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CASE NO 296/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

MV "JUTE EXPRESS" APPELLANT

AND

THE OWNERS OF THE CARGO LATELY
LADEN ON BOARD THE MV "JUTE EXPRESS" RESPONDENT

CORAM: CORBETT CJ, BOTHA, MILNE, GOLDSTONE JJA
et HOWIE AJA

DATE HEARD 17 FEBRUARY 1992

DATE DELIVERED: 27 MARCH 1992

J U D G M E N T

HOWIE AJA: The question raised by this appeal is whether, in terms of the Admiralty Jurisdiction Regulation Act, 105 of 1983 ("the Act"), an admiralty action **in rem** is commenced by arrest or by the issue of summons.

The appeal is brought, with the leave of the Court below, against the dismissal of appellant's special plea to the effect that respondents' action **in rem** was time-barred. The parties agreed, and the Court **a quo** ordered, that the issue raised by the special plea be decided separately from the other issues in the case.

In the judgment of the Court below, which is reported in 1991 (3) SA 246 (D), the nature of the claim and the basic facts are set out by Howard JP as follows at 247H-248C:

> "The plaintiffs sue by way of an action **in rem** for damages for delivery in a damaged condition and short delivery of cargo carried by the defendant from Santos to

Durban. The plaintiffs sue as holders of a bill of lading which embodies the terms and conditions upon which the cargo was carried. Clause 2 of the conditions of carriage renders the Hague Rules applicable to this transaction, and art 3(6) of the Hague Rules provides that

> '(i)n any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered'.

It is common cause that the cargo was discharged at Durban and delivered between 12 and 20 July 1989, and that any cargo which the defendant failed to deliver should have been delivered by 20 July 1989.

On 21 July 1989 the defendant furnished security for the plaintiffs' claim, by way of a letter of undertaking which refers to the action which the plaintiffs 'intend to institute' and states that in consideration of the plaintiffs refraining from arresting the ship or an associated ship the Standard Steamship Owners Protection and Indemnity Association (Bermuda) will pay any amount not exceeding US $332 977,50 for which the defendant accepts liability or is found to be liable. The summons in the action was issued on 13 September 1990, more than a year after the goods in question were delivered or should have been delivered."

The learned Judge President concluded that the action was in time, it having commenced with the

giving of the undertaking. For a proper consideration of his reasons and the arguments advanced on appeal it is appropriate at this juncture to refer to the various statutory and regulatory provisions central to the issue.

S 1(2) of the Act reads as follows:

"(2) For the purposes of any law, whether of the Republic or not, relating to the prescription of or the limitation of time for the commencement of any action, suit, claim or proceedings, an admiralty action shall be deemed to have commenced -
(a) by the making of an application for the attachment of property to found jurisdiction if the application is granted and the attachment carried into effect;
(b) by the issue of any process for the institution of an action **in rem** if that process is thereafter served;
(c) by the service of any process by which that action is instituted."

S 3(5) provides:

"An action **in rem** shall be instituted by the arrest....of property....against or in respect of which the claim lies...."

S 3(10) reads as follows:

"(a) Property shall be deemed to have been arrested or attached and to be under arrest or attachment if at any time, whether before or after the arrest or attachment, security

> or an undertaking has been given to prevent the arrest or attachment of the property or to obtain the release thereof from arrest or attachment.
> (b) That security shall for the purposes of sections 9 and 10 be deemed to be the freight or the proceeds of the sale of the property."

S 9 empowers the court to order at any time that the arrested property be sold and the proceeds be held as a fund in the court or otherwise dealt with. S 10 is not presently material. S 11 lays down the order in which maritime claims rank. It is clear from that section that such claims are met either out of a fund in the court or security given in terms of the Act or the proceeds of property sold pursuant to an order or judgment in terms of the Act.

The Admiralty Proceedings Rules were promulgated in terms of the Supreme Court Act, 59 of 1959, read with s 4 of the Act.

The relevant provisions of rule 3 read as follows:

> "(1) An arrest in an action **in rem** shall be effected by the service of a warrant in accordance with these rules.
> (2) (a) A warrant shall be issued by the registrar and shall be in a form corresponding to Form 2 of the First

Schedule.

