] 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.
- [5] The rationale for s 7(2) of the Act was explained in *The Wave Dancer* 1996 (4) SA 1167 (SCA). It was held that the provision was directed, at least in part, at avoiding the complications that used to arise, particularly when it came to the ranking of claims for payment purposes, when, prior to the enactment of the Act, there was an overlap between the (then) Supreme Court's parochial civil jurisdiction and the jurisdiction its provincial and local divisions exercised when constituted as Colonial Courts of Admiralty. Characterising a claim as a 'maritime claim' may also affect whether it falls to be decided according to English or Roman-Dutch law.[2] Scott JA set out the position as follows (at p.1076-1077A):

Prior to the coming into operation of the Act on 1 November 1983 the various Divisions of the Supreme Court, sitting as Colonial Courts of Admiralty, exercised the admiralty jurisdiction of the English High Court as that jurisdiction existed in 1891 when the Colonial Courts of Admiralty Act 1890 came into operation. The ordinary parochial jurisdiction of the Supreme Court and its jurisdiction as a Colonial Court of Admiralty overlapped to a certain extent. The result was that in such an event, whether the dispute between the parties was determined in accordance with Roman-Dutch or English law depended upon the Court in which the plaintiff decided to bring his action. In practice, however, problems associated with this concurrent jurisdiction arose most frequently in connection with the ranking of competing claims. One of the objects of s 7(2) was no doubt to remove this undesirable state of affairs.

The Act considerably increased the jurisdiction of the Admiralty Court. In terms of s 6(1) Roman-Dutch law is to be applied with regard to what may conveniently be called the 'new maritime claims' while English admiralty law, as it was on 1 November 1983, is to be applied to any matter in respect of which a pre-1983 South African Court of Admiralty had jurisdiction prior to that date. (Compare *Transol Bunker BV v MV Andrico Unity and Others*; *Grecian-Mar SRL v MV Andrico Unity and Others* 1989 (4) SA 325 (A) at 334H-J.) Section 7(2) does not, however, seek to draw a distinction between the old and the new maritime claims, although in the case of the latter, Roman-Dutch law would be applied regardless of whether a Court were to exercise its admiralty jurisdiction or its ordinary civil jurisdiction. Nonetheless, the Admiralty Court has different rules and procedures as well as special powers conferred in terms of the Act and the existence of concurrent jurisdictions even in relation to the new maritime claims could have unsatisfactory consequences.

The Act does not expressly exclude maritime claims from the ordinary jurisdiction of the Supreme Court. But, if a maritime claim is instituted in a Provincial or Local Division (including a Circuit Local Division) exercising its ordinary civil jurisdiction, the question will ordinarily arise whether the claim is a maritime claim or not. The question may be raised by one or other of the parties or by the Court *mero motu*. Once the Court decides that it is a maritime claim, s 7(2) requires that the matter 'shall be proceeded with in a Court competent to exercise its admiralty jurisdiction'. To this extent, and subject to the discretion of a Court to decline to

exercise its admiralty jurisdiction in terms of s 7(1)(a), the intention underlying s 7(2) is undoubtedly that maritime claims are to be heard by the Court exercising admiralty jurisdiction and by no other Court. (See *Shaw Admiralty Jurisdiction and Practice in South Africa*.) It has been suggested that because of the peremptory nature of s 7(2) the Admiralty Court has exclusive jurisdiction to hear maritime claims. (See Staniland 'Admiralty Jurisdiction over Wrecks' (1991) 108 SALJ 594 at 596; Annual Survey of SA Law 1993 at 723; Joubert (ed) *The Law of South Africa* vol 25 para 172; see also Pistorius Pollak on Jurisdiction 2nd ed (1993) at 15; *Peros v Rose* 1990

(1) SA 420 (N) at 424D.) But the peremptory provisions of s 7(2) become applicable only once the Court decides that the claim is a maritime claim. It is the decision which has the effect of depriving the Court of its ordinary civil jurisdiction to hear the matter.

- [6] This court is thus called upon to determine whether the third defendant's contention is well founded or not. If it is, the matter must be proceeded with in a court exercising its admiralty jurisdiction. The court's determination of the question is final, and not appealable.[3]
- [7] Ordinarily, the question would fall to be determined on the basis of the court's characterisation of the claim as it appears from the pleadings, but the parties have chosen to state a case in terms of rule 33. The stated case was in essence, insofar as the description of the claim is concerned, a restatement of the content of the pleadings. The third defendant's position on the characterisation of the claim was, however, more precisely formulated in its plea than in the stated case. In paragraphs 2 and 3 of its 'special plea regarding jurisdiction', the third defendant alleged that –
2. Plaintiff's claim is a maritime claim as meant in Section 1 of [the Act] as amended.
 3. Third Defendant, inter alia, relies on sub-sections (sic) (e), (f), (m) and (q) of section 1 (sic) of the said Act.

