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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

ROBERTO R MALILANG ..... 1st appellant,

RODOLFO B VALDECANTOS ..... 2nd appellant,

ANTON A ASAULA ..... 3rd appellant

and

MV "HOUDA PEARL" ..... respondent

Coram: CORBETT, MILLER, BOTHA et HEFER JJA,
et NICHOLAS AJA.

Date of Hearing: 12 November 1985

Date of Judgment: 19-6-1986

J U D G M E N T

CORBETT JA

In this matter the proceedings in the Court a quo (the Natal Provincial Division, sitting as a Court of Admiralty in terms of the Colonial Courts of Admiralty Act, 1890 (32 and 54 Vict. Ch 27)) took the form of a

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consolidated action in rem, in which a number of seamen, including the three appellants, claimed wages due to them by the owner of the MV Houda Pearl. The trial Judge gave judgment for the defendant with costs. Leave having been granted, the appellants appealed to this Court. On 27 February 1986 this Court gave judgment ("the main judgment") allowing the appeal with costs and setting aside the order of the Court a quo. Difficulty was encountered, however, with regard to the order to be substituted for that of the Court a quo, inasmuch as appellants' claims, as formulated in their joint petition, were expressed in US dollars. This raised the following points:

(a) Whether it was competent and proper for this Court, sitting as a court of appeal in an admiralty action in rem, to make an order for the payment of the amounts due in US dollars or whether the order should be expressed in rand;

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(b) If the latter be the proper form of the order,

(i) with reference to what date or dates the conversion of the claims expressed in US dollars into rand should be made; and

(ii) who should undertake the conversion, bearing in mind that this entails ascertaining the rate of exchange (or mean rate of exchange) on the relevant date or dates.

Since these matters had not been canvassed at the hearing of the appeal, the order of the Court of 27 February 1986 made provision, in the event of the parties failing to reach a written agreement (to be filed) as to the form and content of the order to be substituted for that of the Court a quo, for the filing of written submissions on these points. The order further provided that after having received the written agreement or written submissions, as they case may be, this Court would formulate and pronounce the order to be substituted for that of the Court a quo.

In the event no such agreement was reached and written submissions have been submitted. Appellants contend that the judgment in their favour should be expressed in US dollars; that they should be entitled to recover the equivalent in rand as at the date of payment; and that this equivalent as at the date of payment should be determined by the Registrar (presumably the Registrar of the Natal Provincial Division). Respondent, on the other hand, contends that the judgment should be expressed in rand and that appellants' claims should be converted into rand as at the date upon which they arose. No submission is made as to who should be responsible for making the conversions.

As pointed out in the main judgment, the law to be applied by the Court a quo and this Court is English admiralty law as administered by the English High Court exercising admiralty jurisdiction in 1890. It was

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further stated in the main judgment:

> "In the judgment a quo (at p 426 A) it was stated that the court does have regard to decisions of the English Courts subsequent to 1890 which 'expound the common law with restrospective effect'. On appeal this was accepted by counsel as a correct statement of the legal position. As regards subsequent decisions which clearly expound or clarify the common law and show it as it always has been the statement is unexceptionable. But occasionally decisions in reality change the law and I would prefer at this stage to leave open the approach to such a decision where it deals, after 1890, with admiralty law."

This brings me to the decision of the House of Lords in Miliangos v George Frank (Textiles) Ltd 1976 AC 443. Prior to this decision the established rules of English law, entrenched by at least two earlier decisions of the House of Lords (see SS Celia v SS Volturno [1921] 2 AC 544; In re United Railways of Havana and Regla Warehouses Ltd [1961] AC 1007), were (i) that an English court could not give judgment for the payment of an amount in foreign currency and for the purpose of litigation in England a

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debt expressed in a foreign currency had to be converted into sterling (sometimes termed "the sterling-judgment rule"), and (ii) that such conversion had to be made with reference to the rate of exchange prevailing on the day when the debt was payable (sometimes termed "the breach-date rule"). These rules were ancient in origin - in the Havana case (at pp 1043-4) Viscount SIMONDS referred to a decision dating back to 1626 - and had been consistently observed. They were settled rules which bound all courts (see Havana case, supra, at pp 1048-9). In the Miliangos case, supra, the House of Lords, by a majority (Lord SIMON of GLAISDALE dissenting) held that where a plaintiff brought an action for a sum of money due under a contract he was entitled to claim and obtain judgment for the amount of the debt expressed in the currency of a foreign country if the proper law of the contract was the law of that country and the money of account and payment was that of the same country. It was further held that, if it was

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necessary to enforce the judgment, the amount in foreign currency was to be converted into sterling at the date when leave was given to enforce the judgment. In coming to this decision the House, in the exercise of the power to depart from its previous decisions affirmed in 1966 (prior to that the practice was to adhere to previous decisions), decided not to follow the decision in the Havana case.

In the speeches of the Law Lords who formed the majority in the Miliangos case various reasons were given for departing from the ruling in the Havana case and the long-standing principles upon which it was based. One of these related to currency stability. As Lord WILBERFORCE put it (at p 463 F-G) —

> "The situation as regards currency stability has substantially changed even since 1961. Instead of the main world currencies being fixed and fairly stable in value, subject to the risk of periodic re- or devaluations, many of them are now 'floating', i.e., they have no fixed exchange value from day to day. This is true of sterling. This means that,

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> instead of a situation in which changes of relative value occurred between the 'breach date' and the date of judgment or payment being the exception, so that a rule which did not provide for this case could be generally fair, this situation is now the rule. So the search for a formula to deal with it becomes urgent in the interest of justice."