(b) The registrar may refer to a judge the question of whether a warrant should be issued.

(c) Any such question shall be so referred if it appears from a certificate contemplated in rule 3(3), or if the registrar otherwise has knowledge, that security or an undertaking has been given in terms of section 3(10)(a) of the Act to prevent arrest or attachment of the property in question.

(d) If a question has been so referred to a judge, the judge may authorize the registrar to issue a warrant, or may give such directions as he thinks fit to cause the question of whether a warrant should be issued to be argued.

(e) If a question has been so referred to a judge, no warrant shall be issued unless the judge has authorized the registrar to issue the warrant.

(3) Save where the court has ordered the arrest of the property, the registrar shall issue a warrant only if summons in the action has been issued and a certificate signed by the party causing the warrant to be issued is submitted to him stating:

(a) that the claim is a maritime claim and that the claim is, or that on the effecting of the arrest the claim will be, one in respect of which the court has or will have jurisdiction;

(b) that the property sought to be arrested is property in respect of which the claim lies or, where the arrest is sought in terms of section 3(6) of the Act, that the ship is an associated ship

which may be arrested in terms of the said section;

(c) whether any security or undertaking has been given in respect of the claim of the party concerned, or to procure the release, or prevent the arrest or attachment of the property sought to be arrested and, if so, what security or undertaking has been given and the grounds for seeking arrest notwithstanding that any such security or undertaking has been given; and

(d) that the contents of the certificate are true and correct to the best of the knowledge, information and belief of the signatory and what the source of any such knowledge and information is."

As regards the requirement in article 3(6) of the Hague Rules that "suit (be) brought", Howard JP held, firstly, that to "bring suit" was to commence the appropriate proceedings for enforcing the claim and, secondly, that the question as to when suit was brought was to be determined by the law of the country and the practice of the court where suit was brought. In support of the first conclusion the Court **a quo** referred to **The Merak** (1965) 1 All ER 230 (CA) at 238 and **Dave Zick Timbers Ltd v Progress Steamship Co. Ltd.** 1974 (4) SA 381 (D) at 383-4. As to the second,

reference was made to Tetley **Marine Cargo Claims** 2nd ed at 343. Those conclusions were not disputed before us and can be accepted for present purposes as correct.

Concerning the relevant provisions of s 3 of the Act, the Court **a quo** reasoned as follows. In s 3(5) the word "institute", according to the ordinary meaning of that word as defined in leading dictionaries, and adopted in **Msomi v South African Eagle Insurance Co. Ltd.** 1983 (4) SA 592 (D) at 596E-G, meant to begin, commence, intiate, start or set on foot. Consequently, in terms of that subsection, an action **in rem** generally commenced with the arrest of the property concerned. That basic provision was subject to the terms of s 1(2)(b) of the Act, whereby such an action was deemed to have commenced by the issue of process. However, those terms applied only to statutory time limits and not in the present case where the time limit was contractual.

With regard to s 3(10)(a), the Court held that the plain meaning was that if an undertaking was given to prevent an arrest the property was deemed to have been arrested. The judgment concluded on this

point at 249E:

> "As the arrest institutes the action it follows, I think, that the action commences when the property is deemed to have been arrested."

Referring to the argument on behalf of the defendant (now appellant) that the institution of action merely by way of the giving of an undertaking would involve neither the issue of process nor any entry in the court's records, thus permitting a plaintiff who failed to issue summons to disable a defendant from enforcing disposal of the case, the Court **a quo** held that the latter could protect itself by appropriate conditions, either attached to the undertaking or imposed by an order of court.

In the result Howard JP held that nothing warranted a departure from what he considered was the plain meaning of s 3(5) and s 3(10)(a) and that the action had therefore commenced with the giving of the undertaking.

The arguments advanced for the parties in this Court may in broad outline be summarised as follows. On behalf of appellant, Mr **Wallis** accepted

that the word "institute" in s 3(5) meant in a general sense to commence or to initiate but he argued that the legislature was not really concerned in that subsection with the moment or mechanism of the commencement of the action; all it sought to lay down there was that, subject to the provisions of s 3(10)(a), an action **in rem** necessarily required the arrest of the property concerned. It was only s 1(2), said counsel, that was intended to deal with the question of commencement and according to that subsection an action **in rem** commenced, in cases involving a statutory time limit, with the issue of "process". And "process", it was submitted, meant summons because the words "process for the institution of action" almost without exception were appropriate only to a summons and not, as was urged by Mr **Shaw**, for respondents, to a warrant of arrest. Where the time limit was contractual, the usual position prevailed, namely, that action was instituted by the issue of summons.

