THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 556/2015

In the matter between:

WINDRUSH INTERCONTINENTAL SA **FIRST APPELLANT**
MT "ASPHALT VENTURE" **SECOND APPELLANT**

and

UACC BERGSHAV TANKERS AS **RESPONDENT**

Neutral citation: *Windrush Intercontinental SA v UACC Bergshav Tankers AS* (556/2015) [2016] ZASCA 199 (6 December 2016)

Coram: Maya DP, Shongwe, Wallis, Dambuza JJA and Makgoka AJA

Heard: 8 September 2016

Delivered: 6 December 2016

Summary: Admiralty Jurisdiction Regulation Act 105 of 1983 – action *in rem* – maritime lien – application to set aside deemed arrest *in rem* of vessel in terms of s 3(4)*(a)* of the Act to enforce maritime lien for its crew members' unpaid wages – vessel hijacked by pirates for ransom but pirates releasing vessel and not all crew members despite payment of ransom – pirates' conduct a supervening event rendering fulfilment of hostage crew members' employment contracts impossible – hostage crew members' employment and entitlement to wages ended by supervening impossibility or frustration of performance of employment contracts – no claim for unpaid wages giving rise to a maritime lien enforceable by an action *in rem*.

ORDER

On appeal from: The KwaZulu-Natal Local Division of the High Court, Durban (Exercising Admiralty Jurisdiction)(Olsen J sitting as court of first instance): judgment reported *sub nom Windrush Intercontinental SA & another v UACC Bergshav Tankers as The Asphalt Venture* 2015 (4) SA 381 (KZD).

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and replaced with the following:

'(a) The deemed arrest of the MT "*Asphalt Venture*" is hereby set aside.

(b) The security furnished on behalf of Windrush Intercontinental SA shall be released to it forthwith.

(c) UACC Bergshav Tankers AS shall pay the costs of the application, including

(i) the costs attendant upon the further argument as a consequence of the court's request for responses to queries;

(ii) the costs of the application for leave to appeal; and

(iii) the costs of the application to set aside the arrest of the MT "*Asphalt Venture*".'

JUDGMENT

MAYA DP (Shongwe, Wallis and Dambuza JJA and Makgoka AJA concurring):

[1] This appeal is against the refusal of the KwaZulu-Natal Local Division of the High Court, Durban (Exercising Admiralty Jurisdiction)(Olsen J) to set aside the deemed arrest of the second appellant, the MT *Asphalt Venture,* owned by Bitumen Invest AS (Bitumen), leave to appeal having been granted by the high court. The first

appellant, Windrush Intercontinental SA (Windrush), is a company duly registered and incorporated in accordance with the laws of Panama, carrying on business in Sharjah in the United Arab Emirates. The respondent is UACC Bergshav Tankers AS (Bergshav), a company duly incorporated and registered in accordance with the laws of Norway and carrying on business, inter alia, as the registered owner of the MT *UACC Eagle* in Dubai in the United Arab Emirates.

[2] Windrush was the *Asphalt Venture*'s bareboat charterer in terms of a bareboat charterparty it concluded with Bitumen in May 2008 for the period 7 May 2008 to 7 November 2015. The bareboat charterparty was part of an adapted sale and leaseback arrangement between Concord Worldwide Inc (Concord), Bitumen and Windrush, under which Concord, which was then the vessel's owners, sold the *Asphalt Venture* to Bitumen and Windrush bareboat chartered it from Bitumen. The charter was on the Barecon 2001 form for seven and a half years, at the end of which Windrush was obliged to purchase the vessel.[1] Windrush concluded a sub-bareboat charterparty with Concord for the same period.[2] Between April and August 2010 Concord, through its technical manager and crewing agent, OMCI Shipmanagement (Pvt) Ltd (OMCI), entered into employment contracts with 15 crew members, who were citizens of the Republic of India, in order to crew the *Asphalt Venture*.

[3] On 23 September 2010, Somali pirates, demanding ransom money, hijacked the *Asphalt Venture* about 100 nautical miles east of Mombasa. Concord duly informed

[1] The application papers were drafted while the bareboat charter remained extant. We have no information as to what happened after the bareboat charter expired.

[2] In March 2008 Concord had entered into a time charterparty with Colas SA in terms of which the *Asphalt Venture* was time chartered to Colas SA for a period of five years, from 19 March 2008 to 19 March 2013. The reason for the sub-bareboat charter between Windrush and Concord was to enable the latter to fulfil its commitments to Colas SA in terms of the time charter.

the relevant insurers of the hijacking, engaged solicitors and retained security advisers to assist in negotiations with the pirates and appointed a negotiator. Seven months later, on 15 April 2011, a ransom of USD 3.4 million was delivered to the pirates in exchange for the release of the vessel and her 15 crew members. However, after the ransom was delivered, the pirates reneged on their agreement and refused to release all the crew members. Only eight crew members were released with the vessel. Seven (the hostages) were held captive, apparently to be used in negotiations for the release of 120 Somali pirates arrested by the Indian navy who awaited trial in India. On 22 December 2011 the Indian government, in line with its policy, formally refused to negotiate with the pirates for their release. It was only some years later, between August and December 2014, and after payment of a further ransom, that the pirates finally released the hostages.

[4] On 17 June 2011, Windrush withdrew the *Asphalt Venture* from the sub-bareboat charterparty with Concord, thereby terminating the sub-bareboat charterparty. This followed Concord's failure to honour its obligations in terms of the sub-bareboat charterparty, due to the vessel being held hostage for about seven months. Concord nonetheless continued to pay to the hostages' families' amounts equivalent to the hostages' wages until the end of October 2011, six months after the payment of the ransom and the release of the eight crew members.

