

In the High Court of South Africa

REPORTABLE

KwaZulu-Natal Division, Pietermaritzburg

Appeal Case No. AR 350/2018

In the matter between:

World Net Logistics (Pty) Ltd

Appellant

and

Donsantel 133 CC

First Respondent

Ahmed Mulla

Second Respondent

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Judgment

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Lopes J (Vahed J concurring):

[1] This is an appeal against a judgment of the learned magistrate in the Durban Regional Court, handed down on the 14<sup>th</sup> February 2018. The appeal concerns the admiralty jurisdiction of the magistrates' courts.

[2] At stake in the court *a quo*, was the modest sum of R213 837.05. It was said to be owed, jointly and severally, by the first respondent (as principal) and the second respondent (as surety) for freight forwarding services rendered by the appellant to the first respondent. But a little more of the background is perhaps necessary.

[3] During September 2013 the appellant and the first respondent concluded a written agreement ("the service agreement") for the provision of freight

forwarding services by the appellant to the first respondent. At the same time the second respondent bound himself as surety and co-principal debtor (“the suretyship agreement”) for all debts due by the first respondent to the appellant.

[4] The service agreement contained the consent by the first respondent to the jurisdiction of the magistrates’ courts in the following terms:

‘The customer consents to the jurisdiction of the Magistrates’ Court in terms of Section 45 of the Magistrates’ Court Act No. 32 of 1944 (as amended), to any Magistrates’ Court otherwise having jurisdiction under Section 28 of the said Act, notwithstanding that the claim by the company exceeds the normal jurisdiction of the Magistrates’ Court as to amount. The company shall, in its discretion, be entitled to proceed against the customer in any other court of competent jurisdiction notwithstanding the foregoing.’

[5] The appellant’s trading terms and conditions were also included by reference into the service agreement. These were contained in a document titled “South African Association of Freight Forwarders: Trading Terms and Conditions” (“the T’s and C’s”) which was annexed to the service agreement. The first respondent agreed to be bound by those. The T’s and C’s contained a submission to jurisdiction by the first respondent in the following terms:

**‘SUBMISSION TO JURISDICTION**

The parties agree that any legal action or proceeding arising out of or in connection with these trading terms and conditions shall be brought in the divisions of the Supreme Court of South Africa where the company’s head office is situated at the commencement of the proceedings, and the customer irrevocably submits to the non-exclusive jurisdiction of such court.’

[6] In a similar vein, the suretyship agreement contained the following provisions:

‘12. I hereby agree and consent that the creditor shall, at its option, be entitled to institute any legal proceedings which may arise out of or in connection with this deed of suretyship, at the election of the creditor, in:-

12.1. any magistrate’s court having jurisdiction, notwithstanding the fact that the claim or value of the matter might exceed the jurisdiction of such magistrate’s court; or

12.2. the [insert relevant high court ie: South Gauteng] (sic) High Court of South Africa to which jurisdiction I hereby consent.’

[7] The action began in the court below during May or June 2014. A year later, during May 2015, the respondents delivered their joint plea. It contained a mere five terse paragraphs. That delay is perhaps explained by paragraph 4 of the joint plea which said that ‘...the First and Second Defendants incorporates paragraphs 6 to 38 of the Defendants (sic) Affidavit in support to (sic) its application for recession (sic)’.

[8] The affidavit does not form part of the appeal record. Indeed, none of the documents delivered within that year, (May 2014 – May 2015), and no information as to what happened during that year, has been placed before us.

[9] The record then reveals that during February and March 2017 the second respondent delivered a notice of intention to amend his plea by the introduction of two special pleas. The actual amendments took effect towards the end of April 2017 when the second respondent delivered the amended pleadings.

[10] The first special plea contended that the court *a quo* did not have jurisdiction to entertain the suit on the basis that the claim was a maritime claim as defined in s 1 of the Admiralty Jurisdiction Regulation Act, 1983 ('the Act') and that only the high court exercising its admiralty jurisdiction could determine the dispute. The second special plea related to a contention that the appellant was obliged to register as a credit provider in terms of the relevant provisions of the National Credit Act, 2005 and that its failure to do so precluded it from recovering any debt alleged to be due to it where such debt arose from the provision of credit by it.

[11] The special pleas were enrolled before the court *a quo* on 6 December 2017 and argued on that date. On 14 February 2018 the learned magistrate delivered a written judgment dealing only with the first special plea which he upheld. He did not deal with the second special plea because, he said, there was no need to, and, in any event, his conclusion that he lacked jurisdiction meant that he also lacked jurisdiction to consider the second special plea. This appeal is against the upholding of that first special plea.

[12] What occurred between the delivery of the initial joint plea (2015) and the delivery of the special pleas (2017) does not form part of the appeal record. Indeed, none, if any, of the documents delivered within that period (2015-2017), and no information as to what happened during that period, has been placed before us. However, a transcript of a portion of the argument before the court *a quo* concerning the special pleas has been included in the record. From there one notes a singular reference to the fact that at the time argument unfolded before the court below the first respondent was by then in liquidation. It was also noted that counsel for the respondents' initial heads of argument contained an indication that the first respondent was in liquidation. The record contains no indication as to what was done about that fact, if anything, and

whether the trial (on the special pleas) unfolded with the knowledge and consent of the first respondent's liquidator is unknown.

[13] The appeal was originally enrolled before Vahed and Olsen JJ on 24 May 2019. Prior thereto, in preparation for the hearing of the appeal, they had requested counsel to address, firstly, the question of the liquidation of the first respondent and the impact that had on the appeal continuing and, secondly, the implication of the divers consents or submissions to jurisdiction alluded to earlier in this judgment.