Mr **Wallis** went on to highlight the inconsistency inherent in the conclusion that the action commenced with the giving of the undertaking.

He said that this meant that when a time limit for "bringing suit" was statutory, the action commenced with the issue of summons but that when, as in the present instance, the time limit was contractually imposed, the action commenced with the furnishing of an undertaking. The instant case showed that in the latter event the action could be in existence for many months without any process having been issued and without any of the other, usual, consequent procedural manifestations of pending litigation. This anomalous situation, it was argued, could never have been intended by the legislature and detracted profoundly from the conclusion reached by the Court **a quo**.

Reverting to s 3(5), Mr **Wallis** said that its requirement of an arrest reflected a return to the form of action that originated in the English admiralty courts but that if the section meant that the action commenced with the arrest, this was in contrast to current English practice, and to South African admiralty practice prior to the commencement of the Act, which laid down that an action **in rem** commenced by way of summons. Even the current South African

practice as set out in rule 3(3), so counsel pointed out, required the issue of summons before an arrest warrant could be issued and it would constitute a further, surprising anomaly were it competent, if an actual arrest were dispensed with by reason of the terms of s 3(10)(a), to begin the action without a summons.

Mr **Wallis** submitted that the **raison d'être** of the latter subsection was this. It was fundamental to the action **in rem** to have the property concerned before the Court in order to provide the means whereby judgment could in due course be satisfied. However, it was a long-standing feature of admiralty practice that the owner of the property could avoid the trouble and inconvenience occasioned by arrest if he gave security or an undertaking. Accordingly, said counsel, s 3(10)(a) was intended to enshrine that practice and to afford an alternative, purely contractual method by which to provide the necessary means to satisfy the eventual judgment. It was submitted that there was no other intention behind the enactment of the subsection in question; it merely deemed the property to have been

arrested and to remain under arrest; it did not lay down that the deemed arrest was deemed to be the commencement of the action. Accordingly, concluded Mr **Wallis**, s 3(10)(a) permitted a plaintiff to institute an action **in rem** without causing the arrest of the property concerned but such institution had to be effected by the issue of summons, which issue, in the present instance, was out of time.

Accepting the submissions made on appellant's behalf as to the history, nature and procedural implications of an action **in rem** both in England and South Africa, Mr **Shaw** proceeded to advance the contentions which prevailed in the Court below. He accepted that s 1(2)(b) gave rise to the anomaly explained above but said that the subsection was inapplicable seeing that the time limit here was contractual. Furthermore, as no arrest had been required, rule 3 also had no present application. Shortly and simply put, a deemed arrest took the place of an actual arrest for all purposes, including the commencement of the action.

As to the absence of any process and of any

judicial record of the pending action in a case like the present, that is to say between the time of the undertaking and the issue of summons, Mr **Shaw** said, firstly, that this was unusual, but not anomalous, and was in any event the unavoidable consequence of applying the plain language of the Act. He suggested various ways - some referred to by the Court **a quo** - in which a concerned defendant could have conditions imposed which would put a dilatory plaintiff upon terms. Secondly, Mr **Shaw** pointed to the provisions in rule 5(4)(d) for the service of a warrant of arrest even in a case where, in terms of s 3(10)(a), property was deemed to have been arrested. Counsel's suggestion was, as I take it, that the issue and service of the warrant would supply the allegedly missing manifestation of the existing action. Finally, Mr **Shaw** referred to the fact that rule 3(3) envisaged an order for arrest without a summons first having been issued.

Before discussing counsel's rival contentions I may say that they were agreed that for present purposes an undertaking has the same effect and consequences as security. For easier reference I shall

simply refer from now on to security as covering both.