The paragraphs of the definition of 'maritime claim' in s 1(1) of the Act upon which the third defendant relies for its characterisation of the claim were not, however, identified in the stated case, or in its counsel's heads of argument. When I enquired at the hearing as to which paragraphs of the definition it relied on, the third defendant's counsel identified paragraphs (f) and (ee). The plaintiff's counsel agreed that these were the only paragraphs that could arguably be pertinent.

[8] Paragraph (f) of the definition provides:

'maritime claim' means any claim for, arising out of or relating to-

- (f) loss of life or personal injury caused by a ship or any defect in a ship or occurring in connection with the employment of a ship,

and paragraph (ee) reads:

any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs

- [9] It is plain in my view that the plaintiff's claim does not arise out of or relate to personal injury caused by the ship or any defect in the ship. As far as paragraph (f) is concerned, the question is therefore did the plaintiff's alleged personal injury occur 'in connection with the employment of the ship'?
- [10] The word 'employment' is not defined in the statute and thus falls to be interpreted according to its ordinary meaning, determined with due regard to the context in which it has been deployed. The Oxford Dictionary of English gives the relevant meaning of the word as 'the utilization of something'. The Afrikaans version of the Act, which is the signed text, uses the expression 'in verband met die gebruik' as the equivalent of 'in connection with the

employment'. I would translate the Afrikaans phrase as 'in connection with the use'. It follows that the relevant question may perhaps be more clearly stated as 'did the plaintiff's alleged personal injury occur in connection with the use of the ship'.

[11] Deballasting is plainly something connected with the use of a vessel. But despite the wording of paragraph 13.1 of the stated case, quoted above,[4] it seems to me on a proper reading of the allegations concerning the circumstances of the occurrence of the plaintiff's injuries that their essential import is that the defendants are alleged to be liable for having caused the means of disembarkation from the ship (the gangplank) to be in a hazardous condition and also for having unreasonably failed to warn users of the danger. It was the dangerous state of the gangplank, rather than the alleged reason for it having been hazardedly precipitous ('inappropriate deballasting'), that is the basis of the claim. The plaintiff has in essence alleged that the defendants acted negligently and wrongfully in causing the gangplank to be in a dangerous condition and for failing to warn users of the danger. It is clear that the injuries allegedly sustained by the plaintiff were incurred while using the gangplank to disembark from the ship.

[12] In my judgment the provision of a means of disembarkation from a ship and the utilisation of such means for that purpose by persons

aboard are ordinary incidences of the use of a ship. It follows that an injury sustained while the injured party is disembarking from a ship as a consequence of a problem with the slope of the gangplank would qualify as an occurrence that happened in connection with 'the employment of [the] ship' within the meaning of that phrase in paragraph (f) of the statutory definition.

[13] I am fortified in that view when I have regard to what is accepted to have been the historical basis for the formulation of the statutory definition. It is noted in Shaw, Admiralty Jurisdiction and Practice in South Africa, at p. 8, that '[t]he origins of the heads of maritime claim stated in the definition of maritime claim in s 1(1) are to be found largely in the International Convention for the Unification of Certain Rules Relating to Seagoing Ships[[5]] signed at Brussels in 1952..., the heads of admiralty jurisdiction as set out in s 20(2) of the United Kingdom Supreme

Court Act 1981,[[6]] and of the similar provisions with regard to Scotland contained in s 47 of the Administration of Justice Act 1956 of the United Kingdom'. Advocate Shaw QC, who is widely acknowledged to have played an important role in drafting the South African Act, proceeded (ibid.) to explain that '[t]he justification for adopting this method of defining admiralty jurisdiction, rather than a more general method such as the one applying, for instance, in the United States of America, appears to be that, as the overwhelming majority of shipping cases have an international flavor, it is desirable to adopt as a basis, a Convention which has international approval'.

[14] The correspondence between the relevant provisions of the International Convention and the United Kingdom statutes identified by Shaw and the majority of the several paragraphs of the definition of 'maritime claim' in the Act is striking. It seems probable that the United

Kingdom legislation was also informed in the relevant respects by the International Convention, as, no doubt, was the content of the International Convention influenced by the pre-existing legislation of the covenantors, which included the United Kingdom. And it does indeed seem desirable, for the reason given by the author, to construe the definition, to the extent that its language permits, in a way that would lend congruity to its provisions with its international equivalents. This is consonant with the view expressed by Thirion J in *Continental Illinois National Bank and Trust Co of Chicago v Greek Seamen's Pension Fund* 1989 (2) SA 515 (D), at 525G, that '[t]here is such a close correlation between the definition of "maritime claims" in s 1(1)(ii) and the "claims", "questions" and "proceedings" in respect of which the High Court exercises its Admiralty jurisdiction that it would be permissible to refer to the English Supreme Court Act in interpreting "maritime

claims" in s 1(1)(ii) of our Act'.

