

SOUTH AFRICA / JUDGMENT

Weissglass NO v Savonnerie Establishment (288/90) [1992] ZASCA 95; 1992 (3) SA 928 (AD); [1992] 2 All SA 275 (A) (29 May 1992) [1992] ZASCA 95

COURT
Supreme Court of Appeal

BEFORE
Corbett, E M Grosskopf, Nestadt, Van Den Heever,
Howie

CASE / FILE NUMBER
288/90

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\CCC CASE NO 288/90

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION) In the matter between
DOV WEISSGLASS NO APPELLANT

and

SAVONNERIE ESTABLISHMENT RESPONDENT

CORAM: CORBETT CJ, E M GROSSKOPF, NESTADT,

VAN DEN HEEVER JJA et HOWIE AJA DATE HEARD: 10 MARCH 1992 DATE DELIVERED: 29 MAY
1992

JUDGMENT NESTADT, JA:

This appeal arises from an order made in the Cape Provincial Division in the exercise of its

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admiralty jurisdiction under the Admiralty Jurisdiction Regulation Act, 105 of 1983 (the Act). The respondent (Savonnerie) is a Lichtenstein corporation carrying on business as financiers. On 24 January 1986 it brought an application in the Cape Provincial Division for an order attaching two motor fishing vessels. They were the "Azgad IV" and the "Hashomer". The boats were berthed in the Table Bay docks. They were the property of an Israeli company called Atlantic Fishing Shipping Company Ltd (Atlantic). It carried on the business of fishing in South African waters. The object of the attachment was to found jurisdiction in an action which Savonnerie wished to institute in the Cape Provincial Division against Atlantic for payment of the sums of 300 000 and 45 000 US dollars. Atlantic was cited as the first

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respondent. The appellant (Weissglass), an advocate practising in Israel, was joined as the second respondent. He was sued in his capacity as what is termed the "receiver" of Atlantic. This would appear to correspond to our judicial manager. Atlantic had been placed under receivership by order of an Israeli court in September 1985. Savonnerie's application was brought ex parte and as a matter of urgency. It came before ROSE-INNES J who granted the relief claimed. The vessels were attached. On 21 February 1986 Weissglass, having been served with the order and acting in his official capacity, brought an application against Savonnerie to set the order of ROSE-INNES J aside. He also sought the release of the boats from attachment. Savonnerie opposed Weissglass's application. Answering and replying affidavits having been filed, the matter

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was argued before NEL J. Save for directing that Savonnerie's claim for 45 000 US dollars be reduced to R80 000, the learned judge ordered that the application be dismissed. So the attachment of the vessels to found jurisdiction remained. Weissglass now appeals against that order. He does so with the leave of the judge a quo.

The broad issue that arises for determination is whether the application to attach the two vessels was correctly granted. This issue must be considered with the Act in mind. For, as will be seen, Savonnerie's application was founded on and ROSE-INNES J's order was made in terms of the Act. It will be apparent from what has been said that both Savonnerie and Atlantic are peregrini of the Republic as a whole. At common law

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therefore, no additional ratio jurisdictionis being present, the attachment of Atlantic's property would not have sufficed to found jurisdiction in the Cape Provincial Division and would have been refused. The Act, however, mitigates the inconvenience of this rule (Shaw: Admiralty Jurisdiction and Practice in South Africa 49). Sec 2(1) confers admiralty jurisdiction on the various provincial and local divisions of the Supreme Court in respect of any "maritime claim" irrespective of the place where it arose or the residence or domicile of the owner of the ship. One of the ways such a claim may be enforced is by an action in personam (sec 3(1)). In terms of sec 3(2) (b) such an action lies inter alia against a person whose property within the court's area of jurisdiction has been attached to found or to confirm jurisdiction. Sec

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4(4)(a) deals with such attachment. It provides:

"Notwithstanding anything to the contrary in any law relating to attachment to found or confirm jurisdiction, a court in the exercise of its admiralty jurisdiction may make an order for the attachment of the property concerned although the claimant is not an incola either of the area of jurisdiction of that court or of the Republic."

