IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG
(Exercising its admiralty jurisdiction)

CASE NO: A4/19

In the matter between:

THE OWNERS AND UNDERWRITTERS OF THE MV "MSC SUSANNA" First Applicant

THE DEMISE CHARTERER OF THE MV "MSC SUSANNA" Second Applicant

and

THE NATIONAL PORTS AUTHORITY OF SOUTH AFRICA, A DIVISION OF TRANSNET (SOC) LTD First Respondent

MINISTERÈRE DES ARMÉES Second Respondent

SAUDI BASIC INDUSTRIES CORPORATION (SABIC) Third Respondent

ORDER

It is ordered:

The application to join the second respondent is dismissed with costs. Costs to include costs of two counsel where so employed.

JUDGEMENT

Delivered on: 2020

Mngadi J

[1] The applicants seek in the main to join the second and third respondents to an action already instituted by the applicants against the first respondent. The first respondent abides by the decision of the court. The second respondent opposes the application. The third respondent has not taken part in the proceedings. The application is in terms of s 1(1)*(w)* read with s 5(2)*(a)* of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Admiralty Act'). The court in exercising its admiralty jurisdiction is required to consider and decide any matter arising in connection with any maritime claim which in the present context involves one 'arising out of or relating to the limitation of liability of an owner of a ship' in terms of s 261(1)*(b)* of the Merchant Shipping Act 57 of 1951 ('the MSA').

[2] The first applicant is theOwner and Underwriters of the MV "MSC Susanna". The second applicant is the Demise Charterer of the MV "MSC Susanna" which due to s 232(2) of the MSA is deemed for purposes of these proceedings to be the owner of the MV "MSC Susanna". The first respondent is the National Port Authority of South Africa, a Division of Transnet (SOC) Limited. The second respondent is the Ministère Des Armées, the ministry having responsibility in terms of the French Law for the French Navy of the French Republic. The third respondent is the Saudi Basic Industries Corporation (SABIC), a company duly incorporated in the Kingdom of Saudi Arabia.

[3] The first and second applicants are the first and second plaintiffs, respectively, in the action against the first respondent, as the first defendant in the main action. The second respondent is the party cited in respect of claims relating to the French Naval vessel the "FNS Floreal". SABIC, it is claimed, to bore the risk in and to a certain

cargo loaded upon the MV "MSC Susanna" at the material time and which cargo is alleged to have been damaged arising out of the events giving rise to the action.

[4] The applicants have founded the application, to join the second and third respondents, on the provisions of s 5(1) of the Admiralty Act, which provides:

'A court may in the exercise of its admiralty jurisdiction permit the joinder in proceedings in terms of this Act of any person against whom any party to those proceedings has a claim, whether jointly with, or separately from, any party to those proceedings, or from whom any party to those proceedings is entitled to claim a contribution or an indemnification, or in respect of whom any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between the party and the person to be joined and which should be determined in such a manner as to bind that person, whether or not the claim against the latter is a maritime claim and notwithstanding the fact that he is not otherwise amenable to the jurisdiction of the court, whether by reason of the absence of attachment of his property or otherwise.'

[5] The issue in the main action is one of limitation of damages in terms of s 261 of the MSA, the relevant part provides:

'**261. When owner not liable for whole damage.** — (1) The owner of a ship, whether registered in the Republic or not, shall not, if any loss of life or personal injury to any person, or any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity—

(a) if no claim for damages in respect of loss of or damage to property or rights arises, be liable for damages in respect of loss of life or personal injury to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's tonnage; or

(b) if no claim for damages in respect of loss of life or personal injury arises, be liable for damages in respect of loss of or damage to property or rights to an aggregate amount exceeding 66,67 special drawing rights for each ton of the ship's tonnage; or

(c) if claims for damages in respect of loss of life or personal injury and also claims for damages in respect of loss of or damage to property or rights arise, be liable for damages to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's tonnage: Provided that in such a case claims for damages in respect of loss of life or personal injury shall, to the extent of an aggregate amount equivalent to 140 special drawing rights for each ton of the ship's tonnage, have priority over claims for damages in respect of loss of or damage to property or rights, and, as regards the balance of the aggregate amount equivalent

to 206,67 special drawing rights for each ton of the ship's tonnage, the unsatisfied portion of the first-mentioned claims shall rank *pari passu* with the last-mentioned claims.