[5] During the period in which all the crew members were held hostage, namely 28 September 2010 to 15 April 2011, Concord had continued to make payment to the crew in terms of the crew's employment contracts as if they had remained in force. After the eight crew members were released, Concord paid for their repatriation costs and they were discharged from the vessel. Concord contended that it had paid the

further amounts to the hostages families, although their contracts had terminated, 'on a voluntary, *ex gratia* basis, in sympathy and on humanitarian grounds and without legal obligation'. But it ceased effecting payments to the hostages' families when it ran into financial difficulties and no longer had any substantial assets or income.

[6] As a result of Concord discontinuing payment of these amounts, the Indian government and the Norwegian Maritime Officers' Association demanded that Bitumen, as *Asphalt Venture*'s registered owners and, so they claimed, the hostages' employer, continue paying the hostages' wages. This was based on the demand by the hostages' families to Bitumen for the continued payment of wages beyond October 2011, as the hostages had not yet been repatriated. In response to that demand Windrush asserted that neither it nor Bitumen were liable for any crew wages or repatriation costs in respect of the hostages, either before or after October 2011, because neither party had entered into employment contracts with them. This was so, it contended, because the crew contracts were concluded with OMCI, which, as indicated, was contracted to perform this function by Concord.

[7] Thereafter, on 17 January 2012, the *UACC Eagle* was arrested in Mumbai, India by the hostages' families, representing the hostages, as security for their cumulative claim of USD 6 787 440. They sought a decree for payment of the daily wages that the hostages would have earned from November 2011 until they each reached the age of 70 years. It was alleged in the application papers filed in the High Court of Judicature, Bombay, (Admiralty and Vice-Admiralty Jurisdiction) (the Bombay high court), that the *UACC Eagle* was arrested because it was in the same beneficial ownership as the *Asphalt Venture*, that is, a 'sister ship' as a matter of Indian law. Bergshav successfully contested this allegation. It nevertheless entered

into a settlement agreement with the hostages' families, which was approved by the Bombay high court on 10 February 2012. It did so for practical reasons, to secure the expeditious release of the *UACC Eagle* from arrest and to avoid possible protracted litigation.

[8] The basis of the settlement agreement was that the hostages had been employed on the *Asphalt Venture* over which they claimed a maritime lien for unpaid crew wages recognised in Indian law.[3] To secure the *UACC Eagle*'s release Bergshav undertook, inter alia, to pay to into an escrow account (a) the claims for crew wages for the period 1 November 2011 to 29 February 2012, (b) USD 306 000 (an amount equal to ten months' future crew wages to the end of December 2012), (c) crew wages for the period 1 January 2013 to 31 December 2013 which would be paid as quarterly deposits of USD 91 800, subject to its right to call for arbitration on whether the hostages' employment contracts entitled them to crew wages pending repatriation for this period, and (d) fees and legal costs. In consideration of this undertaking, the hostages' families unconditionally and irrevocably assigned 'any claim and/or maritime lien they have or may have in the same priority against the *Asphalt Venture* interests and any other party whatsoever for the Crew Salary up to the value of the Crew Salary paid and/or secured by this Agreement, and any security rights they hold or may hold in respect of such claims for Crew Salary, including but not limited to any maritime liens against the Asphalt Venture interests'.

[9] Relying on this assignment, Bergshav commenced an action *in rem* against the *Asphalt Venture* in the KwaZulu-Natal Local Division of the High Court, Durban. On

[3] The claims were maritime claims in terms of the 1952 International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going ships (Brussels, 10 May 1952) and the International Convention on the Arrest of Ships (Geneva, 12 March 1999).

21 September 2012, the vessel was arrested *in rem* in the port of Durban. But it was subsequently released against the provision of security in the form of a letter of undertaking furnished by its P & I Club on behalf of Windrush, without admission of liability and without prejudice to the rights and contentions of the owner or the bareboat charterers of the vessel; specifically their right to challenge the arrest of the vessel in respect of the claim or to bring an action for wrongful arrest. Bergshav sued as cessionary of the hostages' claims and maritime lien and demanded payment of the amounts it had paid to their families. It also sought an order declaring its entitlement against the *Asphalt Venture* to recover any amounts it still had to pay in terms of the settlement agreement.[4]

[10] The summons and particulars of claim alleged that the hostages were employees of Bitumen, the *Asphalt Venture*'s owners, alternatively employees of Concord as the *Asphalt Venture*'s sub-bareboat charterer, or further alternatively employees of Windrush, the bareboat charterer. As such, it was alleged, they were and remained entitled to be paid the wages reflected in their contracts of employment during the currency thereof and following any valid termination thereof, until such time as each of them was repatriated. Crucially it was alleged that any of their claims for unpaid wages were maritime claims as defined in the Admiralty Jurisdiction Regulation Act

[4] The claim was itemised as follows:
'(a) payment of the sum of USD 122 400, being accrued crew wages from 1 November 2011 to 29 February 2012;
(b) payment of the sum of USD 214 000, being crew wages for the seven months from March to September 2012;
(c) an order declaring that the Plaintiff is entitled to payment as against the Defendant in respect of the sum of USD 30,600 per month or any part thereof, being crew wages for the months of October 2012 to and including December 2013 as are paid pursuant to the settlement agreement, subject to a maximum amount of USD 459 000 together with interest from the date of payment to the date of reimbursement at the prescribed rate of 15,5% per annum, alternatively an indemnity in respect of such amounts as they fall due and are released for payment to or on behalf of the crew' and ancillary relief.'