[14] At the hearing on 24 May 2019 the appeal was adjourned to 21 June 2019. This was because:

- (a) Mr *Tobias*, who then appeared for the second respondent, contended that the appeal could not proceed in the absence of the involvement of the first respondent's liquidators;
- (b) The court sought additional submissions on certain aspects of the judgments (majority and minority) delivered in *The Wave Dancer: Nel v Toron Screen Corporation (Pty) Ltd & another* 1996 (4) SA 1167 (SCA);
- (c) By then it was probable that the two judges presiding would have differing views on the appeal.

[15] That was how, by direction of the Judge President, the full court was constituted at the resumed hearing of the appeal on 21 June 2019. At the resumed hearing we were satisfied with the evidence contained in an affidavit deposed to by the second respondent's attorney to the effect that the liquidators of the first respondent had been furnished with the record and that those liquidators had elected not to participate in the appeal, but instead chose to abide our decision.

[16] The following facts are common cause:

- (a) The appellant's claim is a maritime claim as defined in s 1 of the Act.
- (b) The suretyship agreement provided for the jurisdiction of the magistrates' courts, notwithstanding that the claim or value of the matter in dispute might exceed the jurisdiction of the magistrates' courts. The jurisdiction clause also provided for the consent of the parties to the jurisdiction of the relevant high court, if selected by the parties. No election was made.
- (c) Two issues fall to be decided by this court:
  - (i) Do the magistrates' courts have jurisdiction to hear a maritime claim, in circumstances where the magistrates' courts would otherwise have jurisdiction to hear the action?
  - (ii) Where an objection is raised to the magistrates' courts' jurisdiction, does a magistrate have the authority to ignore the objection, and proceed to hear the claim, if it is otherwise within the magistrates' courts' jurisdiction?
- (d) As the second respondent was sued as surety, he was entitled to raise any defence which would have been available to the principal debtor.

[17] Mr *Wallis*, who appeared for the appellant, submitted that:

- (a) In the 35 years since the passing of the Act, there are no reported cases dealing with whether the magistrates' courts have jurisdiction to hear admiralty matters. He drew attention to the rising ordinary jurisdiction of the magistrates' courts. The result is that an action based upon a maritime claim may be made in a magistrate's court, which is otherwise competent to hear the claim. However, it may not do so if admiralty jurisdiction is reserved to the admiralty court. In this matter the learned magistrate incorrectly dismissed the action on the basis that the appellant's claim is a maritime claim, and the magistrates' court is precluded from hearing any matter that would qualify as a maritime claim. That decision, if correctly made, would deprive litigants from access to justice because of the high costs involved in high court litigation. It would also place all maritime matters, no matter how small, before the admiralty court.
- (b) Where no objection is raised to a maritime claim brought in a magistrates' court, and which claim is otherwise within its jurisdiction, a magistrate could simply continue to apply the ordinary jurisdiction of that court. See: *The Wave Dancer*, and the comments on that case in *Columbus Stainless (Pty) Ltd v Kuehne & Nagel(Pty) Ltd & another, In Re: National Ports Authority of South Africa v Kuehne & Nagel (Pty) Ltd & another* [2014] ZAKZDHC 19, para 25.
- (c) In the *The Wave Dancer*, Olivier JA dealt with the provisions of s 7 of the Act, where two principles emerged:

- (i) That it is not peremptory that maritime claims be heard in an admiralty court. An admiralty court may decline its 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.
  - (ii) If the question of jurisdiction is raised in proceedings before a provincial or local division of the high court, such court should determine the issue, and if it decides that the matter relates to a maritime claim, it shall order that the matter be proceeded with in a maritime court.
- (d) In *The Wave Dancer*, the matter of jurisdiction had not been raised in the provincial division. Olivier JA was of the view that where the question of jurisdiction was not raised, and that court failed to make a decision on jurisdiction, the provincial division was not precluded from exercising its ordinary jurisdiction, and the jurisdiction issue could not be raised on appeal.
- (e) Although the minority judgment in *The Wave Dancer* has no precedential authority, Scott JA agreed that the Act did not expressly exclude maritime claims from the ordinary jurisdiction of the high court. The question whether a claim instituted in the high court is a maritime claim may be raised, and the decision on that issue determines the court's civil jurisdiction. If the court decides that the claim is a maritime claim, then it must proceed in the admiralty court. This only



applies, however, when the high court determines that the claim is a maritime claim.

- (f) On the authority of *The Wave Dancer*, the learned magistrate in the matter had no jurisdiction to conduct an enquiry into whether the forwarding claim was a maritime claim. The exclusive jurisdiction of the admiralty court, when challenged, could only be invoked once an enquiry in terms of s 7(2) of the Act was completed in the high court (aside from admiralty claims made as such). The Act falls to be interpreted along the principles set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), and the article by DB Friedman entitled 'Maritime Law in the Courts after 1 November 1983', published in *South African Law Journal*, volume 103, 1986, at page 678.
- (g) There is, however, a practical solution to a defendant in a magistrate's court raising a defence that the plaintiff's claim is a maritime claim. The presiding magistrate should halt the proceedings, and refer the matter to the high court for a decision to be made in terms of s 7 of the Act. The decision itself is not one which a magistrate has the jurisdiction to make. The dismissal of the appellant's claim in this matter was accordingly incorrectly made by the learned magistrate. This practical solution was an alternative to the earlier submission that the learned magistrate had no power to determine whether a claim fell within the provisions of s 1 of the Act, because it was within his power to determine whether he had jurisdiction to determine any claim.