[6] The second respondent, for the purposes of these proceedings, accepts that the provisions of s 261 of the MSA would have applied to it was it not for the provisions of s 3(6) of the MSA which provides: '(6) The provisions of this Act shall not apply to ships belonging to the defence forces of the Republic or of any other country'. Therefore, the second respondent contends, the "FNS Floreal", its ship involved in the incident, is a naval vessel of the French Navy and accordingly, the second respondent concluded that the provisions of the MSA, including s 261, do not apply to it.

[7] The incident giving rise to the litigation arose out of an incident which occurred on 10 October 2017 at the port of Durban, KwaZulu-Natal, Republic of South Africa. A considerable storm struck the port. The MV "MSC Susanna" and other vessels were berthed at the port. The storm caused the MV "MSC Susanna" and at least four other vessels to break their moorings. The MV "MSC Susanna" drifted and during the drift collided with a number of vessels and other port infrastructure including the "FNS Floreal".

[8] The applicants are not merely seeking to join the second respondent in the pending litigation, but are in fact seeking a declaratory order that the second respondent is bound by the provisions of the MSA, especially the s 261, ie that there is a limitation in the claim it may institute for the damage to the "FNS Floreal" caused by the MV "MSC Susanna". They seek to join the second respondent as a co-defendant in the action against the first respondent wherein they seek the following relief in their summons,

'a declaration that the Plaintiffs are entitled to limit their liability in respect of all claims arising from the incidents of 10 October 2017 in the port of Durban in respect of the MV "MSC Susanna" in accordance with s 261(1)*(b)* of the Merchant Shipping Act 57 of 1951.'

The second respondent points out that if its contention has merit, the amended particulars of claim relating to it would be excepiable. Both parties agreed, and correctly so in my view, that the relief sought against the second respondent is to be viewed as a declarator. A decision on it, as between the applicants and the second respondent, will have a final effect and it shall be appealable.

[9] The applicants seek to join the second respondent in order to obtain relief against the second respondent. In such a case the applicants must show that *prima facie* they have a sustainable cause of action against the second respondent. See Gys Hofmeyr *Admiralty Jurisdictional Law and Practice in South Africa* 2 ed (2012) at 212. The court has no discretion after such a finding that a prima facie cause of action has been established. See *Khumalo v Wilkins* 1972 (4) SA 470 (N) at 475A-B. In the case of a declarator, the party seeking the relief must prove the requirements for the relief on the preponderance of probabilities. See *Compagnie Interafricaine de Travaux v SA Transport Services* 1991 (4) SA 217 (A) at 230I-231C. If the construction that the applicant has set out in the particulars of claim constitutes a cause of action, the exception based on the respondent's construction of the pleading although reasonably possible shall not succeed. To obtain a declarator the onus is on the applicants to prove on a balance of probability that the second respondent is subject to the provisions of s 261 of the MSA, it is not enough to show that he might be subject to the limitation in s 261.

[10] The applicants contend that s 261 is focused on granting a right to limitation on a ship that has caused the damage. It does not seek to limit those who can claim against the ship. As long as the damage by the ship relates to property or rights the limitation applies. The nature of the property damaged by the ship is irrelevant. The applicant concludes that while the MSA is not applicable to the "FNS Floreal" it is applicable to the MV "MSC Susanna" and to claims against MV "MSC Susanna". The applicants, further, contend that if s 261 creates unfairness by limiting claims by "FNS Floreal" but does not limit claims against the "FNS Floreal", the unfairness should be addressed by appropriate amending legislation not by judicial contortions unfairly refusing limitation to MV "MSC Susanna". Anomalies consistent with internal law can only be resolved by amendments to the legislation. The applicants contend that s 3(6) of the MSA has no application in the interpretation of s 261 of the MSA. The provision is directed at excluding the navy from the various provisions dealing with maritime safety, crewing, crew wages, licensing and other provisions, which clearly cannot be rendered applicable to a naval vessel. The applicants also argued that it excludes the application of the MSA to ships, not to all the property of the defence force. It is an anomaly that limitation can be excluded on a defence force ship but it be allowed on

the defence force property on the ship. It is not clear why, it is argued, on policy grounds the navy ought to be in a preferred position relative to other claimants.

