REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
(Exercising its admiralty jurisdiction)

CASE NO: **AC 22/07**

In the matter between:

VIKING INSHORE FISHING (PTY) LTD Plaintiff

And

MUTUAL & FEDERAL INSURANCE COMPANY LIMITED Defendant

Admiralty action in personam

Coram:	N J Yekiso, J
Dates of Hearing:	2, 3, 4, 8 & 11 September 2014
Date of Judgment:	17 October 2014

Summary

Promissory warranty: imposes strict obligations on the insured to comply with conditions stated in the warranty

Vicarious liability `not the basis of liability

Inchmaree clause: Promissory warranty not having an effect of negating the *Inchmaree* clause

JUDGMENT DELIVERED ON 17 OCTOBER 2014

YEKISO, J

[1] Viking Inshore Fishing (Pty) Limited ("Viking"), a company with limited liability duly incorporated in accordance with the company laws of the Republic of South Africa, was the owner of a fishing vessel MFV "Lindsay" . In the early hours of 8 May 2005, a collision occurred between "Lindsay" and a bulk juice carrier vessel MV "Ouro do Brazil" some 18 nautical miles off Sardinia Bay, but within the district of Port Elizabeth. As a result of the collision, the "Lindsay" sank almost immediately and 14 of the 16 crew serving on board the "Lindsay" were tragically lost.

[2] It is contended on behalf of Viking that the collision was caused by the negligence, incompetence and/or error of judgment of the persons on the bridge of the MV "Ouro do Brazil" and/or the negligence of the officers and/or crew of the MFV "Lindsay" ("the Lindsay").

[3] The defendant, Mutual & Federal Insurance Company Limited ("Mutual & Federal") denied these allegations. It did so despite the fact that a matter of a collision between the "Lindsay" and MV "Ouro do Brazil" was common cause and in circumstances where Mutual & Federal knew full well that the allegations relating to the occurrence of the collision were true. This denial could well be described as a tactical denial. This tactical denial is one of the issues raised by Viking in an interlocutory

application which served before Davis AJ on 12 September 2013. In paragraph 27 of her judgment delivered on 30 October 2013 Davis AJ held that the matter of a tactical denial which Viking complained about falls to be decided with reference to the pleadings as they stand and in accordance with those legal principles set out in authorities such as *Joseph v Black & Others* 1930 (WLD) 327; and *Nieuwoudt v Joubert* 1988 (3) SA 84 (SE) amongst other authorities referred to in her judgment.

[4] The Lindsay was insured under a written marine hull policy issued by the defendant, Mutual & Federal Insurance Company Limited ("Mutual & Federal"), in favour of plaintiff, Viking Inshore Fishing (Pty) Ltd. In terms of the policy, the hull, machinery and equipment of Viking's fleet, which included the Lindsay, was insured against loss, damage, liability or any expense incidental thereto in the manner provided for in the policy. As a result of the collision Viking lodged a claim with Mutual & Federal for indemnity arising from the loss it suffered as a result of the sinking of the Lindsay.

[5] The policy, amongst others, provided an indemnity subject to the Institute Fishing Vessels Clauses ("the Vessels Clauses") and subject to the Institute Additional Perils Clauses – Hulls ("the Perils Clauses"). The institute referred to is the Institute of International Underwriters at London (previously Institute of London Underwriters).

[6] By way of a letter dated 8 October 2005 addressed to Viking, Mutual & Federal repudiated liability on the basis that:

"1. At the time of the collision, there was not an Able Seaman or rating holding a Proficiency in Survival Craft on board the MFV 'Lindsay' as required by Regulation 18 of the Regulations to the Merchant Shipping Act, No 57 of 1951 ('Merchant Shipping Act');

2. furthermore, at the time of the collision, and in the time leading up to the collision, there was not a certificated officer on the bridge of the MFV 'Lindsay' as required in terms of Regulation 6, read with annex 1, to the regulations of the Merchant Shipping Act; and

3. during the course of the policy, [Viking] failed to take reasonable and/or diligent steps to ensure that the watchkeeping standards referred to in Regulations 4 and 6 of the Merchant Shipping Act were complied with by the Master and crew of the MFV 'Lindsay'."

[7] Following upon the repudiation of its claim, Viking, the owners of the "Lindsay", instituted these proceedings out of this court. In these proceedings Viking claims an indemnity from Mutual & Federal in terms of a marine hull insurance policy. The policy provided insurance cover to various companies affiliated and associated with Viking and included Viking. Attached to the policy was a schedule referred to in the policy as schedule "A" which contained several fishing vessels covered in terms of the policy. The "Lindsay" was one of the vessels included in Schedule "A" attaching to and forming part of the policy.

[8] In response to the claim by Viking, Mutual & Federal has proffered two defences based upon a warranty and a proviso contained in the policy, these being the Merchant Shipping Act Warranty ("MSA Warranty"); and the due diligence proviso which is

included at the end of clause 6.2 of the Institute's Fishing Vessels Clauses and clause 3 of the Institute's Additional Perils Clauses – Hulls. In terms thereof Mutual & Federal can avoid liability if either the MSA Warranty or the due diligence provisos have been breached.