- (h) This court could only uphold the decision of the learned magistrate if the Act removed the powers of magistrates to decide admiralty matters. If that was the intention of the legislature, it would have been very simple for it to have stated that explicitly in the Act. That it did not do so indicates that it did not intend to do so.

[18] Mr *Harpur SC*, who appeared for the second respondent, submitted that:

- (a) There were only two issues to be decided by this court:
  - (i) Does a magistrate have jurisdiction to deal with maritime claims under the Act?
  - (ii) Can a magistrate, if an objection to jurisdiction is raised on the basis that the claim is a maritime claim, ignore that fact, and decide the case using the magistrates' courts' ordinary jurisdiction (on the basis that the matter otherwise falls within the magistrates' courts' jurisdiction)?
- (b) It is common cause that the answer to the first question is that the magistrates' courts do not have the power to exercise admiralty jurisdiction. If the issue of a claim being a maritime claim is not raised before the magistrate, the action may clearly proceed in the exercise of the magistrates' courts' ordinary jurisdiction. In that instance there would be no question of the magistrate exercising admiralty jurisdiction. The magistrates' courts have no inherent original jurisdiction. The jurisdiction of the magistrates' courts is to be found in the statute creating it. *The Wave Dancer* does not assist the appellant, because it dealt with a claim in the high court - a court of original jurisdiction.

- (c) Where a defendant raises before a magistrate the fact that a claim is a maritime claim, the plaintiff may still wish to proceed in an admiralty court in order to secure the benefits available in that jurisdiction, which are not available in the magistrates' courts' ordinary jurisdiction. Should such a litigant be deprived of those benefits? To do so would be to breach the litigant's rights of access to court and the equality provisions of the Constitution.
- (d) It is undesirable to allow plaintiffs to choose the forum which best suits them, which would happen if they could simply elect the court in which they wished to proceed. The high court has exclusive jurisdiction to hear matters in admiralty because it is a court of unlimited jurisdiction. In *Admiralty Jurisdiction Law and Practice in South Africa* (2006) by Gys Hofmeyr, at page 19, the learned author states:

‘Prior to the commencement of the Act, a Magistrate’s Court did not have admiralty jurisdiction. The Colonial Courts of Admiralty Act of 1890 conferred admiralty jurisdiction only on courts of law having unlimited jurisdiction. The preamble to the Act records that the Act was “to provide for the vesting of the powers of the admiralty courts of the Republic in the provincial and local divisions of the Supreme Court of South Africa . . . .” (now the High Court). Moreover s 2 of the Act provides that the Supreme Court shall have jurisdiction to enforce maritime claims which are enforceable either *in rem* or *in personam*. There is no statutory provision authorising the Magistrate’s Court to entertain proceedings *in rem* or to exercise the other powers vested in courts exercising admiralty jurisdiction. It is accordingly submitted that a Magistrate’s Court does not enjoy admiralty jurisdiction. This view appears to derive some support from the fact that the Act specifically preserves the jurisdiction which a

Magistrate's Court has under sections 131, 136 and 151 of the Merchant Shipping Act of 1951.' (Footnotes omitted).

The learned author then makes the point that a magistrate's court may hear a maritime claim falling within its ordinary jurisdiction, but the court would not be exercising admiralty jurisdiction. Should such a procedure result 'in "undue expense or inconvenience", a magistrate's court would be empowered in terms of s 35 of the Magistrates' Court's Act, to transfer the proceedings to "any other court"'.

Mr *Harpur* submitted that Hofmeyr misread the Magistrates' Courts Act in this regard.

[19] During my research of the matter, my brother Olsen J drew my attention to a thesis submitted by Mr Pré Prinsloo in partial fulfilment of the requirements for the degree of Master of Laws in the Faculty of Law, Natal University (Durban) 1998-2000. The thesis is entitled 'The Jurisdiction of the Magistrate's Court over Maritime Claims'. In his thesis, Mr Prinsloo deals extensively with the problem which existed prior to the enactment of the Act (that claims could be pursued in more than one court, with possibly different outcomes), and he cites a number of cases dealt with in the various magistrates' courts prior to the Act. All the cases were the subject matter of appeals. Counsel were referred to those cases, and the thesis, and invited to make further written submissions. They both did so.

[20] Mr *Wallis* submitted that:

- (a) The cases would all have qualified to be heard pursuant to the Colonial Courts of Admiralty Act, 1890.

- (b) Notwithstanding that fact, the magistrates' courts exercised jurisdiction and heard the matters.
- (c) The matter of jurisdiction was not raised by any of the appeal courts. That was because the jurisdiction of the two courts overlapped at the time.
- (d) The position, which was regarded as unsatisfactory, was the subject matter of the decision in *Crooks & Co v Agricultural Co-Operative Union Ltd* 1922 AD 423.
- (e) The problem arose because the magistrates' courts' jurisdiction was not limited by the Colonial Courts of Admiralty, and consequently, no jurisdictional points were raised on appeal.
- (f) Accordingly, there is nothing in the preamble to the Act which shows an intention by the legislature to revoke the jurisdiction of the magistrates' courts which had hitherto been exercised.

[21] Mr *Harpur* submitted that:

- (a) None of the cases cited refer to the question whether the magistrates' courts had the jurisdiction to decide admiralty claims.
- (b) The cases concerned claims which would have fallen within the definition of maritime claims in terms of the Act. However, when the cases were heard on appeal, no reference was made to the fact they involved maritime claims.