105 of 1983 (the Admiralty Act),[5] giving rise to a maritime lien enforceable by proceedings *in rem* against the *Asphalt Venture* in terms of s 3(4)*(a)* of the Admiralty Act.[6] It was alternatively alleged that Bitumen or Concord or Windrush as Asphalt Venture's owner, bareboat charterer and sub-bareboat charterer, respectively, were in any event liable *in personam* to the hostages for payment of the wages in terms of s 3(4)*(b)*[7] read with s 1(3) of the Admiralty Act. The latter basis for the alleged claims has, however, since been abandoned and nothing more need be said about it.

[11] When the *UACC Eagle* was arrested in Mumbai it was subject to a demise charter concluded in December 2010 between Bergshav, as owner and United Arab Chemical Carriers Limited (UACC) as charterer. Bergshav launched arbitration proceedings in London against UACC to recover the amounts it had paid in terms of the settlement with the hostages' families and obtained an award in its favour.[8] At that stage Bergshav had paid the hostages' families USD 743 800. The parties thereafter entered into a settlement agreement (the arbitration agreement) in terms of which UACC would pay Bergshav the latter sum and any further sums and payments made in terms of outstanding undertakings it had made to the hostages' families plus interest. The arbitration agreement obliged Bergshav to continue with the action *in*

---

[5] A maritime claim is defined for present purposes in s 1(1) as 'any claim for, arising out of or relating to–
(y) any maritime lien, whether or not falling under any of the preceding paragraphs.
(z) (e*e*) any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs;
…
(*ff*) any contribution, indemnity or damages with regard to or arising out of any claim in respect of any matter mentioned above or any matter ancillary thereto, including the attachment of property to found or confirm jurisdiction, the giving or release of any security, and the payment of interest'.

[6] In terms of this provision '[w]ithout prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action a maritime claim may be enforced by an action *in rem* … if the claimant has a maritime lien over the property to be arrested'.

[7] This section provides '[w]ithout prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action a maritime claim may be enforced by an action *in rem* …if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.

[8] We were not furnished with a copy of the award and so are unaware of the basis upon which UACC was held liable to compensate Bergshav for these amounts.

rem in South Africa in its own name. But it would have to transfer absolutely and unconditionally to UACC any proceeds it recovered from the appellants up to the value of the sums and interest thereon that UACC had paid it, although the arbitration agreement provided that it was 'not intended to cede or assign to UACC, Bergshav's claim or right of action in the South African proceedings'.

[12] In response to the arrest of the *Asphalt Venture* and its release against the provision of security the appellants brought an application to set aside the deemed arrest of the vessel.[9] They also sought an order for the return of the security which had been furnished to secure its release. The court a quo (Olsen J) dismissed the application with costs. It found that Bergshav 'ha[d] established a prima facie case for the proposition that Concord has been liable at all material times since October 2011 to pay wages to the [hostages] … whether by reason of article19.2 of [their] conditions of employment, or by reason of the provisions of the Merchant Shipping Act 44 of 1958 (India)'. According to the court a quo, 'upon a proper construction of the settlement agreement … the parties [thereto] must have intended that the monthly wage claims would pass [to Bergshav] with their associated liens [to Bergshav] as and when each was paid by [Bergshav]'. It held that the maritime lien afforded to the hostages in respect of their claim for wages, which they prima facie established, was ceded or assigned to Bergshav with the leave of the Bombay high court.

[13] The court a quo also dismissed the appellants' alternative contention that Bergshav had suffered no loss in light of the arbitration agreement which, in the

[9] In terms of s 3(10)*(a)*(i) of the Admiralty Act '[p]roperty shall be deemed to have been arrested or attached and to be under arrest or attachment at the instance of a person if at any time, whether before or after the arrest attachment, security or an undertaking has been given to him to prevent the arrest or attachment of the property or to obtain the release thereof from arrest or attachment.'

court's view, merely established where the loss would lie if Bergshav's action failed and UACC discharged the obligation under the indemnity it owed Bergshav. The court a quo held that the agreement did not determine which of them was vested with the claims for wages, which were never transferred to UACC. The court declined to decide the issue of future wages ie whether a lien could exist in respect of wages not yet accrued and whether the tender of security for the full claim amounted to a compromise as to whether an action in rem could be sustained in respect of such wage claims. It held that this had not been canvassed in the papers and would have to be raised in the impending plea in the action.

[14] It is this judgment that is the subject of this appeal, with the court a quo's leave. The crisp issue before us was whether at the time of the *Asphalt Venture*'s arrest at Bergshav's instance, there existed a maritime lien for crew's wages entitling Bergshav to arrest the *Asphalt Venture* by way of an *in rem* arrest in terms of s 3(4)*(a)* of the Admiralty Act.

[15] It was contended on the appellants' behalf that no such maritime lien existed because the hostages' crew contracts terminated by no later than 15 April 2011 as a matter of Indian law arising from frustration or supervening impossibility of any remaining performance of the employment contracts. This was so, it was argued, because neither Windrush nor Concord could procure the hostages' release or cause them to be repatriated under the employment contracts, as the hostages' release had become a political issue beyond their reach. Moreover, the hostages performed no services to or in respect of the *Asphalt Venture* after 15 April 2011. There were no unpaid wages due to them on that date and no maritime lien for crews' wages could arise thereafter. It was further argued that if any lien did arise, it was extinguished by

Bergshav's payment to the hostages' families under the settlement agreement and could not lawfully be assigned to Bergshav. For Bergshav it was argued that a maritime lien arising from the wages' claims, which had been transferred to it as sanctioned by the Indian Court and permitted by s 11(8) of the Admiralty Act, did exist. This was so, continued the argument, because the hostages' employment did not terminate after the release of the vessel. And, in any event, their employment contracts entitled them to repatriation and to payment of their wages until so repatriated.