I must revert to the concept of a maritime claim. It follows from what has been said that the existence of such a claim is a fundamental prerequisite to the exercise by the court of its admiralty jurisdiction. The term "maritime claim" is comprehensively defined in sec 1(1)(ii). Twenty-six categories are enumerated. The two which are relevant are contained in sub-paragraphs (1) and (z). They read:

"(1) any claim in respect of goods supplied or services rendered to a ship for the employment or maintenance thereof;"

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"(z) any claim not falling under any of the previous paragraphs which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890 (53 and 54 Victoria, C.27), of the United Kingdom, could have heard and determined immediately before the commencement of this Act, or relating to any matter in respect of which any court of the Republic is empowered to exercise admiralty jurisdiction."

Paragraph (z) requires some explanation. As SHAWop cit, at 1-2 puts it, the section is one of those in the Act which does not "relieve the South African practitioner of the burden of history". Briefly stated, its effect is to render applicable those

principles of the law relating inter alia to claims for necessities supplied to ships which the English High Court would have applied in 1890 (cf *Beaver Marine (Pty) Ltd vs Wuest* 1978(4) SA 263(A) at 274). The source of these principles is two English Admiralty Court Acts.

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In terms of sec 6 of the 1840 one (3 and 4 Vict. c. 65), jurisdiction is conferred to decide "all claims...for necessities supplied to any foreign ship or sea-going

vessel". Sec 5 of the 1861 Act (24 Vict, c.10) extends jurisdiction by conferring it "over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs" unless the owner is domiciled in the country. These provisions have, as will be seen, been considered and applied by the English courts in a number of cases and, seeing that paragraph (z), read with sec 6(1) of the Act, enjoins the application of English law, it is to those cases that one must look in order to determine what are necessities and therefore what is a maritime claim under this head.

Savonnerie's case was that the payment of sums referred to were loans by it to Atlantic giving rise

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to maritime claims which it was entitled to enforce by

an action in. personam against Atlantic in terms of the Act. Savonnerie therefore relied on sec 3(2) (b) read with sec 4(4)(a). Whether this was well-founded must be decided against the background of the following undisputed facts. Atlantic had been carrying on fishing operations for a number of years prior to 1986. Its agent in Cape Town was a company called Quick, Louw and Moore (Pty) Ltd (QLM). It handled the provisioning of Atlantic's ships, their bunkering and repair, port facilities, the hiring of crew and the shipment of fish caught to Israel (where it was, in the main, marketed). Up to 1985 Atlantic's business was financed by Atlantic itself. It would remit funds from Israel to QLM in payment of QLM's charges and disbursements. By the beginning of 1985 however Atlantic's financial position

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had deteriorated. It owed QLM certain monies in respect of disbursements that QLM had already made. Moreover,

there were a number of accounts for services rendered to Atlantic's vessels that were due for payment. The

crisis was such that Azgad IV was unable to be

provisioned and fitted in order to put to sea to fish.

And Hashomer had been ordered not to return to port for

fear of her arrest or attachment there by creditors. On

21 February 1985 the manager of Atlantic's office in

Cape Town, a Mr Tsemach, sent the following message (by

means of what is referred to as a "fax") to Atlantic in

Israel:

"4. FUNDS - FUND REQUIREMENTS

Based on 'Nola' arriving next call 10.4.1985

one vessel operating - 40 days fishing

(i) bankers R130 000-00 (Azgad 4)

(ii) agency 68 000-00

(iii) cold store 50 000-00

(iv) cartons 20 000-00

(v) stevedores 15 000-00

(vi) blue continent 6 000-00

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(vii) I & J 8 000-00 (viii) Teescape 22 000-00

(ix) Victor 20 000-00

(x) Appeldoorn 20 000-00(xi) Various creditors 45 000-00(xii) Salaries 80 000-00

R484 000-00" (My numbering.)

"Nola" was a vessel which was on 10 April 1985 to shipfish caught by Atlantic from Cape Town to Israel. The catch was to come from forty days of fishing by Azgad

IV. It was therefore essential that it put to sea as

soon as possible. To this end the goods and services

listed in the fax had immediately to be paid for. At

about the same time QLM demanded from Atlantic that it

be furnished with a guarantee for 300 000 US dollars.

Failing this it refused to disburse any further amounts.