- (c) The thesis submits that no admiralty jurisdiction was ever accorded to the magistrates' courts.
- (d) The thesis concludes that the effect of *The Wave Dancer* is that the concern of overlapping jurisdictions was not resolved by the introduction of the Act. Consequently the problem would persist. This is an overstatement of the case which did no more than apply a practical solution to a problem which only arose on appeal because the parties in the provincial division had failed to identify the problem.
- (e) *The Wave Dancer* created an exception which accorded with the inherent jurisdiction of the high court – ie. if no dispute is raised, the high court may proceed with a claim which qualifies as a maritime claim, although the high court would exercise its ordinary jurisdiction. Where the claim is identified as a maritime claim, it is necessary for it to be decided in an admiralty court. It is this exception which proves that the admiralty court has exclusive jurisdiction to determine maritime claims.
- (f) Accordingly, the learned magistrate had no alternative but to classify the claim as a maritime claim, and dismiss the action. Unlike *The Wave Dancer*, in this matter, the jurisdictional objection was raised and the decision was correctly made.
- (g) It would have been bizarre for the learned magistrate to have found that the claim was a maritime claim, but nevertheless continued to hear the matter in the exercise of the magistrates' courts' ordinary jurisdiction. The fact that a claim is classified

as a maritime claim precludes the hearing of that claim as a ordinary claim.

### **Reasoning:**

[22] The Act provides:

#### **‘2 Admiralty jurisdiction of Supreme Court**

(1) Subject to the provisions of this Act each provincial and local division, including a circuit local division, of the Supreme Court of South Africa shall have jurisdiction (hereinafter referred to as admiralty jurisdiction) to hear and determine any maritime claim (including, in the case of salvage, claims in respect of ships, cargo or goods found on land), 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.

(2) For the purposes of this Act, the area of jurisdiction of a court referred to in subsection (1) shall be deemed to include that portion of the territorial waters of the Republic adjacent to the coastline of its area of jurisdiction.

...

#### **7 Disputes as to venue or jurisdiction**

(1)(a) A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other court in the Republic or any other court or any arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by such other court or by any such arbitrator, tribunal or body.

...

(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 claim, it shall be proceeded with in a court competent to exercise its admiralty jurisdiction, . . .
- (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: . . .’

[23] The following factors support the argument that the magistrates’ courts have no jurisdiction to decide maritime claims:

- (a) The provisions of the Magistrates’ Courts Act, 1944 prescribe the jurisdiction of the magistrates’ courts. It makes no express or implied provision for the exercise of admiralty jurisdiction.
- (b) The introduction to the Act provides:

‘To provide for the vesting of the powers of the admiralty courts of the Republic in the provincial and local divisions of the Supreme Court of South Africa, and for the extension of those powers; for the law to be applied by, and the procedures applicable in, those divisions; for the repeal of the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, in so far as it applies in relation to the Republic; and for incidental matters.’
- (c) Section 14 of the Act provides for the retention of jurisdiction by the magistrates’ court, to deal with certain matters formerly covered by the Merchant Shipping Act, 1951. Those provisions relate to a very limited area of jurisdiction which existed prior to the commencement of the Act, and deal with the speedy treatment of seafarers’ wages. This specific inclusion in the Act appears to indicate that the Act did not, otherwise, intend to extend admiralty jurisdiction to the magistrates’ court.



- (d) There are various aspects of admiralty practice which are not available in the ordinary jurisdiction of the magistrates' courts. These include: the ability of the admiralty court to give security for 'any claim' (s 5(2)(b) of the Act); the referral of a matter to arbitration (s 5(2)(e) of the Act); actions *in rem*; provisions for security arrests; and procedural aspects such as the admission of hearsay evidence, the gathering of evidence, etc.
- (e) The fact that the Colonial Courts of Admiralty Act, 1890 sought to extend the jurisdiction of the admiralty courts to only courts of original unlimited civil jurisdiction – which does not apply to the magistrates' courts. In *Admiralty Jurisdiction and Practice in South Africa* (1987) DJ Shaw QC records that after the enactment of the Colonial Courts of Admiralty Act, 1890, South African courts, in the exercise of their ordinary jurisdiction, heard cases which could have been brought before the Colonial Courts of Admiralty. Thus, two courts could apply different systems of law, with both subject to local statutory law. This could affect both the result of the matter and the ranking afforded to claimants. With the introduction of the Act, admiralty jurisdiction was set out in s 2, by referring to the hearing and determination of maritime claims. Shaw also states that s 7 of the Act provides for the final determination of disputes of jurisdiction, a decision which cannot be appealed (see s 7(4) of the Act). I am unable to find any reference by the learned author that it was envisaged that magistrates' courts would have the right to exercise admiralty jurisdiction.

- (f) It would appear from literature at the time of commencement of the Act that it was never envisaged that the magistrates' courts would have jurisdiction to hear admiralty matters. This is in accordance with the views of Hofmeyr. John Hare in his work *Shipping Law & Admiralty Jurisdiction in South Africa*, 2ed (2009) expressed a seemingly contrary view, and opined that s 35(1) of the Magistrates' Courts Act, 1944 enables that court to transfer matters to the high court. Counsel for both parties before us viewed this as a misinterpretation of that section. Hare's analysis of the provisions of s 7(2) of the Act, allows for a magistrate to decide whether a claim is a maritime claim in terms of the Act. This approach ignores the provisions of s 2 of the Act leading to the interpretation that s 7 of the Act refers only to a high court.
- (g) There is no real prejudice to be suffered by litigants being deprived of having access to justice or of equality, or of being heard, by having to proceed in the high court at added expense. A plaintiff has the right to elect the court in which to prosecute the claim made against the defendant. If the plaintiff chooses the magistrates' court, and the defendant objects on the basis that that the matter is an admiralty claim, that is a consequence of the legislation – the claim will then have to be heard in the admiralty court which will retain a discretion with regard to costs where a defendant has unreasonably resorted to the admiralty court for tactical reasons. The same logic would apply to a plaintiff who sues in the first instance in the admiralty court when the ordinary jurisdiction of a lower court would have sufficed.