[9] The relevant portions of the Vessels and the Perils Clauses read as follows:

"**Vessels Clauses**

6.2 This insurance covers loss of or damage to the subject matter insured caused by

…

6.2.3 Negligence of the Master Officer's crew or Pilots;

…

provided that such loss or damage has not resulted from the want of due diligence by the Assured, Owners or Managers."

"**Perils Clauses**

1. In consideration of an additional premium this insurance is extended to cover

…

1.2 Loss of or damage to the vessel caused by an accident or by negligence, incompetence or error of judgment of any person whatsoever.

…

3. The cover provided in clause 1 is subject to all other terms and exclusions contained in this insurance and subject to the proviso that the loss or damage has not resulted from a want of due diligence by the Assured, Owners or Managers."

[10] The indemnity provided by the policy was further subject to a warranty which provides as follows:

> "**Merchant Shipping Act Warranty**
>
> Warranted that the provisions of the South African Merchant Shipping Act and the regulations pertaining thereto shall be complied with at all times during the currency of this policy, provided that this warranty shall be effective only to the extent of those regulations which are promulgated for the safety and/or seaworthiness of the vessel(s).
>
> It is understood and agreed that this warranty shall in no way be construed to nullify the 'inchmaree' Clause, or any part thereof in the Institute Clauses attached to this Policy."

[11] There is something that has to be said about the *Inchmaree* clause referred to in the last paragraph of the warranty clause. Authority has it that the *Inchmaree* clause derives its origin from a landmark decision in *Thames & Mersay Marine Insurance Co Limited v Hamilton, Fraser & Co* (1887) 12 AC 484 in which the steamer, *Inchmaree*, sustained damage to a donkey engine which was used for pumping water into her main boilers. Her donkey engine, as part of the machinery of the *Inchmaree*, was covered by an insurance policy. The donkey engine was damaged because a valve was closed which ought to have been kept open, forcing water into the airchamber of the donkey pump and causing it to split open.

[12] Professor Hare in his work: *Shipping Law & Admiralty Jurisdiction in South Africa* 1999, para 19-22 at p746 states that the closing of the valve was either accidental or due to the negligent act of an engineer, but was demonstrably not due to

wear and tear. Although the use of the donkey engine was incidental to navigating the vessel, the House of Lords rejected the argument that the explosion of the donkey engine should be a "peril of the sea" or indeed a "like peril" requiring a *sui generis* interpretation of the extent of cover.

[13] Subsequent to the decision in the *Inchmaree*, the Institute Underwriters included clauses to extend the indemnity provided in marine hull insurance policies beyond perils of the sea, to include additional named perils. It is submitted that although these are commonly known as *Inchmaree* clauses, they actually extend cover beyond the cure to the *Inchmaree* problem and have added additional perils so that this clause is rather the "cousin" to the "liner liability clause".

[14] It is against the background set out in the preceding paragraphs that clause 1.2 of the Perils Clauses and clause 6.2.3 of the Vessels Clauses referred to in paragraph [9] of this judgment do form part of the *Inchmaree* clauses which are attached to and form part of the insurance policy. Viking's claim is based on the *Inchmaree* clauses

THE INTERPRETATION OF THE POLICY

[15] There appears to be a common thread as regards the general approach in interpreting insurance policies. Authorities such as *Fedgen Insurance Limited v Leyds* 1995 (3) SA 33 (A) at 38A-E; *French Hairdressing Salons Limited v National Employers Mutual General Insurance Association Limited* 1931 AD 60 at 65; *Kliptown Clothing Industries v Marine & Trade Insurance* 1961 (1) SA 103 (AD) at 106H-107D are but

some of the authorities that demonstrate such an interpretive approach. The approach appears to be that any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted; that in interpreting insurance contracts it is the duty of the insurer to make it clear what particular risks he wishes to exclude; that the court should incline towards upholding the policy and against producing a forfeiture; that the construction of a warranty is generally taken in favour of the assured and against the insurer and so forth.

[16] With regards to the onus, it has been held in authorities such as *Van Zyl v Kiln Non-Marine Syndicate No 510 of Llyods of London* 2003 (2) SA 440 (SCA) that the ordinary rule is that the insured must prove himself to fall within the primary risk insured against whilst the onus is on the insurer to prove the application of an exception. It is submitted on behalf of Viking that both in terms of the general approach in our law and on the basis of international authorities such as *Secunda Marine Services Limited v Liberty Mutual Insurance Co* [2006] NSCA 82 (the Novia Scotia Court of Appeal) that Mutual & Federal bears the onus of proving both of the defences upon which it relies. It has already been pointed out that such defences are based on the alleged breach by Viking of the MSA Warranty and the alleged breach of due diligence provisions.