On behalf of Atlantic a Mr Mila Brener of Israel dealt

with the matter. He was Atlantic's chief executive

officer and also held a substantial minority

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shareholding in the company. In addition he was the chief executive officer of Savonnerie. At his instance the Bank of America in Luxembourg on 25 February 1985 sent a telex to Atlantic confirming its preparedness to guarantee payment by Atlantic to QLM of 300 000 US dollars. On the following day a letter to this effect was sent by the bank to QLM. On the strength of this QLM paid for the items listed in the fax. This enabled Azgad IV to leave port to fish. And Hashomer returned to port whereafter it again put to sea to continue fishing. But financial problems continued. By April 1985 Atlantic's account with QLM stood at R704 000. On 18 April QLM

informed Atlantic that it would on 10 May 1985 (later extended to 14 May 1985) "call up" the guarantee (it was still operative) unless its indebtedness were discharged by then. On 14 May 1985 the bank paid QLM 300 000 US dollars (equivalent to

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R574 162,68) and QLM released the bank from its

guarantee. A Mr Louw, a director of QLM filed an affidavit in support of the application to set aside the attachment. According to the affidavit the money was "in substitution of the guarantee in order to enable QLM to recoup its charges and disbursements made by it over the preceding months". These would have included the amount of R484 000 referred to in the fax dated 21 February 1985. (Details of the further expenditure incurred by QLM on behalf of Atlantic are not given. Nor is it explained how the shortfall of some R130 000, being the difference between the sums of R704 000 and R574 162,68, was met.)

What has been stated relates to Savonnerie's claim for 300 000 US dollars. I turn now to the facts relevant to its other claim, viz for 45 000 US dollars. Atlantic obtained its fuel requirements (for the two

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vessels in question) from Mobil Oil Southern Africa

(Pty) Ltd (Mobil). Atlantic had an account with Mobil and from time to time made payments in reduction of its indebtedness to Mobil in respect of the fuel it had purchased. By May 1985 however the credit afforded by Mobil to Atlantic had reached its limit. Mobil informed Atlantic that no further fuel (Brenner uses the word "bunkers") would be supplied unless a "cash payment" was made. This led to the transfer on 29 May 1985 from a bank in Israel of 45 000 US dollars to QLM's bank account in Cape Town. On Tsemach's instructions, QLM then paid Mobil the sum of R80 000 (being slightly less than the rand equivalent of 45 000 dollars) on Atlantic's behalf "in respect of Mobil's existing account" (I have quoted from Louw's affidavit).

The Act does not expressly empower a court to

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set aside an attachment order granted under sec 4(4)(a). Nevertheless, it was not in dispute that the court a quo had this power at common law (cf *Cargo Laden and Lately Laden on Board the MV Thalassini AVGI vs MV Dimitris* 1989(3) SA 820(A) at 834 C) . Although Weissglass was in this respect the applicant, Savonnerie bore the onus of proving that its application for an attachment order was correctly granted. The principle is that a party cannot by obtaining ex parte an order in his favour secure a more advantageous position than he would have been in if the other party had, consequent upon notice, had an opportunity of opposing (*Bradbury Gretorex Co (Colonial) Ltd vs Standard Trading Co (Pty) Ltd* 1953(3) SA 529(W) at 531 B-C; the *MV Thalassini* case at 834 D-E). What Savonnerie had to prove was a prima facie case on the merits; ie it had to tender evidence which, if

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accepted, established a cause of action (MV Thalassini at 831 H-I). But in seeking to do this, Savonnerie was not confined to the allegations made in its application for an attachment order. It was entitled to rely on what is alleged in its answering affidavit filed in opposition to the application to set aside the attachment (see MV Thalassini at 834 F-G where what was stated by MARAIS J in Transol Bunker BV vs MV Andrico Unity and Others 1987(3) SA 794(C) at 799 is approved).