[16] This court's admiralty jurisdiction derives from s 2(1) of the Admiralty Act.[10] Section 6 of the Admiralty Act further provides:

'(1) Notwithstanding anything to the contrary in any law or the common law contained, a Court in the exercise of its admiralty jurisdiction shall–

(a) with regard to any matter in respect of which a Court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;

(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.

(2) The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph *(a)* or *(b)* of that subsection.'

[17] The enquiry into whether there was an enforceable claim based upon a maritime lien at the time of the *Asphalt Venture*'s arrest is two-pronged. First, it must be determined, on a prima facie basis, whether Bergshav has established the existence

[10] These provisions read: '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.'

and nature of the claims sought to be enforced *in rem* against the *Asphalt Venture*. Secondly, it must be determined whether as a matter of South African law Bergshav has prima facie established claims which, by reason of their nature and character, are protected by a maritime lien in South African law.

[18] The term 'maritime lien' is not defined in the Admiralty Act but is mentioned, in addition to s 3(4)*(a)*, in subsecs 1(1) and 11 thereof.[11] In s 1(1), under the definition of 'maritime claim', is included any claim for, arising out of or relating to 'any maritime lien, whether or not falling under any of the preceding paragraphs'. And s 11[12] lists in subsection (4)*(e)*, 'a claim in respect of any maritime lien on the ship not mentioned in any of the preceding paragraphs'. Therefore, a maritime lien is by definition a type of a 'maritime claim' and its importance lies in the facts that (a) it constitutes one of the bases upon which a claimant may found an action *in rem* (s 3(4)*(a)*); and *(b)* it confers a certain preference in the ranking of claims in terms of s 11.[13] The *lex fori* decides the question as to whether the claim gives rise to a maritime lien and is therefore enforceable on that basis.[14]

[19] The source of the obligation to pay the crews' wages may be gleaned from their employment contracts, which were annexed to Bergshav's particulars of claim. Each

---

[11] According to *The Father Thames* [1979] 2 Lloyd"s Rep 364 at 368, the maritime lien is more easily recognised than defined, and most jurisdictions have avoided defining it. In *Oriental Commercial and Shipping Co Ltd v MV Fidias* 1986 (1) SA 714 (D), at 717I-J, the court mentioned that '[t]he Legislature, for some reason or another, deliberately chose not to define the term "maritime lien". That can only mean that the Legislature was content to leave it to the English law to fix the limits and the contents of this legal phenomenon'. It is suggested that it is perhaps fortunate that the Legislature has refrained from attempting to deal with the onerous subject of defining the maritime lien. See in this regard D J Shaw *Admiralty Jurisdiction and Practice in South Africa* (1987) at 86.

[12] This section deals with the ranking of claims in regard to a 'fund in a Court' resulting from the sale of arrested property in terms of s 9 or in regard to the proceeds of property sold pursuant to an order or in the execution of a judgment of a Court in terms of the Act.

[13] *Transol Bunker BV v MV Andrico Unity & others; Grecian-Mar SRL v MV Andrico Unity & others* 1989 (4) SA 325 (A) at 331D.

[14] See s 6 of the Admiralty Act. See also *Transol Bunker BV v MV Andrico Unity* ibid at 338A.

of these documents comprised a terse, single page document signed by the relevant crew member and on behalf of Concord. They reflected the crew member's personal details, rank, period of employment for the duration of nine months and the details of his salary. Each commenced on a different date, depending on the crew member that was employed, and recorded that the relevant crew member was employed under 'the attached terms and conditions', in reference to a collective bargaining agreement for Indian officers of the International Bargaining Forum entered into between OMCI and Maritime Union of India.[15] In terms of the latter agreement the employment contracts were governed by Indian law.[16] The employment contracts also contained two simple terms to the effect that in the event of the seafarer being stranded or his death, Concord undertook to repatriate him or his mortal remains, respectively, to his port of engagement.

[20] It was common cause that the relevant provisions of the collective bargaining agreement for the crews' wages claims are in articles 5, 18 and 19 thereof. Article 5 reads in relevant part:

'**Duration of Employment**

5.1 An officer shall be engaged for the period specified in Appendix – 1 to this Agreement and such period may be extended or reduced by the amount shown in Appendix – 1 for operational convenience. The employment shall be automatically terminated upon the terms of this Agreement at the first arrival of the ship in port after expiration of that period, unless the Company operates a permanent employment system.'

In terms of article 18.1(a) an officer's employment 'shall be terminated upon the expiry of the agreed period of service identified in APPENDIX – 1'. Appendix – 1 inter alia deals with the 'duration of employment' and provides that '[t]he maximum

[15] Clause 1.2 of the collective agreement deems the agreement as 'incorporated into and contain[ing] the terms and conditions of employment' of the crew members'.
[16] Article 34 thereof.

period of engagement referred to in article 5 shall be nine months, which may be extended to ten months or reduced to eight months for operational convenience [after which] the Officer's engagement shall be automatically terminated in accordance with Article 18 of this Agreement.'