[17] It appears that initially there was a dispute between Viking and Mutual & Federal as regards whether Viking's claim is based on the *Inchmaree* clauses. However, it appears that that dispute has since been resolved at an interlocutory stage of the proceedings when the matter served before Davis AJ. It appears that, in the

course of those interlocutory proceedings, Mutual & Federal conceded that the two clauses upon which Viking's claim is premised, being clauses 6.2 of the Institute Fishing Vessels Clauses and clause 1.2 of the Institute of Additional Perils Clauses, are both *Inchmaree* clauses. This concession was repeated by *Mr Gordon* SC (with him *Mr Voormolen*) in the defence's opening remarks. This being so, so it is submitted on behalf of Viking, Mutual & Federal 's defence, based as it is on the application of the MSA Warranty, cannot be invoked and sustained as the application thereof shall have the effect of nullifying the *Inchmaree* clauses, or any part thereof, in the Institute Clauses attached to the policy. The second paragraph of the MSA Warranty records that the warranty shall in no way be construed to nullify the *Inchmaree* clauses, or any part thereof in the Institute clauses attached to the policy.

[18] It is thus submitted on behalf of Viking that any construction which has, as a consequence, that the MSA Warranty does apply in the instance of this matter, will inevitably lead to the nullity of the *Inchmaree* clauses on which Viking's claim is premised. The submission boils down thereto that the application of the MSA Warranty, based on the natural meaning of the last paragraph of the warranty clause, cannot apply in the instance of this matter as the application thereof shall have the effect of nullifying the *Inchmaree* clauses.

[19] On the other hand it is contended on behalf of Mutual & Federal that Viking's interpretation is not a competent interpretation. It is contended that the warranty and the *Inchmaree* clauses both form part of the policy and must be read together and that

the two are not mutually destructive. It is further contended that in marine insurance practice the word "warranty" is used in the sense of a promissory warranty. It must be complied with and that the breach of this warranty discharges the insurer from liability. Based on this approach, it is thus contended that the interpretation by Viking, which effectively draws a line through the first paragraph insofar as the *Inchmaree* clauses are concerned, is not a sensible interpretation of what is meant by the second paragraph of the MSA Warranty. Viking's interpretation, so the contention goes, also does not sit comfortably with the language used. It is thus contended on behalf of Mutual & Federal that the meaning of the second paragraph of the warranty does not render ineffective the additional cover provided by the *Inchmare*e clauses. Mutual & Federal contends that Viking has the insurance cover in the *Inchmaree* clauses but that insurance cover is nevertheless subject to the warranty. I am perfectly in agreement with this approach. The approach adopted by Viking, effectively drawing a line through the first and the second paragraph of the MSA Warranty clauses is not consistent with the interpretive approach pertaining to the need to interpret a provision in the contract, not in isolation, but in relation to the contract as a whole. It therefore follows, in my view, that the MSA Warranty clause does not have an effect of nullifying the *Inchmaree* clauses as Viking would seek to contend. Thus, the *Inchmaree* clauses do not have an effect of precluding Mutual & Federal's reliance on the MSA Warranty as a defence.

ALLEGED BREACH OF WARRANTY

[20] In its plea Mutual & Federal alleges that Viking breached the warranty in a number of respects, and in doing so, relies on a breach of the regulations appertaining

to the South African Shipping Act promulgated for the safety and/or seaworthiness of a vessel. The regulations referred to are the Merchant Shipping (Safe Manning) Regulations, 1999. In paragraphs 28 to 35 Mutual & Federal sets out the specific regulations on which it relies for the alleged breach of warranty. Mutual & Federal relies on three regulations in its defence, and these are, Regulation 4(1); Regulation 6 read with annex 1 thereof; and Regulation 6(B).

[21] In contending that Viking breached the regulations appertaining to the South African Shipping Act, Mutual & Federal pleads as follows in paragraph 35 of its plea.

> "In breach of the said Regulations and therefore in breach of Warranty:
>
> (i) there was no officer in charge of the navigational watch either at all times or at all relevant times or at the time immediately before the said incident; and
>
> (ii) The said Owner did not prepare or, alternatively, preserve the said Schedule with the consequence that the defendant is not liable to plaintiff for the claim and became entitled to reject the claim, as it did."

[22] The Schedule referred to in paragraph 35(ii) of its plea is a schedule of duties referred to in Regulation 6(B) of the Merchant Shipping (Safe Manning) Regulations which the owner of a vessel is required to prepare and to preserve for a period of five (5) years.

REGULATORY MATRIX

[23] Regulation 4(1) of the Merchant Shipping (Safe Manning) Regulations, 1999 provides as follows:

"(1) The Owner of every ship shall ensure that –

(a) (i) no ship's officer takes charge of a navigational or engineering watch on the ship unless he or she holds appropriate valid certification entitling him or her to do so; and

(ii) no rating forms part of a navigational or engineering watch on the ship unless he or she holds appropriate valid certification entitling him or her to do so."

[24] In turn, Regulation 6 under the heading "Watchkeeping Standards" provides as follows:

"Watchkeeping Standards

6 The owner and master of a ship shall ensure that their watchkeeping standards set out in annex 1 are complied with on the ship at all relevant times."