With regard to the requirement in article 3(6) of the Hague rules that "suit (be) brought", it appears to be inconsistent with the initiation of litigation that, supposedly, action was commenced in the present case by respondent's mere passive acceptance of security. On the other hand, if it were plain from the Act and the Admiralty Proceedings Rules that in South Africa an action **in rem** could competently be commenced in the present circumstances by nothing more than the giving of security then I consider that it would be difficult to avoid the conclusion that such would be enough to comply with article 3(6). The question to be answered is: what does South African admiralty procedure lay down as regards the commencement of an action **in rem**? In discussing that question in what follows I mean to refer throughout to an action **in rem** unless expressly stated otherwise.

Taking as one's starting point the requirement in s 3(5) that the action "shall be instituted" by the arrest of the property concerned, it is undoubtedly so that "institute" ordinarily means to

commence or initiate and that, in interpreting a statutory provision, effect will generally be given to the ordinary meaning of the language used. One of the proviso's to that approach, of course, is that the ordinary meaning will not be followed if to do so would give rise to a result which the legislature could never have intended.

The argument that the legislature did intend in s 3(5) to deal with the matter of commencement of the action, must be tested by reference to the following considerations.

In the first place, by the time the Act was passed, this Court had long since held that all actions commence with the issue of summons: **Marine and Trade Insurance Co Ltd v Reddinger** 1966 (2) SA 407 (A) at 413D and **Labuschagne v Labuschagne; Labuschagne v Minister of Justice** 1967 (2) SA 575 (A) at 584. There was therefore no need for the lawgiver to say anything in s 3(5) about when action would commence. It was a matter of settled procedural law.

Secondly, the subject of commencement had in any event been dealt with in s 1(2) in so far as the

legislature had thought it necessary to deal with it at all. And the reason for its doing so there is clear. In the normal course, prescription is not interrupted by the issue of summons but by the service of summons: **Kleynhans v Yorkshire Insurance Co Ltd** 1957 (3) SA 544 (A) and, as already mentioned, an action is not commenced by the service of summons but by the issue of summons. Manifestly the legislature intended to unify the moment of commencement in relation to prescription on the one hand and statutory time limitations on the other. One finds, therefore, that in the case of an action **in rem** the moment of commencement is deemed to be the issue of process and in the case of an action **in personam**, the service of process (see s 1(2)(c)). True it is that the moment of commencement in the case of a contractual time limitation is not dealt with in this subsection but in such a case it would be open to the contracting parties themselves to prescribe, if they saw fit, when and how action would be considered commenced or "suit brought". If they omitted to do so then action would, as a matter of law, commence with the issue of summons. Consequently, commencement

having been expressly catered for in s 1(2) in a specific context, there was neither need nor reason to deal with it elsewhere in the Act, much less by way of latent implication and out of context in s 3(5), which is in any event a general provision.

Thirdly, on respondents' argument, the terms of s 1(2)(b) and s 3(5) are contradictory. By virtue of the former, an action is deemed to commence with the issue of process. The latter subsection, if literally interpreted, would mean that the action commences with service of the warrant of arrest. Mr **Shaw** attempted to lessen the effect of that contradiction by submitting that the words "process for the institution of an action **in rem**" in s 1(2)(b) referred not to a summons but to a warrant of arrest seeing that, in terms of s 3(5), the action was instituted by an arrest. Assuming, for the moment, the correctness of that submission, it could well be, if one sought to test the implications of the legislature's apparent intention by reference to various practical situations, that there might, in most instances, be minimal difference in terms of time and space between the issue and the

service of a warrant. On that basis one might be led into thinking that the discrepancy between issue and service, although clearly discernible, was not really one which served to render unworkable the legislature's ostensible intention in s 3(5). However, the contradiction is given considerable practical meaning if one postulates a situation in which, say, the ship to be served has not yet arrived in port and the time for commencing action is due to expire in a few hours. If the time bar were statutory, the plaintiff could, in terms of s 1(2)(b), defeat the bar by obtaining the issue of his warrant before the moment of expiry, even if the ship's arrival were unexpectedly delayed for some days. If the bar were contractual he could only defeat it by actually serving the warrant. In the event of the ship's arrival being delayed beyond the moment of expiry of the bar, timeous service would be impossible. It follows, I think, that the contradiction referred to is material and one which raises considerable doubt as to whether commencement was intended to be dealt with in s 3(5).