On behalf of Weissglass, Mr Mitchell submitted in the first place that there were a number of factors which, cumulatively regarded, should have resulted in Savonnerie's application being refused. In summary they were (i) whilst rule 4(1) of the Admiralty Proceedings Rules authorises an application for the attachment of property to found jurisdiction to be made

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ex parte, the circumstances of the present matter were such that notice should have been given; (ii) there had been a (probably deliberate) non-disclosure of certain material facts by Savonnerie; (iii) its application was brought with an ulterior motive; and (iv) it was not urgent. It was further argued that sec 4(4)(a) afforded the court a discretion whether or not to grant the attachment order and that the factors referred to should have led the court to exercise its discretion against Savonnerie.

I deal with the last-mentioned point first. It is true that there is authority in support of the proposition that sec 4(4)(a) confers a discretion on the court (as, for example, Mediterranean Shipping Co vs Speedwell Shipping Co Ltd and Another 1986(4) SA 329(D) at 336 C; see too Shaw, op cit, 49-51). But in

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my view this is not correct. Save possibly where the application is an abuse of the court's process or in some other exceptional case, the remedy provided by the section is not a discretionary one. The use of "may" in a statute is not conclusive of the legislature having intended to confer a discretion on the court. It may indicate the conferral of a power coupled with a duty to use it (CIR vs I H B King and A H King 1947(2) SA 196(A) at 209). This is the position here. At common law the court has no discretion to refuse an attachment to found jurisdiction if the requirements of such an application are satisfied (Longman Distillers Ltd vs Drop Inn Group of Liquor Supermarkets (Pty) Ltd 1990(2) SA 906(A) at 914 E-F). Sec 4(4) (a) extends the scope of common law attachments to found jurisdiction to admiralty matters. Parliament must therefore be taken

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to have intended that the relevant principles of the common law should apply to applications under this section (even though a peregrinus may be the applicant). Consistent with this approach, *MV Thalassini* (at 833 B-C) decided that there was no discretion to decline to exercise the power conferred by sec 5(3)(a) of the Act. This section, too, uses the word "may" (in relation to a court ordering the arrest of property in actions in rem) .

I have taken account of the detailed submissions advanced in support of the factual basis of the argument under consideration, ie that set out under (i)-(iv) above. Suffice it to say that although the argument is not without merit, I remain unpersuaded that it should succeed. In my judgment there is insufficient warrant for finding that Savonnerie should have given

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notice of its application or that there was any material non-disclosure or that the application was not urgent or that an ulterior motive can be inferred.

A second argument advanced on behalf of Weissglass amounted to this: that Savonnerie had not shown that it had any claims against Atlantic at all, ie whether maritime or otherwise. Plainly, if this be correct, its application for an attachment order was bound to fail. No prima facie case would have been established. In his application Weissglass sought to make out the case that the transfer of the sums of 300 000 US dollars and R80 000 came not from or on behalf of Savonnerie but from Atlantic's own funds. In the light of Savonnerie's opposing affidavit however Mr Mitchell wisely abandoned this point. Both amounts

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were manifestly transferred at the instance of Savonnerie and must be regarded as payments by it to

Atlantic. But counsel advanced a further argument. It was that it had nevertheless not been shown that such payments were (as was Savonnerie's case) loans by it to

Atlantic; the payments were made on account of the

purchase price of fish which Atlantic had during the

approximate period from February to April 1985 sold and

delivered to Savonnerie. The argument is deserving of

serious consideration. Savonnerie's affidavits on the issue are open to criticism. In its application Savonnerie baldly alleges that "arising out of an agreement entered into" between Atlantic and Savonnerie the amounts of 300 000 and 45 000 US dollars were lent and advanced. The court is left in the dark as to when the loans were requested, whether the agreement was oral

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or written and who acted for Atlantic. Nothing is said regarding the terms of the loans, when they were repayable and whether interest was to be charged. No extracts from the books of account of either Atlantic or Savonnerie were produced to substantiate Savonnerie's version. Its founding affidavit states that an advocate Talmon of Tel Aviv "represented (Savonnerie) in the aforesaid transactions". On the other hand, according to its opposing affidavit, it was Brener who did this. I have explained earlier that the 300 000 US dollars was paid in substitution of the guarantee for this amount. There is no mention of this in Savonnerie's application. Savonnerie does not dispute that it purchased fish from Atlantic (for the sum of approximately 500 000 US dollars). The allegation is however that this indebtedness was discharged not by

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means of the 300 000 and 45 000 US dollars but by other payments. But little detail and no documentary evidence of these payments is adduced. Another factor which it

is said casts suspicion on the truthfulness of Brener and indicates that the underlying transaction is contrived is the following. In November 1985 Brener admittedly requested QLM to treat the amounts remitted to it on Atlantic's behalf as loans to QLM and to include such amounts in the maritime claims which QLM had against Atlantic.