The same point was made by Lord CROSS of CHELSEA (at p 497 E-F), Lord EDMUND-DAVIES (at p 501 D-E) and Lord FRASER of TULLYBELTON (at p 502 B-D). Both Lord CROSS and Lord EDMUND DAVIES emphasized the change which had come over the foreign exchange situation generally and the position of sterling in particular in the 15 years since the decision in the Havana case.

In his powerfully worded dissent Lord SIMON argued that (at p 482 B) —

> "..... it was a most unsuitable case for a revolutionary change in the law to be undertaken by judges."

He stated that his reasons for not agreeing with his

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colleagues could be summarized in two sentences (see p 480 B):

> "First, I do not think that this is a 'law reform' which should or can properly be imposed by judges; it is, on the contrary, essentially a decision which demands a far wider range of review than is available to courts following our traditional and valuable adversary system — the sort of review compassed by an interdepartmental committee. Secondly, your Lordships' predecessors have wisely set limits on the use of the power to overrule previous decisions of your Lordships' House; and no sufficient reason has, in my view, been shown for overruling the Havana decision."

In his speech he referred to the decision of the majority as amounting to "radical law reform" and likened it to legislation. He said (at p 481 A-B) —

> "The instant appeal raises questions the answer to which imperatively demands the contribution of expertise from far out-

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> side the law — on monetary theory, public finance, international finance, commerce, industry, economics — for which judges have no training and no special qualification merely by their aptitude for judicial office. All such experience as I have had of decision-making within and without the law convinces me that the resolution of this issue demands a far greater range of advice and a far more generally based knowledge than is available to a court of law — even one assisted, as we have been, by the most meticulous, cogent and profound argument of counsel. Law is too serious a matter to be left exclusively to judges."

The merits and demerits of the majority decision in the Miliangos case do not, of course, concern us. What has to be decided is whether a South African Court of Admiralty, exercising jurisdiction in terms of the Colonial Courts of Admiralty Act 1890, which requires that the court should apply English admiralty law as administered by the English High Court exercising jurisdiction in 1890, should

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follow the long-standing rules spelt out in the Havana decision or the new rules laid down in the Miliangos case.

In my opinion, a South African Court of Admiralty should follow the rules in the Havana decision, suitably adapted by the substitution of South African currency for sterling. Although in an "afterword" to his speech in the Miliangos case Lord SIMON stated that the overruling of Havana (see p 490 D) —

> "..... involves that the law must be deemed always to have been as my noble and learned friends now declare it".

I think it would be wholly unrealistic to regard the Miliangos decision, which relates essentially to matters of a procedural nature, as representing the law and practice current in the English Court of Admiralty in the year 1890. It is clear from the speeches in the Miliangos case that the decision represented a radical (perhaps "revolutionary") departure from well-established rules of practice and that the decision (regarded by Lord SIMON

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as going beyond the legitimate scope of law reform by the judiciary) was dictated largely by changed conditions in the realm of exchange rates and international currency stability, even since 1961, when the Havana case was decided.

Accordingly, I hold that in the present case judgment should be expressed in rand. The application of the breach-date rule, however, poses problems. The case of each of the appellants is that over the period 1 February 1979 to 15 March 1980 he received less than was his due in terms of his ITF contract. In the petition there is a calculation in respect of each of the appellants showing the total amounts due in respect of wages, overtime, Saturday and Sunday work, holiday pay, leave pay and subsistence and the amounts actually received by way of wages, overtime pay, subsistence and leave pay, the difference representing the appellants'

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claim. The amounts claimed by the individual appellants, in terms of the petition were:

First appellant	US $22 626,70
Second appellant	US $22 724,81
Third appellant	US $30 656,15

As appears from the judgment of the trial Court (see reported judgment 1983 (3) SA 421 (N), at p 422 E-F), by the time the matter came to trial the quantum of the claims had been agreed as follows:

First appellant	US $19 633,20
Second appellant	US $21 289,20
Third appellant	US $29 331,00

In terms of their contracts the appellants were paid monthly. Consequently in order to apply the breach-date rule it would be necessary to know the shortfall in wages paid at the end of each month. While it might be possible to calculate the monthly shortfall in respect of some of the items, I have difficulty in correlating other figures. Moreover, the agreed claims are *in toto* substantially less

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than the claims as put forward in the petition and there is no way of ascertaining where the reductions should be made on a monthly basis. In addition, even if the exact monthly shortfall figures had been established, the procedure of ascertaining and applying a separate dollar/rand conversion rate for each monthly amount would be a complicated and cumbersome one. Though normally the breach-date rule should be adhered to in cases of this nature, in the particular circumstances of this case it is not possible on the information available to the Court to do so. Consequently, an alternative ad hoc basis of calculation must be devised. Having considered all aspects of the matter, I am of the view that the claim of each appellant should be regarded as a single globular amount, as quantified by the above-mentioned agreement; and that the date of conversion should be 15 March 1980, the last day of the period which formed the basis of the appellants' claims. And, in my opinion, the conversion

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