[25] Annex 1 referred to in regulation 6 deals with matters such as watchkeeping principles and arrangements; principles to be observed in keeping navigational watch; principles to be observed in keeping engineering watch; principles to be observed in keeping radio watch; and all those other matters referred to in Part 4 up to Part 9 of matters dealt with in annex 1.

[26] Regulation 10 of annex 1 under the heading "Principles to be Observed in Keeping Navigational Watch" provides as follows:

"10. The officer in charge of the navigational watch is the master's representative and is primarily responsible at all times for the safe navigation of the ship and for complying with the collision regulations."

[27] Furthermore, Regulation 38 under the same heading provides as follows:

"38. The office in charge of the navigational watch shall notify the master immediately-

(a) if restricted visibility is encountered or expected;

(b) if the traffic conditions or the movement of other ships are causing concern;

(c) if difficulty is experienced in maintaining course; and

(d) on failure to site land, a navigational mark or to obtain standards by the expected time."

[28] Regulation 6(B) provides that the owner of every ship of 100GT or more shall comply with this regulation and further provides that the owner is obliged to prepare a schedule of duties and to cause it to be preserved for a period of five (5) years. All these regulations relate to watchkeeping.

[29] I have already made a point in paragraph [19] of this judgment that the *Inchmaree* clauses do not have an effect of precluding Mutual & Federal from raising MSA Warranty as a defence. The meaning of the term "warranty" has had the attention of our courts over a period of time. In *Lewis v Norwich Fire Insurance Limited* 1916 AD 509 at 514 and 515 Innes CJ said the following:

"A warranty, in the sense in which that term is used in insurance transactions, is a statement or stipulation upon the exact truth of which, or the exact performance of

> which, as the case may be, a validity of the contract depends. Courts of law will construe such stipulations as they would any other conditions of the policy; but when once the meaning has been ascertained a warranty must be exactly complied with whether it is material to the risk or not. … A strict observance of its terms is a condition precedent to the incidence of liability."

[30] As recent as 2006 the following was stated by the Supreme Court of Appeal in *Parsons Transport (Pty) Ltd v Global Insurance Co Limited* 2006 (1) SA 488 (SCA) at para 6 where the definition of the term "warranty" as espoused in *Lewis Limited v Norwich Union Fire Insurance Limited,* supra, was qualified as follows:

> "A breach of a warranty by the insured provides the insurer with a defence to any claim brought subject to a breach … the policy is not automatically rendered void by the breach, but the breach entitles the insurer to elect to exercise his right to avoid the policy and repudiate liability."

[31] Based on the abovementioned authorities it is thus clear that the insurer does not have to prove a causal connection between the loss and the breach of the warranty. In *Lewis Limited v Norwich Union Fire Insurance Limited,* supra, the insured warranted that he would keep a complete set of books in connection with his business and that the books would be locked in a fireproof safe or removed to another building at night and at time when the premises are not actually open for business. The insured in that case claimed an indemnity in respect of stock and fixtures insured with the insurance company which had been destroyed in a fire. Plainly, the keeping of a complete set of books had no causal connection to the loss occasioned by the fire. Nevertheless, the

warranty had to be complied with, in the words of Innes CJ, whether it was material to the risk or not.

[32] In the event, the appeal by the insured against repudiation of its claim by the insurance company was dismissed. It is against this background that I have to determine, in the first instance, the question of the alleged breaches of the warranty by Viking and, if need be, an alleged breach of due diligence provisions by Viking, based on evidence led at trial.

ALLEGED BREACH OF REGULATION 4(1)(a)(i) and 6

[33] The evidence tendered for Viking regarding the watchkeeping duties may be summarised as follows:

[33.1.] The Master of the "Lindsay" was the officer in charge of the navigational watch during daytime. There ought to exist a document which reflects the times when other officers were to commence their navigational watch duties. At some point during the evening prior to the collision Captain Landers, who was the Master of the ship, handed over the charge of the navigational watch to the Mate. It would appear that this is indeed what happened on the evening before the collision with "Ouro do Brazil". At the time of the collision, the Master was asleep in his cabin.

[33.2.] After Captain Landers had handed over the watch to the Mate, Mr Lavendal, but before the collision occurred, Captain Landers walked through the bridge to the deck of the "Lindsay", to urinate. When he walked through the small confines of the bridge of

the "Linday", he only saw two persons on the bridge. Again when he returned from the outside to go back to his cabin, he walked through the bridge in the opposite direction and only saw two persons in the small confines of the bridge of the "Lindsay". In his evidence at trial Captain Landers initially stated that he had seen three persons on the bridge of the "Lindsay" but when confronted with his evidence at the Court of Marine Enquiry, he conceded that the evidence given at the Marine Enquiry was the more accurate.

[33.3.] The Mate had standing orders from Captain Landers to call him in the event of the "Lindsay" coming within 2 miles of another vessel. In his evidence at trial, Captain Landers initially stated that the orders were to call him if the "Lindsay" came within 1 mile of another vessel, but conceded in cross examination that the evidence given by him at the Marine Enquiry was the more accurate.