[11] The applicants state that the concept of limitation arose in Holland and adopted in England as early as 1733. International conventions on limitation followed in 1924, 1957 and 1976. South Africa is not a party to the aforementioned conventions. South Africa encapsulated limitation in ss 261-263 of the MSA. The UK law of limitation cannot be of any help in the interpretation of the South African law of limitation because it developed from the position when the Crown was not liable in tort which has never been the position in South Africa.

[12] The second respondent contends that the purpose of s 3(6) is clear. It is to exempt naval vessels from the vast network of rights and obligations created by the MSA. The position of naval ships differs from that of merchant ships. The MSA seeks to regulate merchant shipping. Section 261 refers to 'loss of life or personal injury to any person, or any loss of or damage to any property or rights of any kind, whether movable or immovable'. It is common cause that the "FNS Floreal" is a ship. As such, it is property. However, it is not the type of property contemplated in s 261 because it is a naval vessel to which the provisions of the MSA do not apply. Reference in s 261 to any property falls to be qualified by s 3(6) of the MSA with the result that limitation may be claimed in respect of damage to any property which is not a ship belonging to the defence force. The exclusion in s 3(6) encompasses the whole of every provision in the MSA. Whether the ship is the subject or object of a provision, and whether the provision creates a right or obligation, it is embraced by s 3(6). The second respondent contends that the approach the applicants are advocating will result in absurdities, for example, if a naval vessel were to be involved in a collision with a merchant ship how will s 255 of the MSA, which allows for apportionment of damages in proportion to one's degree of fault be applied. It would allow the owner of the merchant vessel to claim apportionment in terms of s 255 but the owner of the naval vessel could not. It is manifestly unjust to have the second respondent prohibited from benefiting from the limitation regime in respect of damage caused by its naval ship, but if damage is caused to its naval ship by another vessel, then its claim is subject to the limitation. This approach offends the provisions of the Constitution, as it creates unequal treatment, it was argued.

[13] Both parties referred to foreign case law. In my view, the cases referred to are not on point and they have a different background. In my view they don't assist in resolving the dispute. The task is to reconcile the provisions of s 3(6) with those of s 261(1). Schreiner JA in an oft-quoted passage in his dissenting judgment in *Jaga v Donges, NO & Another; Bhana v Donges, NO, & Another* 1950 (4) SA 653 (A) at 662G – 663A said:

'Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together'

In *University of Cape Town v Cape Bar Council & Another* 1986 (4) SA 903 (A) at 914D-E, it was held:

'I am of the opinion that the words of s 3(2) of the [Admission of Advocates] Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature.'

[14] It is trite that where the provision is capable of more than one interpretation, and, one of those is consistent with the provisions of the Constitution, the court will opt the interpretation consistent with the Constitution. I am of the view that taking into consideration the purpose of the legislation, neither interpretation advocated by either party is inconsistent with the provisions of the Constitution. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 at 603F-604A, the court held:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided

by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

It is clear, in my view, that the various approaches to interpretation are means to an end. In my view, the end is to ascertain the intention of the legislature. Therefore, an approach that leads to ascertaining the intention of the legislature needs no further exposition. See *Manyasha v Minister of Law and Order* 1999 (2) SA 179 (SCA) at 185B-C; *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A) at 942I-944A.