[21] It was not alleged in the papers that Concord operated a permanent employment system as envisaged in article 5. Neither was it disputed that the 'period specified in Appendix – 1', contemplated in that article, in respect of each crew member, expired before the *Asphalt Venture*'s release by the pirates on 15 April 2011. And as already stated, when the vessel arrived at the port in Mombasa on 28 April 2011, it was without the hostages as the pirates had removed them from board. On a plain reading of the above provisions in the ordinary course the hostages' employment would have terminated upon the *Asphalt Venture*'s arrival at the Mombasa port on 28 April 2011.[17] The parties agreed that this was so, because in the founding affidavit it was alleged that the employment contracts of the hostages came to an end by effluxion of time when the time periods in the contracts of employment expired. In reply it was said that quite clearly the fixed term contracts of employment of the hostages had expired. The court a quo accepted this, but nonetheless concluded that if the employment contract provided for a continued obligation to pay wages until repatriation was effected, it was ultimately not relevant whether the employment continued. The central issue was therefore whether Bergshav established a prima facie case that this was indeed the position notwithstanding the fact that the contracts of employment had expired.

.[17] In other words, the contracts mean what they say. See *Phillips v SA Reserve Band & others* [2012] ZASCA 38; 2013 (6) SA 450 (SCA) para 64. See also *Van der Merwe v Road Accident Fund & another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) para 43.

[22] Bergshav's contention that the hostages were entitled to payment of their wages until they were repatriated rested mainly on article 19 of the collective bargaining agreement which governed the repatriation process of ships' officers. The article provided:

'19.1 Repatriation shall take place in such a manner that it takes into account the needs and reasonable requirements for comfort of the Officer.

19.2 During repatriation for normal reasons, the Company shall be liable for the following costs:

a. payment of basic wages between the time of discharge and the arrival of the officer at their place of original engagement or home;

b. the cost of maintaining the Officer ashore until repatriation takes place;

c. reasonable personal travel and subsistence costs during the travel period;

d. transport of the Officer's personal effects up to the amount allowed free of charge by the relevant carrier.

19.3 An Officer shall be entitled to repatriation at the Company's expense on termination of employment as per Article 18 except where such termination arises under Clause 18.2(b) and 18.3(a).'

[23] Bergshav further relied on the expert opinions of advocates practising in Mumbai, Mr S Venkiteswaran and, following his untimely death, Mr SK Mukherji. Neither was very satisfactory in explaining their view. Mr Venkiteswaran initially said, without reference to either, that 'in accordance with Indian law and the contracts of employment' the hostages would be deemed to continue in employment until their employment was terminated. In a second affidavit he referred to two provisions of the Indian Merchant Shipping Act, 1958. It perhaps suffices to say that neither was relied upon in argument before us. Both expressed the view that under Indian law and the employment contracts the hostages remained in employment and were therefore entitled to receive their wages until their repatriation. They placed reliance on a decision of the Indian Supreme Court, *O Konavalov v Commander, Coast Guard*

Region,[18] and s 141(1) of the Indian Merchant Shipping Act 44 of 1958 (the Merchant Shipping Act).

[24] Section 141(1) of the Merchant Shipping Act in relevant part reads:

'Where the service of any seaman engaged under this Act terminates before the date contemplated in the agreement by reason of the wreck, loss or abandonment of the ship or by reason of his being left on shore at any place outside India under certificate granted under this Act of his unfitness or inability to proceed on the voyage, the seaman shall be entitled to receive –

(a) In the case of wreck, loss or abandonment of the ship –

(i) Wages at the rate to which he was entitled at the date of termination of his service for the period from the date his service is so terminated until he is returned to and arrives at a proper return port'.

[25] These provisions found application in *O Konavalov* which concerned a vessel that had apparently been abandoned by its owners with crew and cargo on board. The Indian custom officials found contraband on board the vessel off the Indian coast. They brought the vessel to land with its crew where it was subsequently arrested by the Madras High Court at the instance of the owners of its cargo. The master of the vessel committed suicide on that day and the owners could not be traced. The crew lodged a wages' claim out of the anticipated proceeds of the sale of the vessel. Thereafter the customs officials seized the vessel and its cargo. The crew launched further litigation for payment of their wages from the proceeds of the cargo, or an order for the sale of the vessel, so that their claim could be paid out of those proceeds.

[26] The court found in the crew's favour and ordered the coastguard authorities and the custom officials to pay their wages and attend to their repatriation from the

[18] *O Konavalov v Commander, Coast Guard Region* (2006) 4 SCC 620.

proceeds of the sale of the vessel's cargo. The customs authority successfully appealed against this order in the high court. It also obtained final orders confiscating the vessel whilst the appeal was still pending so that the consulate of the crew, which had remained on the vessel throughout the period of almost two years for which they claimed wages, had to repatriate them. The high court held that the vessel's confiscation vested its ownership in the state thus divesting the crew of its rights against the vessel.

[27] The Supreme Court of India reversed this decision on further appeal to it. It referred to s 141(1) of the Merchant Shipping Act, which it held enables a seaman whose service is terminated by reason of wreck, loss or abandonment of ship, among other reasons, before the termination of employment date envisaged in his employment contract, to payment of 'certain wages and compensation' until his repatriation.[19] The court gave examples of cases which it considered constituted loss of a vessel, in which the crew's right to wages did not cease with such loss, such as the destruction of a neutral ship by a belligerent State or where, unknown to the crew, the vessel was carrying contraband of war. On that basis it held that the crew were lawfully in the employment of the vessel against which they had a maritime lien for service (and not against the cargo) until their deportation. The court further highlighted the special sanctity attaching to wages in Admiralty and under the Indian Constitution and the State's duty to act fairly and reasonably in settling the lawful wage claims of seamen who are at the lowest strata in society and thus suffer greatly without their wages.[20]

[19] Para 29.
[20] Para 45.