(h) The provisions of s 6 of the Act provide that maritime claims which existed under the Colonial Courts of Admiralty Act, 1890, and which still existed in 1983 at the commencement of the Act, are to be decided according to English Admiralty Law. This ‘is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty, either by Act of Parliament or by reiterated decisions and traditions and principles, has adopted as the English maritime law . . .’ See: *Crooks & Co v Agricultural Co-operative Union Ltd*, 447. These have been referred to by some authors as the old maritime claims. Those (new) maritime heads of jurisdiction which came into existence upon the passing of the Act are to be decided according to Roman Dutch Law. All claims however, are to be viewed in the light of the Constitution. Courts are enjoined to interpret legislation, where possible, as being constitutionally valid.

(i) In *Pollak on Jurisdiction* 2ed (1993) by David Pistorius, the learned author deals with cases where the jurisdiction of certain courts is excluded. At page 14, he states:

‘Complete exclusion is usually, but not exclusively, as the result of statutory intervention. The legislature establishes a separate and distinct jurisdiction to deal with a class of cases and within the limits of that jurisdiction the ordinary courts are precluded from interfering.’

He then cites examples such as: the Water Act, 1956 which provides the water court with jurisdiction to deal with certain matters specified in s 40 and no other court may do so. The high court and the water court share concurrent jurisdiction with regard to interdicts in intended proceedings; the Patents

Act, 1978, where a high court judge (the Commissioner of Patents) is given exclusive jurisdiction; the Maintenance and Promotion of Competition Act, 1979; the Income Tax Act, 1962; the Workmen's Compensation Act, 1941; and the Labour Relations Act, 1956. (Some of these acts have been amended or repealed).

The learned author also deals with the Act, and refers to the fact that the ordinary jurisdiction of the high court is excluded in admiralty matters, and even, in some cases from the application of the common law. Similarly, non-admiralty matters may not proceed in the admiralty court.

- (j) The South African Law Commission published 'Project 32 Report on the Review of the Law of Admiralty' on the 15<sup>th</sup> September 1982. It made no recommendation on the aspect of the magistrates' courts exercising admiralty jurisdiction. No reference to the magistrates' court exercising admiralty jurisdiction is made by the Commission in setting out the history of the admiralty jurisdiction. The Bill itself refers only to the precursor of the present s 14 of the Act. In the precursor to the present s 7 (s 8(3) of the Bill), the following paragraph was included:

'Any claim heard and decided as a maritime claim shall for all purposes be deemed to have been a maritime claim and any claim heard and decided as a non-maritime claim shall for all purposes be deemed to have been a non-maritime claim, and no appeal shall lie against any decision or order made under subsection (1).'

The present subsection 7(1) was s 8(1) of the Bill.

- (k) The decision in *The Wave Dancer* finds no application in the present matter. The case does not deal with the jurisdiction of the magistrates' courts, and s 7 of the Act was designed to deal only with a conflict between the jurisdictions of the high court, and the admiralty court.

[24] The following factors suggest that the magistrates' courts have jurisdiction to decide maritime claims otherwise falling within its jurisdiction:

- (a) The parties agree that, absent a complaint from the second respondent, the learned magistrate could have continued with the present claim (despite it being a maritime claim) in the exercise of the magistrates' courts' ordinary jurisdiction, on the basis that the claim otherwise fell within that court's jurisdiction. This carries with it the proviso that the procedures available in the exercise of the magistrates' courts' ordinary jurisdiction enable those court to hear such matters. One can envisage many claims where this would be the case, and there would be no need to hear the matter in the high court. Such a course would have beneficial time and cost implications for both parties. It was also, seemingly, contemplated in the Bill, but omitted from the Act.
- (b) The magistrates' courts were previously considered to have jurisdiction, as is evident from the cases cited in Mr Prinsloo's thesis.
- (c) Why should the objection of the second respondent be sufficient to cause the proceedings to be stopped and force

the applicant to proceed in a far more expensive forum? The ordinary jurisdiction of the high court is not excluded where the matter of the definition of a 'maritime claim' is not raised. What factors would then require the exclusion of the magistrates' courts?

- (d) The fact that the magistrates' courts are perfectly adequately equipped to deal with most maritime claims which are otherwise within its jurisdiction, would seem to suggest that it was intended to be allowed to do so. The occasions when a challenge is made to a magistrate's jurisdiction seem to arise when a wholly unnecessary objection is made because it would suit a defendant to make use of a tactic probably suggested by his legal representative. This should not be tolerated, notwithstanding the abovementioned remedies for costs. The situations where a magistrate is faced with a claim in admiralty where the amount in dispute is within the magistrates' courts' jurisdiction, but the procedural advantages to a defendant would not be available, are surely few and far between. The same applies to claims where the required machinery to prosecute the claim is just not available to a magistrate. To deny litigants an expeditious and inexpensive method of recovery seems unwarranted.
- (e) There is nothing in the language of s 7 of the Act to suggest that magistrates' courts' are not included in the phrase '... any other court in the Republic....' If the legislature had intended admiralty jurisdiction to be the exclusive province

of the high court (and the high court sitting in admiralty) it would surely have used more limiting language.