[33.4.] Captain Kieron Michael Tesling Cox, a Class One Mariner, was called by Viking to testify as an expert. His evidence related to the positions of the three vessels, "Umgeni"; "Ouro do Brazil"; and "Lindsay" prior to the collision; reconstruction of their movements upto the point and the moment "Ouro do Brazil" and "Lindsay" collided with each other

[33.5.] Captain Cox is of the opinion that the primary cause of the collision between the MV "Ouro do Brazil" and the MFV "Lindsay" was the 13º change of course made by the MV "Ouro do Brazil" which commenced at 00h30. The change of course created a

dangerous close-quarter situation with the MFV "Lindsay". This was compounded by the fact that thereafter, the MV "Ouro do Brazil", as the give-way vessel, was obliged to change her course by making a bold turn to starboard, which she could easily have done, should have done and failed to do. Not only that, but the MV "Ouro do Brazil" should have kept a proper lookout for the MFV "Lindsay" and would have acquired the vessel on her Automatic Radar Plotting Aid ("ARPA") long before she did, which should have assisted her to take appropriate avoiding action in good time. As it turned out MV "Ouro do Brazil" and the MFV "Lindsay" collided and the MFV "Lindsay" sank almost immediately.

[33.6.] The only survivors on board the "Lindsay" were the Master (Captain Landers) and a "sparehand" (Mr John Ehlers). Evidence tends to suggest that Royden Koeries, a "deckhand", also found himself in the water. If this be so, this would mean that Koeries had also gotten off the ship. It is suggested on behalf of Mutual & Federal that the three who got off the ship probably could have come from the bridge, whereas the Mate, Mr Lavendal, who should have been on watch, was not seen and not found.

[33.7.] Within days of the collision, an official of the SA Marine Safety Authority ("SAMSA") (Captain Nigel Campbell) was appointed to investigate the circumstances surrounding the collision. Captain Campbell, amongst other persons he interviewed, interviewed Mr Ehlers. Mr Ehlers, in the course of the interview, told Captain Campbell that he (Mr Ehlers) and Mr Royden Koeries (a deckhand) were on the bridge of the "Lindsay" prior to the collision, but there were no officers on the bridge with them.

Particularly, the skipper was asleep, the Mate was in his cabin and the bosun was similarly in a cabin, sleeping.

[34] *Mr MacWilliam,* SC, for Viking, objected to any reference to the evidence procured from Mr Ehlers by Captain Campbell on the basis that such evidence constitutes inadmissible hearsay evidence and that no reliance should be placed thereon in the absence of confirmation of that evidence, at trial, by the deponent thereof in the person of Mr Ehlers. Once this objection was raised, I ruled that the hearsay evidence complained of would be provisionally allowed and that the matter of the admissibility thereof, coupled with probative value to be attached to such evidence in the event it being finally admitted, be addressed in argument. It is worth pointing out at this stage of this judgment that Mr Ehlers could not be located and thus did not testify in this trial. Mr Craig Bacon, the Operations Director at Viking, testified under cross examination that Viking had received a request from "the insurance company" which, it would appear, was a reference to Mutual & Federal, to locate Mr Ehlers and that Viking had sent someone to Mr Ehlers' address. However, Mr Ehlers could not be found and no information of his whereabouts could be obtained.

[35] In argument before me it was submitted on behalf of Mutual & Federal that I should allow the introduction of the hearsay evidence of Mr Ehlers into the *corpus* of the evidence tendered in this trial and in support of this submission Mutual & Federal relies on the provisions of section 6(3) and (4) of the Admiralty Jurisdiction Regulation Act, 105 of 1983 ("the Admiralty Act").

[36] Section 6(3) of the Admiralty Act provides as follows:

> "(3) A court may in the exercise of its admiralty jurisdiction receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such directions and conditions as the court deems fit.
>
> (4) The weight to be attached to the evidence contemplated in sub-section 3 shall be in the discretion of the court."

[37] The application of the provisions of section 6(3) and (4) was considered in authorities such as C*argo Laden and Lately Laden on Board the MV "Thalassini Avgi" v MV "Dimitris"* 1989 (3) SA 820 (A) at 842D-H. In that authority Botha JA, writing for the full court, made the following observation:

> "The Legislature has given no indication of how a Court should approach the exercise of its discretion under s 6(3) if regard is had to that subsection by itself. It seems to me, however, that ss (3) must be read with ss (4), and that the latter subsection provides the clue as to the general approach to be adopted in applying ss (3). In terms of ss (4) the weight to be attached to hearsay statements, if allowed under ss (3), is itself left for assessment in the discretion of the Court. Subsection (4) is, I consider, of overriding importance in the scheme of the procedure envisaged in the combined provisions of the two subsections. Accordingly, in my view, the general approach to be adopted in the application of s 6(3) should be lenient rather than strict; the Court should, speaking generally, incline to letting hearsay statement go in and to assess the weight to be attached to them under s 6(4) when considering the case in its totality; and a decision to

exclude such statements should normally be taken only when there is some cogent reason for doing so."