[28] Based on this reasoning, Messrs Venkiteswaran and Mukherji opined that Indian law would regard the *Asphalt Venture* as having been 'lost' in the manner contemplated in s 141(1) thus entitling its crew to their wages until repatriated. To counter this view, the appellants tendered an opinion of their own expert, former Chief Justice of India, Justice VN Khare. The nub of his opinion was that although in the ordinary course clauses 5 and 19 of the collective bargaining agreement entitled seamen to payment of their wages until their repatriation, the hostages had no viable claim to wages in this case. As he saw it, even if the hostages' contracts of employment remained in force until the return of the vessel and the remaining hostages, when the vessel sailed without them on 15 April 2011, any further obligation by Concord to repatriate them was rendered impossible by a supervening event that, to a reasonable person, was not foreseeable. In his view, it could not have been contemplated that even after full ransom was paid the hostages would continue to be held captive.

[29] Justice Khare based his view on the decision of the House of Lords in *Horlock v Beal*.[21] There, a British ship, during a voyage for which a British seaman had signed articles, was detained at a German port on 4 August 1914 after the declaration of war. On 2 November 1914 the crew, including the seaman, was removed from the vessel and imprisoned. The seaman's wife launched an action for the allotment of his wages. The House of Lords held that his contract of employment had come to an end and that he ceased to be entitled as soon as the further performance of his contract became impossible. The court took the view that if the crew had been released on 2 November 1914, the common law would not have treated the employment contract as terminated. But because they were imprisoned from that date neither party was any longer bound

[21] *Horlock v Beal* [1916] 1 AC 486.

by the contract from that date; otherwise if they were bound it would mean that wages were to be paid, without any service in return, for the duration of the war.[22]

[30] The court a quo recognised the conflict between the experts but held that the opinion expressed by Bergshav's experts was tenable, 'even though Justice Khare may well be right'. In the court's view it was 'arguable that the vessel was lost to pirates, albeit temporarily'. The court assumed that the hostages had been kept on board until shortly before the vessel sailed without them after the ransom was paid. It consequently held that their service terminated upon their removal from the vessel in advance of the date of termination of their employment in their contracts upon the first docking of the vessel in Mombasa on 28 April 2011. The court considered itself constrained to 'confine [itself], at least more or less to what has been stated by [Bergshav]' as it had not been 'established with certainty that Indian law would recognise impossibility of performance or frustration as having released Concord from its obligation to pay wages pending repatriation'. The court reasoned that foreign law is a question of fact. It accordingly held that, in the context of establishing a prima facie case, the respondent need not show that the court hearing the trial would necessarily come to the conclusion that the opinion of the respondent's witnesses should be accepted.

[31] I have difficulty with the court a quo's reasoning and findings. It seems to me that its first misstep was in its evaluation of the expert evidence and in accepting the plausibility of the opinion of Bergshav's experts, without analysing that evidence. Where a court is dealing with the evidence of experts on foreign law it is entitled to consider it in the same way in which it considers the evidence of any other expert. As

[22] Ibid, at 494.

this court has consistently said, foreign law is a question of fact and must be proved.[23] This is achieved by reference to the evidence of experts ie lawyers practising in the courts of the country whose law our courts want to ascertain. But the court is not bound to accept the view of the experts and it may, for cogent reasons, accept the testimony of one as against that of another where they are at odds. And, if in their evidence the experts have referred to passages in the Code of the country whose law is sought to be ascertained, the court is at liberty to look at those passages and consider their proper meaning.[24]

[32] This court has recently re-articulated these views, in *MV Pasquale Della Gatta MV Fillipo Lembo Imperial Marine Co v Deiulemar Compagnia Di Navigazione*,[25] as follows:

'Lastly on the aspect of proof of a prima facie case, the parties relied on expert evidence in regard to … the legal position in terms of English law, which governs the charterparty. In a trial action it is fundamental that the opinion of an expert must be based on facts that are established by the evidence and the court assesses the opinions of experts on the basis of 'whether and to what extent their opinions advanced are founded on logical reasoning". It is for the court and not the witness to determine whether the judicial standard of proof has been met. How, if at all, are these principles to be applied in the context of an application where the applicant is required to show only that it has a prima facie case? There does not appear to be any authority dealing with this problem. In my view the court must first consider whether the underlying facts relied on by the witness have been established on a prima facie basis. If not then the expert's opinion is worthless because it is purely hypothetical, based on facts that cannot be demonstrated even on a prima facie basis. It can be disregarded. If the relevant facts are established on a prima facie basis then the court must consider whether the expert's view is one that can reasonably be held on the basis of those facts. In other

[23] *Schlesinger v Commissioner for Inland Revenue* 1964 (3) SA 389 (A) at 396G.
[24] See *Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GMBH of Bremen* 1986 (4) SA 865 (C) at 874E-G.
[25] *MV Pasquale Della Gatta MV Filippo Lembo Imperial Marine Co v Deiulemar Compagnia Di Navigazione SPA* [2011] ZASCA 131; 2012 (1) SA 58 (SCA) paras 25-27.

words, it examines the reasoning of the expert and determines whether it is logical in the light of those facts and any others that are undisputed or cannot be disputed. If it concludes that the opinion is one that can reasonably be held on the basis of the facts and the chain of reasoning of the expert the threshold will be satisfied. This is so even though that is not the only opinion that can reasonably be expressed on the basis of those facts. However, if the opinion is far-fetched and based on unproven hypotheses then the onus is not discharged. Foreign law is treated as a fact requiring to be proved by tendering the evidence of a witness who can speak to the contents of that law. However, such evidence is unnecessary where the law in question can be ascertained readily and with sufficient certainty without recourse to the evidence of an expert, because the court is then entitled to take judicial notice of such law. In many maritime cases our courts deal with English admiralty or maritime law. They are accustomed to considering questions arising out of bills of lading and charterparties and the operation of vessels. Since at least 1797 in the case of the Cape Colony and 1856 in the case of the Colony of Natal our courts have in relation to a wide variety of maritime matters been required in admiralty cases to apply English admiralty and maritime law. That law is readily accessible in law reports and textbooks that are part of the standard libraries of the courts and practitioners in this field. In those circumstances it should generally speaking be unnecessary for it to be presented through affidavits from practitioners, who all too frequently (as in this case with Deiulemar's expert) are representatives of the parties. The undesirability of expert evidence from such a source has been the subject of previous comment from our courts.'