- (f) The approach of the Appellate Division in *The Wave Dancer* was that maritime claims were not excluded from the ordinary jurisdiction of the high court. The court held that a decision that a claim is a maritime claim deprives the high court of its ordinary civil jurisdiction. Where the matter is not raised the court is not precluded from exercising its ordinary jurisdiction.

[25] In my view those arguments favouring a conclusion that the magistrates' courts have no jurisdiction outweigh those suggestive of the opposite conclusion. The learned magistrate correctly found that the claim was a maritime claim. Had he been sitting in the high court, he would have referred the matter to the admiralty court. Sitting in a magistrates' court, however, he could not do so, and was obliged to hear the action, or dismiss the action. If he had not dismissed the action, and had subsequently heard the matter to completion, he may not have had to apply the provisions of the Act. That however, was not a discretion which he was empowered to exercise at that stage. Once his jurisdiction was challenged, he was compelled to decide whether the matter was a maritime claim. Having found that it was, it fell to be dealt with in terms of the Act, which he could not do.

[26] I have read the dissenting judgment of my brother Olsen J. I regret that I am unable to agree with his conclusion, because s 7 of the Act, in my view, is intended to deal only with matters in the high court. It does not follow that because the Act does not preclude maritime claims being heard in the high

court, it does not preclude maritime claims being heard in the magistrates' courts. Once it is accepted that the magistrates' courts have no jurisdiction to apply the Act, the same referral as would occur from the high court to the admiralty court cannot apply in the case of the magistrates' courts. This is because the magistrates' courts have no jurisdiction to apply the provisions of the Act, and there is no provision in the Magistrates' Courts Act, 1944, to transfer the matter to the high court exercising its admiralty jurisdiction. There are many instances where the high court is able to exercise a jurisdiction which the magistrates' courts may not. The exclusion of a maritime matter only arises where a challenge is raised to a magistrate's jurisdiction. This does not, in my view, raise objection to the exclusivity of the high court exercising its admiralty jurisdiction, any more than a claim otherwise in excess of the jurisdiction of the magistrates' courts, would raise such an objection.

[27] I conclude that the learned Magistrate correctly dismissed the claim, because once the objection was raised, and the learned Magistrate (correctly) held that the matter was a maritime claim, he had no option but to dismiss the action. The conclusion is, for some of the reasons set forth above, an unfortunate one. This is a matter which may easily be resolved by the legislature to remove any doubt. Perhaps the time has come for that to be done.

[28] In an attempt to avoid any confusion, I summarise what I have intended to convey in this judgment:

- (a) In the magistrates' courts, if nothing at all is raised concerning the jurisdiction of the court on the basis that a plaintiff's claim is a maritime claim as defined by the Act, the magistrate may continue to hear the matter if it is otherwise within the court's jurisdiction.



(b) If the defendant objects to the jurisdiction of the court on the basis that a plaintiff's claim is a maritime claim (or if the magistrate *mero motu* raises the question), then the magistrate must determine whether the claim is based on a maritime claim, and, if so, the action must be dismissed for want of jurisdiction.

(c) If no objection is raised (and the magistrate does not raise the question), on the basis that the plaintiff's claim is a maritime claim, that issue may not later be raised on appeal by either of the parties.

[29] With regard to costs, although this matter is unusual, involving as it does matters of substantive law and procedure, the costs should follow the result.

[30] The appeal is accordingly dismissed with costs.

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Lopes, J

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Vahed, J

OLSEN J (Dissenting)

[31] I have considered the majority judgment of my brother Lopes J. I regret that I cannot support the conclusion it reaches. As this is a minority judgment I will state my reasons for disagreement as briefly as possible, attempting to avoid unnecessary repetition.

[32] I commence with some explanations of terms I use in this judgment, and one or two preliminary observations.

- (a) Merely because it is convenient, I refer to the ordinary civil jurisdiction of our courts as “parochial jurisdiction”. I intend the term to convey and involve not only the concept of “jurisdiction” in the narrow sense, but also the determination of issues by the application of South African law.
- (b) When I use the term “maritime claim” I intend to convey nothing more than that the claim features in the list which comprises the definition of “maritime claim” appearing in s 1 of the Admiralty Jurisdiction Regulation Act, 105 of 1983 (the “Admiralty Act”).
- (c) This case does not concern the question as to whether the Magistrates’ Courts have the admiralty jurisdiction created and defined by the Admiralty Act. The Magistrates’ Courts clearly have no such jurisdiction. It is conferred only on the High Court.
- (d) This case concerns the question as to whether a Magistrates’ Court has the power to decide a maritime claim when the requirements for the engagement of the court’s jurisdiction set out in the Magistrates’ Courts Act are met, and the claim as pleaded engages the court’s parochial jurisdiction.

[33] The claim made by the appellant in the regional court, which that court decided it had no jurisdiction to entertain, was for payment of a little over

R200 000 in respect of freight forwarding services rendered by the appellant. It was accepted before us that the claim fell within paragraph (p) of the definition of “maritime claim” appearing in s 1 of the Admiralty Act. The question in this case is whether, merely by reason of its presence on the list of maritime claims, a claim for services rendered by a clearing and forwarding agent is put beyond the parochial jurisdiction of the Magistrates’ Courts. As will be seen, I take the view that the answer to that question must be the same answer as is properly given to the question as to whether a claim which appears on the list is by that reason alone put beyond the parochial jurisdiction of the High Court.