[15] The equivalent of para (f) of the definition in the Act is found in paragraphs (e) and (f) of s 20(2) of the United Kingdom Senior Courts Act 1981, which provide as follows:

The ... claims ... are -

- (e) any claim for damage done by a ship;
- (f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment,

or in consequence of the wrongful act, neglect or default of—

- (i) the owners, charterers or persons in possession or control of a ship; or
 - (ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible,
- being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship

Section 47(2)(b) of the Administration of Justice Act 1956, which regulates the admiralty jurisdiction of the Scottish courts, provides:

This section applies to any claim arising out of one or more of the following, that is to say –

- (b) loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful

act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, unloading or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship

Article 1(1) of the International Convention provides as follows in the relevant respect:

“Maritime Claim” means a claim arising out of one or more of the following:

- (b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship

[16] It seems to me that the difference between the relevant definitions in the United Kingdom legislation, on the one hand, and those in the Act and the International Convention, on the other, is an economy of language in the latter. The United Kingdom legislation details the various uses of the ship in consequence of which a maritime claim for personal injury will lie, whereas the International Convention and the Act do not. I agree with the observations by Shaw, *op. cit.* at p. 12, that the phrases ‘the employment of a ship’ used in the Act and ‘in connexion with the operation of any ship’ used in the International Convention are essentially synonymous, and also that they both ‘cover substantially the same ground as that covered by the more detailed provisions relating to England and Scotland’. It is therefore significant that the latter provisions, consistently with the conclusion stated by me in paragraph [12], above, expressly include ‘any claim for loss of life or personal injury... sustained... in consequence of the wrongful act, neglect or default of...[various categories of parties who may be liable are specified] being an act, neglect or default... in the embarkation, carriage or disembarkation of persons on, in or from the ship’.

[17] For these reasons I have concluded that the plaintiff’s action does indeed concern a matter relating to a maritime claim as defined in paragraph (f) of the definition of the term in the Act. The conclusion that the claim is one falling under paragraph (f), excludes any finding that it might resort under paragraph (ee). That follows necessarily from the qualifying effect of the phrase ‘any other matter’ at the beginning of paragraph (ee).

[18] The claim must accordingly be proceeded with in a court competent to exercise its admiralty jurisdiction.

[19] In the result the following orders are made:

1. It is declared that the action instituted by the plaintiff under case number 11755/2005 concerns a claim as defined in paragraph (f) of the definition of ‘maritime claim’ in s 1(1) of the Admiralty Jurisdiction Regulation Act, Act 105 of 1983 (‘the Act’).

2. Consequent upon the effect of the declaration in terms of paragraph 1, and pursuant to the provisions of s 7(2)(a) of the Act, the matter shall be proceeded with in a court competent to exercise its admiralty jurisdiction.
3. The plaintiff shall pay the third defendant's costs of suit in respect of the case stated for determination in respect of the question that arose in terms of s 7(2) of the Act.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

Plaintiff's counsel: Anton Laubscher

Plaintiff's attorneys: DSC Attorneys

Cape Town

Third Defendant's counsel: H.M. Raubenheimer SC

Third Defendant's attorneys: Willem Jacobs & Associates

Somerset West

Bagraims Attorneys

- [1] The stated case speaks of the vessel having been 'excessively', alternatively, 'inappropriately deballasted'.
- [2] See s 6(1) of the Act. In the current case it may be that the claim, if it falls within paragraph (f) of the definition of 'maritime claim', has to be decided in terms of English Law, on the basis that paragraph (f) is arguably an extension of the claim for 'damage done by any ship' within the meaning of s 7 of the Admiralty Court Act,
- ¹⁸⁶¹. (The latter provision falls, for jurisdictional purposes, to be read with s 2 of the Colonial Courts of Admiralty Act, 1890.)
- [3] In terms of s 7(4) of Act 105 of 1983.
- [4] At para [2].
- [5] International Convention Relating to the Arrest of Sea-Going Ships (Brussels, May 10, 1952).
- [5] International Convention Relating to the Arrest of Sea-Going Ships
(Brussels, May 10, 1952).
- [6] Since renamed as 'The Senior Courts Act 1981', in terms of Schedule 11 to the Constitutional Reform Act 2005.

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Prepared on 12 October 2026 · Esheria