[15] Alexander J in *the Nagos Shipping Ltd v Owners, Cargo Lately Laden on board the MV Nagos, & Another* 1996 (2) SA 261 (D) at 271 to 272 referred to limitation as 'that time-honoured and intentionally endorsed practice, which is now embodied in domestic statute . . . The South African Merchant Shipping Act reflects in s 261 the accepted principle that, in the interests of encouraging sea bound trade and enterprise, a ship owner should be protected in a given amount, save where he has been at fault'.

See John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) at 515 where it says that in

'embracing the concept of a limitation of liability, the world of maritime commerce has recognised also that there is a certain element of joint venture in the carriage of goods by sea. The epitome of such sharing of risk is found in the concept of general average in which all parties who stand to benefit from a successful maritime venture . . . are exposed equally to loss in certain circumstances, by way of contribution.'

The concept of limitation is well known throughout the maritime law and has, in modern times, becomes a basic premise upon which maritime commerce is conducted.

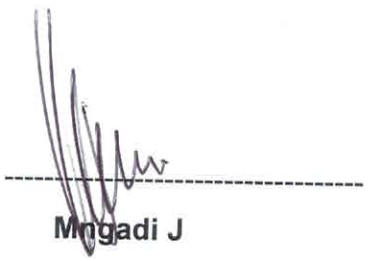
[16] Section 261 of the MSA absolves the ship-owner from liability, which exceeds an amount in South African rands, calculated by applying the factor of the vessel's tonnage to a prescribed number of special drawings rights of the International Monetary Fund. Section 261 looks after the interests of the merchant ship owners, not the rights of owners of property damaged or lost. The legislature must have been well aware that there would be owners of property that was either damaged or lost who were not regular participants in the shipping business or in international shipping commerce, nevertheless, for the benefit of international shipping commerce, such owners are subject to a limitation in their claims.

[17] The navy is a specific category of ship owners. It is not merely the other owner of property or holder of rights. It does not normally participate in commercial shipping. It does not benefit from commercial shipping. Historically, it is excluded from legislation regulating commercial shipping. It is not entitled to a limitation of claims against it in terms of s 261 of the MSA because it is excluded as a bearer of rights and obligations in terms of the MSA. The legislature when enacting s 3(6) entrenched the *de facto* position. When the legislature enacted s 261 it must be taken that it intended consistency. If it intended that, the navy as a ship owner should be bound by s 261 it was expected to state so. But it had excluded the navy by broadly excluding it from the provisions of the MSA, it was, therefore, not necessary, if it intended the navy to remain excluded, to state in s 261 that the navy was excluded. I find that taking into consideration the purpose of the limitation law it is artificial to say that property in s 261 includes ships of the navy, that would be, in my view, to pay lip service to s 3(6) of the MSA. The legislature having excluded deliberately the ships of the navy in s 3(6) for good reasons, that cannot, in my view, be negated by interpreting property in s 261 to include ships of the navy. In my view, the weakness in the applicants' contention is that they have not sufficiently considered the purpose of the provision, which is to promote merchant shipping and exclude the ships of the defence force or navy. An approach to interpretation, which loses this balance, will depart towards determining the intention of the legislature.

[18] In my view, the application for joinder falls to be dismissed. By virtue of s 3(6) of the MSA the second respondent has no interest in the litigation relating to limitation in terms of s 261 of the MSA and, therefore, need not be joined to such proceedings.

[19] I make the following order:

'The application to join the second respondent is dismissed with costs. The costs to include costs two counsel where so employed.



Mngadi J

APPEARANCES

Case Number	:	A4/2019
For the First & Second Applicant	:	SR Mullins SC with PJ Wallis
Instructed by	:	Shepstone & Wylie Attorney PIETERMARITZBURG
For the First Respondent	:	Ms M. Mazibuko
Instructed by Inc	:	Northon Rose Fulbright South Africa c/o GNG Incorporated PIETERMARITZBURG
For the Second Respondent	:	CJ Pammenter SC with DJ Cooke
Instructed by	:	Clyde & Co. c/o Tomlinson Mnguni James Inc. PIETERMARITZBURG
Heard	:	01 September 2020
Judgement delivered on	:	10 September 2020