[38] In further support of its submission that I should allow the hearsay statement into the body of evidence, Mutual & Federal relies on the provisions of section 3 of the Law of Evidence Amendment Act, 45 of 1988 ("Evidence Amendment Act"). Section 3 of the Evidence Amendment Act also makes provision for admission of hearsay evidence in both criminal and civil proceedings, provided that the admission of such hearsay evidence is in the interest of justice. In considering whether the admission of hearsay evidence is in the interest of justice, the court is enjoined to have regard to all those factors listed in section 3(c). In the process of considering whether it will be in the interest of justice to admit hearsay evidence the court shall have regard to all those factors listed in section 3(c)(i) to (vii) and, on the basis of all those factors, considered cumulatively, and any other factor that may be taken into account in the determination of whether or not it is in the interest of justice to allow into the body of evidence such hearsay evidence.

[39] In *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety & Security* 2012 (2) SA 137 (SCA) at p147 par [28] D-E Brandt JA, made the following observation with regards to the application of the provisions of section 3(1)(c), it being an exception to the rule against the admission of hearsay evidence:

"As explained in *S v Ndhlovu* (supra) para 15, the very purpose for the introduction of s 3(1)(c) was to 'supersede the excessive rigidity and inflexibility – and occasional

absurdity – of the common-law position' by creating another avenue for the admission of hearsay evidence which turns on what the interest of justice require."

[40] And in paragraph [31] of the same authority Brandt JA went further to make the following observation:

"The section requires that the court should have regard to the collective and interrelated effect of all the considerations in paras (i)-(iv) of the section and any other factor that should, in the opinion of the court, be taken into account. The section thus introduces a high degree of flexibility to the admission of hearsay evidence with the ultimate goal of doing what the interests of justice require."

[41] In further support of the submission to allow the statement made by Mr Ehlers to Captain Campbell in the body of evidence it is contended on behalf of Mutual & Federal that Mr Ehlers could not be located for the purposes of the trial in this court; Mr Ehlers was the only survivor of the collision who was awake at the time that the collision occurred and that, therefore, the only eyewitness; the statement and answers given to Captain Campbell by Mr Ehlers were given shortly after the collision (approximately 8 days) and that there can be no doubt that the dramatic events leading up to the collision must still have been fresh in the Mr Ehlers' mind.

[42] Several months later, Mr Ehlers also testified at the Court of Marine Enquiry. At that enquiry, Mr Ehlers changed his evidence. He testified at that enquiry to the effect that, and contrary to his earlier statement made to Captain Campbell that there was no Mate on the bridge when the collision occurred, that indeed there had been a Mate on

the bridge of "Lindsay" and that his earlier contrary evidence had been given to Captain Campbell because he wanted to "get back" at the Mate who had denied him a promotion.

[43] It is thus suggested in the submissions on behalf of Mutual & Federal that, applying the lenient approach advocated in the *Dimitris*, supra, and the highly flexible approach advocated in *Giesecke*, supra, the proper approach would be to admit all of the evidence of Mr Ehlers, both in the form of a statement made to Captain Campbell as well as the evidence under oath given at the enquiry where Mr Ehlers was also cross-examined by counsel.

[44] The submission goes further to suggest that while the evidence of Mr Ehlers, on its own, should be treated with caution (because of the contradiction), that does not necessarily mean that none of his evidence can be believed. Relying on the authority of *Stellenbosch Farmers' Winery Group Ltd & Another v Mantell et Cie & Others* 2003 (1) SA 11 SCA at para 5 that a court, when confronted with two irreconcilable versions, and where all other factors are equipoised, the probabilities should prevail. It is suggested in those submissions that there are a number of probabilities, in the instance of this matter, which support the initial statement by Mr Ehlers that he and Mr Koeries were alone on the bridge without the Mate when the collision occurred. These would include:

[44.1.] after Captain Landers had handed over the watch to the Mate, but before the collision, Captain Landers walked through the bridge to the deck of the "Lindsay" to urinate. When he walked through the small confines of the bridge of the "Lindsay", he

only saw two persons on the bridge. Again, when he returned from the outside to go back to his cabin, he walked through the cabin in the opposite direction and only saw two persons in the small confines of the bridge of the "Lindsay".

[44.2.] the Mate had standing orders from Captain Landers to call him in the event of the "Lindsay" coming within 2 miles of another vessel, yet he was not called to the bridge prior to the collision (he was woken by the sound of the impact). It is suggested on behalf of Mutual & Federal that this strongly suggests the Mate was not on the bridge because the Mate would, both in terms of the standing orders given by Captain Landers, and in terms of Regulation 38(B) of Part 1 of the Safe Manning Regulations, have been obliged and required to call Captain Landers to the bridge when the "Lindsay" was close to another vessel.