In the fourth place, one must ask what the

legislature did intend to lay down in s 3(5). A discussion of the history and nature of the action **in rem** is to be found in Shaw, **Admiralty Jurisdiction and Practice in South Africa** at 25 **et seq.** Because this topic was not a matter of dispute between counsel it is unnecessary in this judgment to say more than that the primary purpose of an arrest in such an action is to give the action utility and effectiveness by affording the plaintiff pre-judgment security: see, for example, **The Dictator** (1891-4) All ER 360 at 363D-E, **The Banco** (1971) 1 All ER 524 (CA) at 531 a-b and Thomas, **Maritime Liens** (British Shipping Laws, vol 14) para 67 at 43. That purpose is reflected in ss 3(5), 3(10)(b), 9 and 11 of the Act. S 3(5) therefore seeks to achieve that purpose in all actions **in rem** by making an arrest an essential requirement. It is unnecessary for the attainment of that object, and irrelevant to it, to require, in addition, that the arrest should initiate the action. Indeed, the legislature's objective would in no way be defeated if the action were to commence with the issue of summons.

It is instructive, while on the subject of

s 3(5), to have regard to the related provisions of s 3(10)(a). The basic requirement of an arrest in s 3(5) is qualified. If the plaintiff is given security then, by reason of the terms of s 3(10)(a), he is relieved of the need to secure an arrest and the property concerned is deemed to have been arrested. As to the meaning of s 3(10)(a), the functions of a deeming provision are various and the function intended in any particular legislation must be ascertained from an examination of the aim, scope and object of that enactment: **S v Rosenthal** 1980 (1) SA 65 (A) at 75G-77B. In the light of the purpose of an arrest in an action **in rem** it seems to me that the legislature's intention in s 3(10)(a) was not merely to relieve the plaintiff of the need, and the defendant of the inconvenience, of an arrest. Had the intention been as narrow as that the subsection could simply have stated that an arrest would be unnecessary if security were given. The legislature's intention in going further and deeming the property involved to be, and to remain, under arrest, was, in my view, to emphasise that substantially the same legal consequences relative to

execution would pertain to the security as would have pertained to the property had it remained under arrest. (I say "substantially" because if security were given there would obviously be no need, for example, to resort to a sale in terms of s 9). Furthermore, the subsection contains no implication that the deemed arrest brought about by the giving of security is to be regarded as the commencement of the action.

In my opinion, therefore, the deeming provision in s 3(10)(a) pertains solely to the executability of the eventual judgment. It has nothing to do with the commencement of the action.

That view, together with what I have already said about the legislative object behind s 3(5), warrants the conclusion that the latter subsection itself has nothing to do with the time of commencement of the action despite its use of the word "instituted".

Reference to the matter of word usage brings me to the fifth point. It is significant that where the legislature is pertinently concerned with the moment of initiation of the action it uses, in s 1(2), the word "commenced" and not, as in s 3(5), the word

"instituted". The contrast is more marked in the signed, Afrikaans text. S 1(2) uses the expression "'n aanvang te geneem het" while in s 3(5) the term is "word ingestel". These are strong indications that s 3(5) was not intended to deal with the matter of commencement. Furthermore, one finds the word "instituted" ("ingestel") in ss 3(2) and 3(3), and the word "brought" ("ingestel") in s 3(6). The legislature was quite obviously not referring to the commencement of the actions referred to there. In those subsections the word "instituted" and "brought" manifestly have a broader meaning than "commenced" and, on my interpretation, were intended to refer to the process of bringing the claim before court. There is every reason to think that the legislature intended the word "instituted" to have that same meaning in s 3(5).

In the sixth place, in South African admiralty practice from the last century until the passing of the Act, the action was commenced by the issue of summons: see rule 5 of the rules made in terms of the English Vice-Admiralty Courts Act, 1863 (in force in this country by virtue of the Colonial

Courts of Admiralty Act, 1890). The legislature must be taken to have been aware of such practice and no reason suggests itself why any alteration in that long-standing state of affairs would have been thought necessary or advisable.