That these are unsatisfactory features of Savonnerie's case cannot be gainsaid. They detract from the veracity of the allegations on which it is based. It must also be borne in mind that the remedy of attachment to create jurisdiction is an exceptional one which is to be applied with care and caution (Ex Parte

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Acrow Engineers (Pty) Ltd 1953(2) SA 319 (T) at 321 H;

Thermo Radiant Oven Sales (Pty) Ltd vs Nelspruit Bakeries (Pty) Ltd 1969(2) SA 295(A) at 302 C) .
Even

so, I do not think that it can be said that Savonnerie failed (for this reason) to establish a prima facie case. For this conclusion to be warranted it would have to be quite clear that it has no action or cannot succeed (MV Thalassini at 832 A-B). In my opinion, giving full weight to the criticisms referred to, this has not been shown. We must be careful not to enter into the merits of the case or at this stage to attempt to adjudicate on credibility, probabilities or the prospects of success. It was only in the replying affidavit that it was pertinently alleged on behalf of Weissglass that the payments by Savonnerie to Atlantic were in respect of the fish. So Savonnerie has not had a proper opportunity of dealing with the point. If then

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this causa for the payments is left out of account and seeing a donation is not presumed (especially in a commercial transaction between companies), the only other rational explanation for the payments is that they were a loan. In the absence of evidence that a time for repayment was agreed upon, Atlantic would have been obliged to repay it on the lapse, after notice, of a

reasonable time. In its application Savonnerie alleges that a demand for repayment was made on 6 September 1985. We do not know the terms of the demand but Weissglass has not alleged that a reasonable period was not given. Brener explains why he requested QLM to include Savonnerie's payments to Atlantic as part of QLM's claim against Atlantic. Such explanation cannot at this stage be said to be an unacceptable one. For the rest, the matters relied on by Weissglass would be

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for the trial court to determine. The argument underconsideration must fail. A further point raised on behalf of Weissglass was that the court a quo should in its discretion have declined to exercise its admiralty jurisdiction in terms of sec 7(1)(a) of the Act. It 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 the action can more appropriately be adjudicated upon by another court in the Republic or by any other court, tribunal or body elsewhere."

The section would seem to give the court a discretion, namely to decline to exercise jurisdiction on the ground of forum non conveniens (Katagum Wholesale Commodities Co Ltd vs The MV PAZ 1984(3) SA 261(N) at 266 I). The submission that this should have been done rested on the following propositions: (i) the disputed transactions relate in large measure to events which occurred in

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Luxembourg and Israel; (ii) Atlantic is an Israeli company which is under receivership in Israel; (iii) the parties were already engaged in litigation in Israel arising from the operation of the vessels in question which litigation has not been concluded; (iv) when the matter goes to trial it would be more convenient that the litigation be conducted in Israel as most of the witnesses and relevant documentation are there; (v) both parties are peregrini; (vi) the law applicable to the transactions in issue is not South African law but that of Israel or some other foreign law. I am not sure how cogent these points are. But in any event there is a short answer to the argument. It seems to me that a respondent who seeks to rely on sec 7(1)(a) as a defence should generally raise the issue in his papers. Weissglass did not do so. He did not specify which

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forum he considered to be the appropriate one. It would in the circumstances be unfair to non-suit Atlantic on this ground (which is not dealt with by the

court a quo).

This brings me to the fourth main submission advanced on behalf of Weissglass. It was that the payments in question did not give rise to a maritime claim. NEL J held that they did. A preliminary question is whether this finding is appealable. On behalf of Savonnerie, Mr Hofmeyr submitted that it was not. Counsel relied on secs 7(2) and (4) of the Act. They read:

"(2) 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

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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.

(4) No appeal shall lie against any decision or order made under subsection (2)."