[34] A consideration of the Admiralty Act as a whole reveals that the list of maritime claims in s 1 is there not for the purpose of excluding them from the parochial jurisdiction of our courts, but for the purpose of defining the ambit of matters in respect of which the High Court may exercise the admiralty jurisdiction conferred upon it by the Admiralty Act. Section 2 of the Act confers admiralty jurisdiction upon the High Court

‘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 5(2)(a) of the Admiralty Act permits a court also to exercise its admiralty jurisdiction to

‘consider and decide any matter arising in connection with any maritime claim, notwithstanding that any such matter may not be one which would give rise to a maritime claim’.

[35] Whilst the Admiralty Act thus employs the list of maritime claims to identify the matters with respect to which admiralty jurisdiction may be employed, it does not otherwise refer to that list negatively, stating that the listed claims may not otherwise be adjudicated upon. On the contrary, s 7(1)(a)

of the Admiralty Act provides that a High Court may decline to exercise its admiralty jurisdiction if it is of the opinion that

‘any other court in the Republic ... will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court ...’.

In my view it is wrong to interpret the term “any other court in the Republic” as meaning any other court in the Republic besides the two courts which are the backbone of our judicial system, that is to say the High Court and the Magistrates’ Courts. The word “any” is used twice in the section.

‘In its natural and ordinary sense "any" --- unless restricted by the context --- is an indefinite term which includes all of the things to which it relates.’

(Per Innes JA in *Hayne & Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 363 at 371.)

Nothing in the context of s 7(1)(a) suggests that the word “any” should be restricted in its meaning.

[36] What the judgments in *The Wave Dancer: Nel v Toron Screen Corporation (Pty) Limited and Another* 1996 (4) SA 1167 (A) illustrate is that certainly in the case of a High Court parochial jurisdiction over maritime claims is maintained. Concerning s 7(1)(a) of the Admiralty Act, Olivier JA (writing the majority judgment) held (at 1188 – 1189) that it is not preemptory that maritime actions be heard by an admiralty court.

[37] The *Wave Dancer* had more to do with s 7(2) of the Admiralty Act which provides that when the question arises in proceedings before a High Court as to whether a matter pending or proceeding is a maritime claim, that question must be decided first. An affirmative answer renders it compulsory that the matter should be proceeded with in a court competent to exercise admiralty jurisdiction. The case in the *The Wave Dancer* proceeded to judgment before

the Supreme Court exercising its parochial jurisdiction without the question as to whether the claim was a maritime claim ever being raised. The majority judgment of the Appellate Division (at 1189B) held that

‘if the question of jurisdiction is not raised before such court, and it therefore fails to make a decision, it is not precluded from exercising its ordinary jurisdiction.’

In the minority judgment of Scott JA the following appears on the same subject at 1176 – 1177.

‘But the preemptory provisions of section 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. I can see no justification for construing the section otherwise.’

[38] Section 7(2) of the Admiralty Act appears to me to be the only provision in the Act which compels the engagement of the High Court’s admiralty jurisdiction. It is worth observing that in terms of s 7(4) the decision made by a Judge hearing a matter in which the High Court’s parochial jurisdiction has been engaged, as to whether in fact the claim before the court is a maritime claim, is not appealable. Accordingly, an erroneous decision that a claim is not a maritime claim will result in a maritime claim being determined in the exercise of the High Court’s parochial jurisdiction. In a sense then, the only provision in the Admiralty Act which compels the engagement of admiralty jurisdiction turns not on the question as to whether the claim is actually a maritime claim, but on the decision of a single Judge as to whether it is or is not a maritime claim. The two things may not necessarily be the same in every case.

[39] Both the majority and minority judgments in *The Wave Dancer* hold that the effect of s 7 of the Admiralty Act is that the parochial jurisdiction of the High Court may legitimately be employed to decide a maritime claim. The fact

that s 7(2) is a peculiar provision which relates to the High Court only should not be permitted to obscure the fact that what the Admiralty Act has brought about is the continued availability of parochial jurisdiction to determine maritime claims. That jurisdiction in civil litigation is shared between the High Court and the Magistrates' Courts, subject to the restrictions on the exercise of jurisdiction imposed by the Magistrates' Courts Act, 1944. Just as the Admiralty Act does not expressly (or impliedly) exclude the parochial jurisdiction of the High Court to hear maritime claims, so too is it silent on excluding that jurisdiction from the Magistrates' Courts when the requirements for the engagement of the jurisdiction of those courts are otherwise satisfied, as is the case here.

[40] In my view there is no answer to the proposition that if it had been intended by the legislature when enacting the Admiralty Act to deny the magistrates jurisdiction in respect of maritime claims, that would have been done expressly. The argument that the position with regard to the Magistrates' Courts was simply overlooked is of no assistance to the respondents in this case. If it was overlooked then it must be so that the retention of parochial jurisdiction over maritime claims in the High Court means that the magistrates' parochial jurisdiction also survived the Admiralty Act.