Penultimately, if the action were commenced by arrest and not by issue of summons it would mean that in the familiar situation where summons is issued in anticipation of a ship's arrival there would be no action in existence until, eventually, the ship were arrested. The concept of an issued summons bringing no action into existence is one which is compatible neither with logic nor established practice. Equally anomalous is the situation which the Court below held to have prevailed, namely, that without any summons having been issued, the action in the present case came into existence purely by reason of the giving of security. There can be no action without a summons. This is a basic procedural truism and one which is in any event reflected in rule 1 of the Supreme Court Rules (which are made applicable to admiralty matters by s 4(1) of the Act) in which "action" is defined as

"a proceeding commenced by summons". In addition, the action *in rem* in South Africa has always encompassed the issue of a summons (see rule 5 of the Vice-Admiralty Courts rules referred to above) and no reason was advanced why that should not continue to be the case.

Finally, to interpret the Act as meaning that the action commences with the issue of summons and not with an arrest, is to adopt a construction which not only accords with established procedure but one which involves no inconsistencies or incongruities.

The cumulative effect of the aforegoing substantial considerations is such that I am satisfied that the legislature did not intend the word "instituted" in s 3(5) to mean "commenced". Consequently, it did not mean to lay down that the action is commenced by way of arrest. This conclusion necessitates giving the word "instituted" in the context of s 3(5) a meaning other than its ordinary meaning but I consider that to do so is fully justified in order to give effect to the true intention of the legislature. That intention was, in my opinion, to lay

down that an arrest is an essential element of the process whereby an action **in rem** is to be brought to court.

It follows that the interpretation by the Court **a quo** of the provisions of s 3(5) and s 3(10)(a) is not acceptable and that the arguments in support of its judgment cannot prevail.

As to Mr **Shaw**'s contention that rule 5(4)(b), read with rule 3(3), permits of the notion that where security is given an action could be commenced without the issue of a summons, rule 5(4)(b) lays down that a warrant of arrest in the case of property deemed to have been arrested must be served at the address given in terms of rule 3(6). Rule 3(6) requires any person giving security to give an address at which "summons or warrant in an action **in rem** may be served". Usually, as already mentioned, when a plaintiff is given security he does not have to obtain an arrest. Therefore the warrant referred to in rule 5(4)(b) must either be a warrant required by some other claimant or a warrant authorised by a Judge under rule 3(2) or, possibly, a warrant of arrest pursuant to an order of

Court as referred to in the opening line of rule 3(3).

A warrant issued at the instance of another claimant is presently irrelevant. In a case where a warrant is authorised by a Judge under rule 3(2), the matter will first have come via the registrar in terms of rule 3(3) and the latter subrule requires that the issue of summons precede the issue of a warrant. As far as rule 3(3) dispenses with the prior issue of summons where a court orders an arrest, there are two answers. Firstly, as Mr **Shaw** himself pointed out during his argument on another aspect of the case, the court does not have to order an arrest for the purpose of the institution of an action **in rem**. When it orders an arrest it does so under s 5(3) and that is for the purposes of a claimant's obtaining security. That this is so is also apparent from Shaw, **op. cit.**, at 107 and from the absence of any rule dealing with a security arrest. Secondly, and assuming that the opening words of rule 3(3) are of wide enough import to cover the possibility of a court ordering an arrest for purposes of the institution of an action **in rem**, this nonetheless postulates an action being commenced

subsequent to the arrest and, for reasons already given, there could be no action without the issue of a summons. In the result, Mr **Shaw**'s resort to the rules cannot support the conclusion of the Court below that in a case of a deemed arrest the giving of security commences the action.

The conclusion to which I have come is that, either because of established procedural law or because of the terms of s 1(2)(b) of the Act, an action **in rem** commences in all instances with the issue of summons. In the present matter, therefore, the action was out of time and article 3(6) of the Hague Rules was not complied with.

Appellant's special plea ought accordingly to have been upheld.

The following order is made:

1. The appeal succeeds, with costs.
2. The order of the Court **a quo** is set aside and replaced by the following:

   "The special plea is upheld and plaintiff's claim is dismissed, with costs."

HOWIE AJA

CORBETT CJ)
BOTHA JA)
MILNE JA) CONCUR
GOLDSTONE JA)