The argument was that the application before the court a quo was a "proceeding"; that the question had arisen as to whether the matter related to a maritime claim;

that this question had been decided (affirmatively);

accordingly no appeal lay. I am unable to agree.

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To accede to the argument would mean that where the existence of a maritime claim is in issue, there is no appeal from the grant or refusal of an application to set aside an attachment order in terms of sec 4(4)(a).

Such an interpretation would require clear language. I |

have no doubt that secs 7(2) and (4) were not intended

to and do not have this far-reaching effect. Mr

Hofmeyr emphasised that "proceedings" ("verrigtinge") is

a word capable of bearing a wide meaning. That is true (see *S vs Swanepoel* 1979(1) SA 478(A) at 488 E-H). But it was not used in the opening part of sec 7(2) to include an application for an attachment order. The respective references in sub-paragraphs (a) and (b) to "property attached" and "attachment of property" postulate a proceeding which is already pending. In

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particular the section applies to the case where the court is seized with an action. That is clear from the reference in sub-paragraph (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 sub-paragraph (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. As in the legislation under consideration in *Nasionale Vervoerkommissie van Suid-Afrika vs Salz Gossow Transport (Edms) Bpk* 1983(4) SA 344(A) at 356 A - 357 D, this means coming to a decision on the merits. If the claim is a maritime one the action proceeds in the admiralty courts. Otherwise the division of the

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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 sub-paragraph (b)). And in order to achieve finality sec 7(4) precludes an appeal. In this way protracted litigation on a jurisdictional issue is avoided. These considerations do not apply to an application for attachment. It is but a preliminary step to the institution of an action. There is no decision on the merits. The matter is brought ex parte and adjudicated on affidavit. Only a prima facie case has to be made out. In terms of sec 12 of the Act a judgment of a court in the exercise of its admiralty jurisdiction is subject to appeal as if such judgment was that of a provincial or local division of the Supreme Court in civil proceedings. NEL J's judgment was appealable in

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accordance with this provision. As I have said, Savonnerie relies on subparagraphs (1) and (z) of the definition of maritime claim. It is convenient to begin with subparagraph (z). The question is whether Savonnerie's claim is one for necessities. There are really two aspects to the enquiry. The first is: what are necessities? The term has been given a wide meaning by the English courts. It is not confined to what is absolutely necessary. Nor is any distinction drawn (as it used to be) between necessities for the ship and necessities for the voyage. In *The Riga* 26 LTR (1872) 202,

Sir R Phillimore adopted the compendious description of necessities as meaning whatever the owner of a vessel, as a prudent man, if present, would have ordered as being "fit and proper for the service on which a vessel

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is engaged". (For a South African case in which this definition was applied, see *In re The SS. "Manqoro"* 1913 NPD 67 at 82-3.) So it is a question of what is reasonably necessary (Williams' and Bruce's Admiralty Practice, 3rd ed, 194). Typical examples of necessities are goods such as anchors and cables, provisions, crew's wages, ship's charges, repairs and fuel.

The other enquiry is: who may claim for necessities? The English cases show that there are three categories of persons who may have this right. Firstly, those who supplied the necessities; the so-called "necessaries men". Secondly, the person who pays for necessities supplied to a ship has as good a claim as the person who actually supplied them (*Foong Tai & Co vs Buchheister & Co* 1908 AC 458 (PC) at 466). This person will usually be the ship-owner's agent.

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Examples of cases where this type of claim was allowed are *The Underwriter* 25 LTR (1871) 279; *The Riga*; *The Arzpeitia*

[1921] All ER Rep 523 (PDA) and *The Mogileff* 37 TLR (1921) 549. There is a qualification to the right to claim on this basis, namely where the agent has agreed to look to the personal liability of the principal alone (*The Mogileff* at 553). Thus the English courts have refused to exercise the powers conferred by the 1840 and 1861 Acts to enforce the payment of the balance due on an ordinary mercantile account between ship-owner and agent (*The "Comtesse de Frègeville"* [1861] EngR 729; 167 ER 146; see too Williams' and Bruce's Admiralty Practice 192). On the other hand it is immaterial that the agent's claim against the ship-owner is for reimbursement in respect of necessities paid for by the agent in accordance with his prior mandate after their supply by the necessities man. The "*N R Gosfabrick*" 166 ER 1160 is not in conflict with this principle. There

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the claimant was not the ship's agent. He was a third party who only came into the picture and paid the butcher after the vessel had been supplied with meat.