[41] Of course, the Magistrates' Courts were not overlooked in the Admiralty Act. Section 14 provides that the Act shall not derogate from the jurisdiction the Magistrates' Courts have under sections 131, 136 and 151 of the Merchant Shipping Act, 1951. It was argued that the fact that the magistrates' parochial jurisdiction in respect of maritime claims generally was not also saved under s 14 indicates that the Admiralty Act should be construed to exclude the jurisdiction of magistrates. However the sections of the Merchant Shipping Act in question exist because the claims they deal with do not fall within the

ordinary jurisdiction of the Magistrates' Courts. That is self-evident from the contents of the sections.<sup>1</sup> The purpose of s 14 is to convey that the conferral only on the High Court of the special jurisdiction and powers which are the characteristics of admiralty jurisdiction should not be taken impliedly to have repealed the special jurisdiction and powers given to the Magistrates' Courts in respect of the maritime claims dealt with in those sections of the Merchant Shipping Act. If the parochial jurisdiction of the Magistrates' Courts was not disturbed by the Admiralty Act, there was no need similarly to provide that the provisions of the Admiralty Act should not derogate from the ordinary jurisdiction of the Magistrates' Courts to determine maritime claims.<sup>2</sup>

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<sup>11</sup> **131. Right of suing on allotment notes.**-(1) The person in whose favour an allotment note under this Act has been made may, unless the seafarer has forfeited or ceased to be entitled to the wages out of which the allotment is to be paid, recover the sums allotted when and as the same are made payable, with costs, from the owner of the ship in respect of which the seafarer was engaged or from any agent of the owner who has authorized the allotment, and the provisions of section one hundred and thirty-six shall, *mutatis mutandis*, apply to any proceedings for such recovery: Provided that the wife of a seafarer, if she deserts her children or so misconducts herself as to be undeserving of support from her husband shall forfeit all rights to further payments under any allotment made in her favour.

(2) In any proceedings mentioned in subsection (1) it shall be sufficient for the claimant to prove that he is the person mentioned in the allotment note and that the note was given by the owner or by the master or the authorized agent of the owner or master, and the seafarer shall be presumed to be duly earning his wages unless the contrary is shown to the satisfaction of the court-

- (a) in the case of a seafarer serving on a foreign-going ship, by the official statement of the change in the crew caused by the seafarer's absence, made and signed by the master in terms of section 104;
- (b) by a certified copy of some entry in the official log-book, or by a letter from the master, to the effect that the seafarer has left the ship; or
- (c) by such other evidence as the court in its discretion considers sufficient to show that the seafarer has ceased to be entitled to the wages out of which the allotment is to be paid.

**136. Proceedings for wages.**- (1) A seafarer, or a person duly authorized by him, may as soon as wages due to him by reason of his engagement in a South African ship become payable sue for the same before any magistrate's court within whose area of jurisdiction the place at which his service has been terminated is situated, or which by reason of any other fact has jurisdiction in the matter; and no appeal shall lie from any judgment given or order made by the court in the matter.

(2) Nothing in subsection (1) contained shall increase the jurisdiction of any magistrate's court as regards the amount which may be claimed in any proceeding tried by the court.

**151. Property of deceased seafarer may be recovered as wages.**-The provisions of section one hundred and thirty-six shall apply, *mutatis mutandis*, in respect of the property of a deceased seafarer.

<sup>2</sup> If the position were otherwise it would have been a simple matter to provide in s 14 as follows: 'Save as provided under sections 131, 136 and 151 of the Merchant Shipping Act, 1951, the Magistrates' Courts shall have no jurisdiction to determine any maritime claim.'

[42] In my view the conclusion I reach, that Magistrates' Courts continue to be available to exercise parochial jurisdiction in order to decide maritime claims, accords with the provisions of the Constitution. Section 34 of the Constitution provides as follows.

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

Section 166 of the Constitution lists the Magistrates' Courts amongst those recognised as part of our judicial system. It is essential that for the determination of smaller claims plaintiffs should have the right of access to courts which are governed by a lower costs regime than the High Court. To employ a perhaps extreme but nevertheless real example provided by counsel for the appellant in argument, it is ridiculous to suppose that the Admiralty Act has the effect that a hardware supplier who sells a tin of paint on credit for the stores of a yachtsman should have to issue a summons out of the High Court exercising its admiralty jurisdiction in order to recover the unpaid price of a few hundred Rands from the defaulting buyer.

[43] I suggest that for the same reason it would have been inappropriate to render the provisions of s 7(2) of the Admiralty Act applicable also to the Magistrates' Courts.

[44] It was argued before us that the position is (or might be) that a magistrate may hear a maritime claim unless an objection to jurisdiction is raised, in which case it must be upheld. However that cannot be so if a statute removes the court's jurisdiction over such a claim, as it is argued the Admiralty Act has done. In that case the court could no more hear a maritime claim than it could, for instance in the case of the district court, hear a divorce case. The position was put as follows in *Ueckermann v Feinstein* 1909 TS 913 at 920.



‘Apart from statute, the common law of Holland undoubtedly recognised the doctrine of the prorogation of jurisdiction --- that is, that jurisdiction might be conferred or extended by consent of parties so as to enable the court to deal with a dispute which, apart from such consent, it would have had no jurisdiction to entertain. And that prorogation of jurisdiction might take place in regard to inferior as well as superior courts is clear from what Voet says at 2, 1, 15. Some of the authorities favoured a very wide application being given to this doctrine of prorogation. But I think it must be recognised as settled law in South Africa that there can be no prorogation in regard to cases where the court has no authority at all to adjudicate upon the subject-matter of the dispute; because in such cases, the matter at issue being by law outside the cognisance of the court, the consent of parties cannot confer a coercive jurisdiction upon the court, which the law expressly denies to it. And any judgment pronounced upon such a matter would be *ab initio* void; neither prior consent nor subsequent ratification could make it valid.’

[45] There is no middle ground. Either maritime claims are susceptible to the parochial jurisdiction of the Magistrates’ Courts, or they are not. If they are not, no consent to jurisdiction, expressed or implied, can render matters otherwise. If a maritime claim can be heard in those courts, the magistrate cannot decline to exercise jurisdiction.

[46] For these reasons I would have upheld the appeal with costs and remitted the matter to the magistrate to determine the remaining issues in the case.

Case Information:

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Additional Heads of :  
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