[44.3.] the "Lindsay" did not sound its horn when it was in close proximity to the "Ouro do Brazil". Captain Landers would have heard the horn (according to his own evidence) had it been sounded. The collision regulations require that five short blasts be sounded as a "wake up call" from the "Lindsay" to the "Ouro do Brazil". The Mate, who was by all accounts experienced, would have known to sound the horn and the fact that the horn was not sounded is strongly indicative thereof that the bridge was not manned by an experienced officer.

[44.4.] the "Lindsay" made a turn to port which placed it on a collision course with the "Ouro do Brazil". Viking's expert in the person of Captain Cox did not criticise the turn

to port *per se* but criticised the turn for not being positive enough. The collision regulations which would be known by an experienced officer such as the Mate, require that such a manoeuvre be made positively. This, so submission goes, suggests that the person on the bridge was not an experienced officer. The probabilities are that the "Lindsay" endeavoured to cross the bow of the "Ouro do Brazil" but failed to do so.

[45] The position of Viking with regards to admission into evidence of the statement by Mr Ehlers to Captain Campbell is limited merely to pointing out that in his first statement to Captain Campbell, he made no mention of the Mate, let alone that the Mate was not on the bridge. Furthermore, so the submission goes, even when answering Captain Campbell's questions at the very end thereof he watered down a fact of his answers when he volunteered the information that the Mate had made a U-turn "*by us"* and that Mr Koeries had mentioned the other vessel to the Mate when he came to the bridge.

[46] Thus, the position of Viking with regards to the admission of the hearsay evidence is that such evidence should be ignored in as much as Mr Ehlers subsequently testified at the Court of Marine Enquiry where he virtually recanted the earlier statement made to Captain Campbell.

[47] In the circumstances of this matter, and taking into account that Mr Ehlers could not be located for purposes of tendering evidence at this trial; that he (Mr Ehlers) is the only survivor of the collision who was awake at the time the collision occurred

and, hence, the only eyewitness; and the fact that the statement and answers given to Captain Campbell were given shortly after the collision when the dramatic events leading up to the collision would still have been fresh in his mind, the factors I have mentioned, constitute a sufficient basis to admit such hearsay evidence in the interest of justice.

[48] On the basis of the statement by Mr Ehlers made to Captain Campbell, it is probable that there were no officers on the bridge of the "Lindsay" prior to the collision; that only he (Mr Ehlers) and Mr Koeries were on the bridge shortly before and when the collision occurred and that Lavendal, to whom Captain Landers had handed over the navigational watch duties, probably could have been in his cabin when the collision occurred. Ostensibly, this would mean that there was no officer holding an appropriate valid certification in charge of the navigational watch shortly before and at the time the collision occurred as required in terms of Regulation 4(1)(a)(i) of the Safe Manning Regulations. Mr Ehlers, a "sparehand" and Mr Koeries, a "deckhand", who were on the bridge shortly before and at the time the collision occurred were not holders of appropriate valid certification entitling them to do navigational watch duties.

REGULATION 4(1)(a)(i)

[49] Regulation 4(1)(a)(i) of the Safe Manning Regulations place obligations on the owner of the vessel to ensure that no ship's officer takes charge of navigational or engineering watch on the ship unless such officer holds an appropriate valid certification. The evidence of Mr Bacon was that the owners of the "Lindsay" relied on

the skipper of the vessel and the Mate when it came to keeping the navigational watch. He testified that there were indeed proper practices and procedures in place to ensure that "Lindsay" was properly crewed and well-run; that Viking only employed properly qualified and certificated people to work on the "Lindsay"; that Viking ensured that all of its skippers were properly trained; Viking ensured that all their skippers first served under one of their top skippers before being given their own command; Viking ensured that only certificated officers were on board their vessels; always crewed their vessels and "Lindsay", in particular, according to the requirements of the Safe Manning document; Viking vessels' masters and officers had all received comprehensive training with regard to the proper watchkeeping as part of their training and they practised proper watchkeeping on a daily basis. Viking was in daily contact with the "Lindsay" while at sea either by way of e-mail or mobile phone.

[50] The evidence of Mr Bacon boils down thereto that Viking, in the management of its vessels, ensured that each vessel is properly staffed and that the persons on board are competent and capable to man their vessels whilst at sea. Viking, the owner of MFV "Lindsay", is a company that can only act through its human agents in the form of its board of directors and other officers of the company, in other words, persons whose actions are attributed to the company itself and who are charged with the responsibility of management of the affairs of the company. All other duties which are carried out outside the sphere of management of the affairs of the company, as for an example, management of vessels at sea, can only be carried out by employees entrusted with the responsibility of managing such vessels at sea. The view boils down thereto that

whatever commissions or omissions there could be on the part of the persons managing the vessel at sea cannot, on the basis of vicarious liability, be attributed to Viking.