The third class of person who may have a claim for necessities supplied to a ship was described by Lord Atkinson in *Foong Tai* (at 466) as "he who advances money to the person who thus pays, for the purpose of enabling him to pay". Such claimant, it was said, "stands in the same position as the person to whom the money is advanced". It would seem however that his remedy is subject to somewhat restrictive requirements. As I understand the principles of English admiralty law the person who advances money (usually to the ship's agent) by way of reimbursement for necessities which have already been supplied will not, unless he had before their procurement undertaken to pay for them, have a claim for necessities within the meaning of the

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1840 and 1861 Acts. This in my opinion is the effect of the statement of Lord Atkinson which I have quoted. It is to be read as referring to a situation where the advance is made to enable the necessities not only to be paid for, but also to be obtained. Only then is there a claim for necessities. The closing remarks of Dr Lushington in *The India 9 LTR*

(1863) 234 support this approach. So does *The "N. R. Gosfabrick"*. The type of claim now under consideration cannot, as the court *quo* seems to have done, be equated with that of a ship's agent. For it to succeed there would have to be an extension of the remedy to persons twice removed, so to speak, from the necessities man. This would result in the link between the advance of the money and the supply of the necessities being too tenuous. The element of urgency, of immediate necessity, which was the original

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rationale behind a necessities claim (*The "comtesse de Frèzeville"* at 148) would be absent. It is true that an agent's claim to be reimbursed for necessities which have already been supplied may be said to be similarly tainted. But this is not really so. In this situation the necessities would usually have been supplied on the strength of the agent's creditworthiness. On the other hand, it is difficult to imagine the creditworthiness of a person in *Savonnerie's* position being a factor in the material man's transaction with the agent. The *Proceeds of the Albert Crosby Vol III Admiralty and Ecclesiastical Cases (1869-1872)* 37 was a special case. A, being master and sole owner of a vessel, put her into a shipwright's dock for repair. The shipwright repaired the vessel and refused to allow her to leave his dock until his bill for the repairs was paid for. A,

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having no funds, the plaintiff lent him money to pay the shipwright's bill, and A paid the bill with the money

lent. It was held that the money having been advanced for the purpose of releasing the ship from the possessory lien of the shipwright, the plaintiff was entitled to recover the amount of the loan in a suit for necessities. It is clear that the necessities in respect whereof the plaintiff undertook to lend the money was not the repair of the ship but the release of the vessel from the lien and that the loan having preceded this, the claim was a good one.

I revert to the facts. *Savonnerie's* claim for R80 000 in respect of Mobil's fuel account relates to necessities (for *Azgard IV* and the *Hashomer*). The nature of the claim for 300 000 US dollars is less clear. Here the question is whether the expenditure

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referred to in the fax dated 21 February 1985 is in respect of necessities. Many of the items listed ((ii), (vi), (vii), (viii), (ix), (x) and (xi)) give no indication of the type of goods or services involved. Others ((iii), (iv) and (xii)) either appear not to be necessities or are so lacking in particularity as to make it difficult to conclude that they fall into this category. That leaves

"bankers" ((i)) and "stevedores"((v)). It was argued that the first was a typing error for "bunkers", ie fuel (for Azgad IV). I am not sure that this can be accepted. And, as regards "stevedores", there is uncertainty. It is not said how the amount of R15 000 is calculated or why it is not included under salaries. In The Riga one of the claims (for €150) was disallowed on the ground that "though it is alleged in general terms that that sum was advanced

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for necessary expenses, it is not stated, as it ought to have been, what these necessary expenses were" (at 204). Relying on this and the other deficiencies referred to,

counsel for Weissglass argued that on this basis alone

the claim for 300 000 US dollars must fail. |

I do not propose to decide the point. It would not dispose of the matter. There would still be the claim for R80 000. Nor is it necessary to consider whether Atlantic's two ships were of the kind referred to in the 1840 Act, namely "foreign" or whether the goods and services were supplied "elsewhere than in the port" to which the ships belonged as required by the 1861 Act. There is a more fundamental difficulty that Savonnerie faces in regard to both payments. In order to have a claim for necessities, it must bring itself within the third category of person claiming for necessities. There is no question of QLM having acted