(Footnotes omitted.)

[33] It is hard to discern why the court a quo rejected Justice Khare's opinion. The doctrine of impossibility or frustration is applicable to contracts of employment where supervening events rendered the performance of the contract impossible[26] or radically different from what had been undertaken when the contract was entered into.[27] And whether a contract is frustrated in the particular circumstances of the case will be a

[26] *Horlock v Beal*, at 492.

[27] In *Karelrybflot v Udovenko* [2000] 2 NZLR 24 (CA) paras 36- 37 the New Zealand Court of Appeal accepted that contracts of employment could be frustrated and mentioned without confining itself to those instances the imprisonment or internment of the seaman. What happened here seems very close to those examples.

matter of fact and degree.[28] In English law a contract may be frustrated if supervening events prevent its further performance.[29] The principle forms part of the law of contract in India too in terms of s 56 of The Indian Contract Act 9 of 1872, which provides that 'a contract to do an act, which after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful'.

[34] There is nothing special about the contract of employment that precludes such a contract from being subject to the ordinary principles of frustration of contracts. In *Prest v Petrodel Resources* [2013] 2 AC 415 the Supreme Court in the United Kingdom had to deal with the relationship between the law on the division of assets on divorce and the principle of company law that the company and its assets are distinct from the person and assets of the shareholders. It held that the latter principle did not cease to apply in proceedings in the Family Court and Lord Sumption said:[30]

'Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different.'

No more are courts dealing with contracts of employment entitled to disregard the basic principles of contract and treat employment law as excluding basic legal principles. Neither expert on behalf of Bergshav sought to suggest that the doctrine of

---

[28] Ibid.

[29] The classic statement is that of Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC* [1956) AC 696 where he said: 'Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract**.'**
Chitty on Contracts (29 ed) para 23-001 expresses it thus:
'a contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of the entry into the contract.'

[30] At para 37.

frustration of contracts did not apply to employment contracts or was inapplicable in India.

[35] Bergshav's counsel sought to distinguish *Horlock v Beal* from the present case with a contention that 'there is a world of difference between a world war and pirates making unrealistic demands' and that that a lot has changed in relation to the protection of seafarers and their entitlement to wages since the war era. Whilst that may factually be the case, I do not agree that it alters the legal principle. To my mind it is the underlying principle that matters and not the facts of the case. That principle is the same in both cases – the performance of the employment contract was rendered impossible by a supervening event. To continue to pay and support a crew not on board the vessel and not rendering service to the vessel, whose contracts of employment had terminated and who were held in captivity by intransigent pirates, who had been paid a ransom but demanded an exchange that was not within Concord's power, could hardly have been contemplated by the employment contracts.

[36] *O Konavalov* clearly does not support Bergshav's case as was claimed. It is patently distinguished by the fact that there the crew was in the employment of the vessel and remained on board for the entire duration in respect of which wages were claimed. As mentioned above, the hostages claim wages purportedly accrued after their employment contracts ended but before their repatriation, for a period which started seven months after they were last on board the vessel during which they were not on board the vessel (for an unforeseen reason beyond the employer's control).

[37] In that regard, Bergshav's counsel urged us to give 'wages' and, necessarily, the

corresponding lien,[31] an expanded meaning to include the wages for which he contended. It is so that the concept of wages enjoys an extensive and broad construction so as to include claims incidental to the seaman's employment that would not be comprehended under the narrow meaning of the word.[32] This is evident from the very wide wording of s 1(1)*(s)* of the Admiralty Act which inter alia defines 'maritime claim' to mean 'any claim for, arising out of or relating to ... the employment of any master, officer or seaman of a ship in connection with or in relation to a ship, including the remuneration of any such person, and contributions in respect of any such person to any pension fund, provident fund, medical aid fund, benefit fund, similar fund, association or institution in relation to or for the benefit of any master, officer or seaman.'

[38] But the hallmark of a maritime lien in respect of wages is the benefit to the vessel of the service of the crew without which no maritime lien can arise. As Clarke J observed in *The Ever Success*:[33]

'The maritime lien is in respect of service to the ship. In the absence of some very unusual contractual provision, that service will ordinarily be measured by reference to the seaman's contract of service ... under which he was hired, whether by the shipowner, or (as in this case) the putative shipowner, provided of course that there is a sufficient connection between the service and the ship in the sense discussed below. It follows that I accept [the] submission that it is never appropriate for the court to evaluate the services of each seaman on a quantum meruit basis. The proper approach is

[31] In line with *The Tacoma City* [1991] 1 Lloyd's Rep 330 CA, which said '[a]s with the case arising from the statutory expansion of the court's jurisdiction so also the judicial expansion of a substantive concept of a wage has been accompanied by corresponding expansion in the maritime lien. To the extent that a claim is in the nature of a "wage" it is accompanied by a maritime lien.' See also *The Halcyon Skies* [1976] 1 Lloyd's Rep 461 (QB); D R Thomas *British Shipping Laws Maritime Liens* (1980) vol 14 para 313.