REGULATION 4(1)(a)(ii)

[51] As has already been pointed out in paragraph [23] of this judgment, Regulation 4(1)(a)(ii) provides that no rating forms part of a navigational or engineering watch on the ship unless he or she holds an appropriate valid certification entitling him or her to do so. In its submissions Viking makes a point that regulation 4(1)(a)(ii) refers only to an appropriately certificated rating being part of the navigational watch. Rating, so the submission goes, is defined in the Safe Manning Regulations to be "a seaman other than an officer". Both Mr Koeries and Mr Ehlers were seaman, so the submission goes. Both Mr Koeries and Mr Ehlers, as ratings, must hold valid certification but that the Safe Manning Regulations do not specify what that certification is.

[52] In an attempt to show that both Mr Koeries and Mr Ehlers were holders of appropriate valid certification, ostensibly entitling them to form part of a navigational watch, Viking called Captain Gustav Louw, a principal officer based at the Cape Town regional office of the SA Marine Safety Authority ("SAMSA"). His evidence was intended to show that the certification of Mr Ehlers and Mr Koeries constitutes compliance with the provisions of regulation 4(1)(a)(ii) of the Safe Manning Regulations. On 25 January 2013 Captain Louw issued a "To Whom It May Concern" letter wherein he sought to indicate that fishing vessels of 100gt or more only require one certificated rating on board to be compliant with the regulations. Mutual & Federal objected to that

evidence on the grounds that the interpretation of the law, which would include the interpretation of the provisions of the Safe Manning Regulations, is a matter on which the court must decide and that whatever opinion Captain Louw holds with regards to the Safe Manning Regulations, is irrelevant. In the light of this objection, the evidence of Captain Louw was merely limited to confirmation that he in fact is the author of a "To Whom It May Concern" letter dated 25 January 2013.

[53] On the other hand, Mutual & Federal called Captain Campbell of SAMSA who testified, amongst other things, about the requirements for completing a Pre-Sea Safety Induction course. Captain Campbell's evidence was that the course provides basic training for persons who go to sea and who typically do not have any knowledge of how to be safe at sea, which would include topics such as how to react when a man falls overboard. He testified that the Pre-Sea Training Certificate referred to in the evidence of Captain Louw, as well as his letter of 25 January 2013, has nothing to do with watchkeeping.

[54] In contrast to the Pre-Sea Safety Induction course referred to in the evidence of Captain Louw, Captain Campbell testified about the requirements for certification as an ordinary seaman, which require training in, amongst other things, watchkeeping. Captain Campbell went further to testify about the contents of such a training programme. His evidence concludes that neither Mr Ehlers nor Mr Koeries are certified as an ordinary seaman.

[55] And, finally, there is a matter of Regulation 6B which requires the owner of every ship of 100gt or more to produce a schedule of duties complying with the relevant regulation. The evidence of Mr Bacon related to a roster which ostensibly is being kept on board the "Lindsay" which deals with duties of personnel on board the "Lindsay". Under cross-examination Mr Bacon conceded that Viking did not know of the existence of regulation 6B. In the course of his evidence he was referred to the evidence he gave at the court of Marine Enquiry which was to the effect that Viking, as opposed to the captain, did not prepare a schedule of duties as required by regulation 6B.

[56] It is clear on the basis of evidence that Viking did not comply with the provisions of regulation 4(1) and regulation 6B despite the Merchant Shipping Act Warranty which imposes a duty on Viking to comply with such regulations. The warranty referred to in the insurance contract is a promissory warranty. It imposes a strict duty on the insured to take certain steps in an attempt, on the part of the insurer, to control and diminish the risk after the conclusion of the insurance contract. Such warranty is intended to give the insurer some measure of control over the risk that it runs, by imposing certain duties on the insured after the conclusion of the contract aimed, if not at reducing them, at least at controlling that risk. A breach by the insured of such a warranty amounts to breach of the insurance contract. It follows, in my view, that Mutual & Federal has succeeded to prove the breach and that Viking's claim, based on the marine hull policy issued by Mutual & Federal, must fail. In the light of this conclusion, it is not necessary for me to deal with a further defence raised by Mutual & Federal based on want of due diligence.

[57] In the result the following order is made.

(1) The Plaintiff's claim is dismissed.

(2) The Plaintiff is ordered to pay the Defendant's costs, duly taxed or as agreed, including costs consequent upon employment of two counsel.

N J Yekiso
Judge of the High Court

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Exercising its admiralty jurisdiction)

CASE NO: **AC 22/07**

In the matter between:

VIKING INSHORE FISHING (PTY) LTD Plaintiff

And

MUTUAL & FEDERAL INSURANCE COMPANY LIMITED Defendant

Admiralty action in personam

Coram:	N J Yekiso, J
Judgment:	N J Yekiso, J
Counsel for Plaintiff:	RW F MacWilliam SC
Attorneys for Plaintiff:	Webber Wentzel (Mr Bowley)
Counsel for Defendant:	Adv D A Gordon SC Adv V Voormolen SC
Attorneys for Defendant:	Cox Yeats (Durban – Mr Clark)
Dates of Hearing:	2, 3, 4, 8 & 11 September 2014
Date of Judgment:	17 October 2014