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as Savonnerie's agent in paying for the necessities. Nor did Savonnerie at any time prior to their supply undertake to pay for them. This being so and applying the principles of English law referred to, the payments by Savonnerie must have been made to enable QLM to procure the supply of the items listed in the fax and the fuel. Only then would Savonnerie have a maritime claim in terms of sub-paragraph

(z) of the definition section of the Act. Savonnerie has not shown this. The payment of 300 000 US dollars was to reimburse QLM for expenditure previously incurred by it in paying for (what I assume to be) necessities already supplied. Whilst it was only consequent upon the payment of the 45 000 US dollars that QLM paid Mobil's account for R80 000, the fuel had also by then been supplied to Atlantic. It was argued however that if the payment of 300 000 US dollars had not been made, QLM would have

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ceased to act as Atlantic's agent. That may be so. But this is not the test for determining what are necessities.

The remaining issue is whether Savonnerie's claim falls under sub-paragraph (1). It will be recalled that it defines a maritime claim as "any claim in respect of goods supplied or services rendered to a ship for the employment or maintenance thereof". Does it afford Savonnerie any wider basis for relief than sub-paragraph (z) ? One must see sub-paragraph (1) in its historical

perspective. It would seem to be derived from inter alia sec 20(2)(m) of the United Kingdom Supreme Court Act of 1981. In terms of this section, read with sec 20(1)(a), admiralty jurisdiction is conferred on the High Court to determine "any claim

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in respect of goods or materials supplied to a ship for her operation or maintenance". According to D. C. Jackson: Enforcement of Maritime Claims 50 this head of claim "incorporates much that was covered by the age-old claim for 'necessaries'. Indeed, the British Act no longer refers to necessities as such. In *The "Fairport"* (No 5) [1967] 2 Lloyd's Rep 162 BRANDON J held that the claims covered by sec 1(1)(m) of the Administration of Justice Act, 1956 were "certainly no narrower than the claims which were formerly described as claims for necessities". (Sec 1(1)(m) is in the same terms as sec 20(2)(m) of the 1981 Act, its successor.) And in *The River Rima*

[1988] 2 All ER 641 (HL) at 646 d the same learned judge (now Lord Brandon) said that "what is now called a claim in respect of

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goods or materials supplied to a ship for her operation or maintenance is the equivalent of what used to be called a claim for necessities, but without the restrictions which formerly applied to such a claim". I shall assume that our sub-paragraph (1) should be similarly interpreted. Otherwise it would in the light of sub-paragraph (z) be tautologous. But that I think is as far as it goes. For the reasons stated, advances to reimburse an agent in respect of necessities already supplied cannot found a claim for necessities. (*The "Fairport"* was not such a case. The plaintiffs were ships' chandlers. Their claim was in respect of wages paid by them.) Neither the language of the subparagraph nor any other considerations justify subparagraph (1) being given an extended meaning so as to

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include such a claim. In this respect, so it seems to me, sub-paragraph (1) is no wider than subparagraph (z).

To sum up. Savonnerie in my opinion failed to show whether prima facie or otherwise that its claims against Atlantic were maritime ones. The application to set aside the attachment order should therefore have succeeded.

The following order is made:

- (1) The appeal succeeds with costs. Such costs are to include the fees of two counsel. (2) The order of the court a quo is set aside. The following order is substituted:

"1. The order granted on 24 January 1986 by this Court in the exercise of its admiralty jurisdiction in terms of Act 105 of 1983 under case no 623/86 is set

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aside.

2. The Deputy Sheriff is ordered to release

the motor fishing vessels "Azgad IV" and "Hashomer" which are presently berthed in Table Bay docks from the attachment made in case no 623/86.

3. The respondent is directed to pay the costs of this application including the costs of two counsel and the applicant's costs arising out of case no 623/86".

NESTADT, JA

CORBETT, CJ) E M GROSSKOPF, JA) CONCUR VAN DEN HEEVER, JA) HOWIE, AJA)

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