[32] See, for example, *Continental Illinois National and Trust Co of Chicago Bank v Greek Seamen's Pension Fund* 1989 (2) SA 515 (D) at 530I-533E; *The Tacoma City* fn 31 above*; The Arosa Star* [1959] 2 Lloyd's Rep 396 at 402; *The Westport (No 4)* [1968] 2 Lloyd's Rep 559; *The Halcyon Skies* fn 30 above.

[33] *The Ever Success* [1999] 1 Lloyd's Rep 824 at 831; *The Halcyon Skies* above. This approach can be traced to Lord Watson's statement in *The Castlegate* [1893] AC 38 at 52 that the sole condition for the existence of the lien is that such wages have been earned on board the ship.

to ask whether in the relevant period the claimant was rendering a service to the ship as a member of the crew. If he was, he was entitled to a maritime lien in respect of his wages in respect of that period assessed in accordance with his contract.'

Thus, even if on some indeterminate basis the hostages were entitled to recover wages from one of Concord, Bitument or Windrush, the entitlement to those amounts would not have arisen from service on or to the *Asphalt Venture* and would not have attracted a maritime lien. And the absence of a maritime lien was fatal to the entitlement of Bergshav to arrest the *Asphalt Venture*.

[39] The court a quo's finding that, if the hostages 'were engaged in terms of a contract governed by and subject to Indian law, which promised them wages from the date of termination of their employment to date of repatriation without regard to the duration of the delay and without regard to the fact that the employer giving the undertaking might not be at fault with regard to any delay in repatriation', this passes the traditional test of recompense for execution of duty, with the result that 'the claim is supported by a maritime lien', is in my view wrong. It, as did Bergshav's experts, overlooked the provisions of the collective bargaining agreement, which underpinned the employment contracts, especially Appendix – 1 of article 5, which made clear that the hostages' contracts of employment had terminated by 15 April 2011 when the vessel was released. In any event, the wages contemplated in these provisions were paid. The judgment attached no weight to the fact that the reason for the hostages not being repatriated was the conduct of the pirates, which was beyond Concorde's control. It also ignored the fact that the hostages did not perform any service on or to the vessel and were unable to do so because of their detention by the pirates.

[40] The mainstay of Bergshav's case, article 19.2, expressly envisages repatriation for 'normal reasons', which could not be further from the unusual situation in which the hostages found themselves. These provisions cannot by any stretch of the imagination bear relevance here. The employment contracts simply make no provision for the type of wages claimed. And, in my view, neither does the Indian law to which we were referred. I respectfully disagree with the court a quo's interpretation of s 141(1) of the Merchant Shipping Act that the *Asphalt Venture* was 'lost' to the pirates, for which no substantiation was given. This construction goes against the plain wording of the provisions and common sense. We are after all concerned with the situation after the *Asphalt Venture* had been restored to its owners and had resumed trading. It cannot then have been 'lost' to the pirates.

[41] There was an attempt on Bergshav's part to place reliance on ss 141(1)*(b)* and 142 of the Indian Act. Section 141(1)*(b)* entitles a seaman 'to receive … in the case of … inability to proceed on the voyage, wages for the period from the date his service is terminated until he is returned to and arrives at a proper return port'. Section 142 decrees that wages shall not accrue to a seaman during absence without leave, refusal to work or imprisonment. The problem with this late tack raised for the first time before us, however, without even engaging the contentions made by counsel in respect of these provisions, is that none of the experts dealt with them at all. The pre-requisite to the invocation of this provision was a certificate granted under the Indian Act of the seaman's unfitness or inability to continue with the voyage. There was no such certificate, which puts an end to this contention. In the end Bergshav's counsel was unable to identify the source of the alleged continued obligation to pay the contested wages.

[42] There was therefore no obligation on Concord to pay crew's wages or repatriation costs in respect of the hostages beyond 15 April 2011, despite the fact that it continued making payments until October 2011. These payments were respectively made *ex gratia* and in terms of an agreement concluded for expedience as mentioned. Thus, no maritime lien could have arisen and existed on 2 September 2012 when *Asphalt Venture* was arrested. For that reason, Bergshav could not invoke the action *in rem* and execute the arrest in terms of the Admiralty Act. It is unnecessary, on these findings, to decide whether the termination of the sub-bareboat charterparty with Concord on 17 June 2011, some five months before the wages clamed allegedly started accruing, also constituted a supervening event rendering the performance of the employment contract impossible as it no longer had any interest in the vessel. It is also unnecessary to deal with the question whether the lien could be assigned effectively to Bergshav.

[43] For all these reasons, I am not satisfied that Bergshav established a prima facie case for the existence of the wages claim it pursues against Asphalt Venture. Its case does not pass the first leg of the enquiry described above.

[44] In the result the following order is made:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and replaced with the following:

'(a) The deemed arrest of MT "*Asphalt Venture*" is hereby set aside.

(b) The security furnished on behalf of Windrush Intercontinental SA shall be released to it forthwith.

(c) UACC Bergshav Tankers AS shall pay the costs of the application, including

(i) the costs attendant upon the further argument as a consequence of the court's request for responses to queries;

(ii) the costs of the application for leave to appeal; and

(iii) the costs of the application to set aside the arrest of MT "*Asphalt Venture*".'

_____

MML MAYA

Deputy President of the Supreme Court of Appeal

APPEARANCES

For the Appellant:	M J Fitzgerald SC (Heads of Argument prepared by DA Gordon SC) Instructed by: Cox Yeats Attorneys, Durban McIntyre & Van Der Post, Bloemfontein
For the Respondent:	S R Mullins SC Instructed by: Shepstone & Wylie Attorneys, Durban Matsepes Inc., Bloemfontein