IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

(EXCERCISING ITS ADMIRALTY JURISDICTION)

CASE NO: AC13/2018

ANDRE VAN NIEKERK Plaintiff/Applicant

and

MV "MADIBA 1" Defendant/Respondent

JUDGMENT DATED: 06 AUGUST 2019

LE GRANGE, J:

Introduction:

[1] The Plaintiff instituted an admiralty action *in rem* against the Vessel MV "MADIBA 1" (the Defendant) for repayment of a loan in the amount of R 1 900 000, 00 plus interest from the maturity date, alternatively such rate as may be deemed appropriate in terms of s 5(2)(f) of the Admiralty Jurisdiction Regulation Act, 105 of 1983 as amended ("the AJRA").

[2] The Defendant has taken exception in accordance with Rule 9(5)(b) of the Admiralty Rules[1] to the Particulars of Claim (POC) in their existing form, on two grounds. The first is that the claim advanced in the POC is not a maritime claim as defined in s 1(1) of the AJRA. The second ground is the Plaintiff has failed to allege compliance with the various conditions precedent in the terms of the Loan Agreement.

[3] The Plaintiff, as a result of the exception taken, now seeks to amend its POC by the introduction of a paragraph 13 A, which apparently relates to the fulfilment of the conditions precedent in the Loan Agreement. The Defendant has objected to this proposed amendment as well on two grounds. First, on the basis that if granted the amendment it would render the amended particulars of claim non-complaint with Admiralty Rule 9(3)(a), which prescribes that every pleading should contain a clear and concise statement of the material facts upon which the party relies for the claim or defence and susceptible to a challenge in terms of Admiralty Rule 20(2). Secondly, that the claim even as described in the proposed amended particulars of claim, is not a maritime claim as defined in s 1(1) of the AJRA and that this Court accordingly lacks jurisdiction to determine the claim.

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[1] Admiralty Proceedings Rules, as amended by GN R 1026 of 7 August 1998, regulates the conduct of proceedings in the High Courts and Local Divisions of the High Courts in South Africa.

Jurisdiction:

[4] In view of the exception and the objection that the claim even as described in the proposed amended particulars of claim, is not a maritime claim, it is necessary to forthwith consider whether in terms of s 7(2) of AJRA, the Plaintiff's claim as currently pleaded, is a maritime claim or not. If the exception is good, the Application for leave to amend the POC with the introduction of paragraph 13 A will have to be considered. If the exception is unsustainable, it follows that the Application for leave to amend and the objection thereto do not require further consideration, except perhaps on costs.

Background

[5] In the action, the Defendant *in rem* is described as the Motor Vessel "Madiba 1", which is a 2016 built passenger ferry operating in the port of Cape Town to and from Robben Eiland.

[6] The Plaintiff, in para 5 of the POC, pleaded the following allegation namely that; a loan agreement was entered into in August 2016 between the Plaintiff as lender, the Owner and Bareboat Charterer as borrower, and that the Plaintiff lent and advanced to the Bareboat Charterer the capital loan amount of R1 900,000.00 to pay for the design, construction and equipping of the Vessel so as to be put into service for the transportation of passengers to and from Robben Island. The Loan Agreement was attached as POC1. What is

evident from the terms of the Loan Agreement is that Iscorp Investments (Pty) Ltd is the ship owner and that Meltt (Pty) Ltd ("Meltt") is the Bareboat Charterer of the Defendant.

[7] In the Preamble of the Loan Agreement in Clauses 1. 2 and 1.3, the following has been recorded, that : -

" 1.2 The Borrower has entered into a Bareboat Charter with Isocorp in respect of providing the Vessel for the ferry services to Robben Island;

1.3 The Borrower requires funding for the improvements to the Vessel and working capital."

[8] Under the heading Loan and Purposes in the Loan Agreement, the following is stipulated, that:

'3.1 Subject to the other provisions of this Agreement, the Borrower hereby borrows from the Lender, and the Lender hereby lends to the Borrower, in order to:

3.1.1 fund improvements to the Vessel;

3.1.2 provide working capital required by the Borrower.'

[9] In was further recorded that the owner agrees and acknowledges that improvements were being made to the Defendant of which the owner is the true and registered owner (Clause 4.1.4.1). Incorporated in the Loan

Agreement was also an architectural drawing of the Defendant in her intended completed state.

[10] The Loan Agreement further provides that the capital amount of the loan was to be repaid from the proceeds of the trading income generated from the operations of the Defendant, save that Meltt was allowed to procure further funding to settle the loan (Clause 7.5). If Meltt failed to repay the capital and interest in full on or before the maturity date the Defendant would be liable in the place instead of Meltt. (POC, para 7.8)

[11] At the heart of the Defendant's exception is the contention that the claim as advanced by the Plaintiff is not a maritime claim and does not require the protection of the Admiralty Courts. According to the Defendant, the nature of the agreement between the parties, as relied upon by the Plaintiff for its alleged claim, is not maritime in nature but a commercial loan and its purpose was to finance a company.

Argument

[12] Counsel for the Defendant, Mr JD Mackenzie, heavily relied on the dictum in MFV El Shaddai[2] and the cases referred to therein (to which I will return) in support of the proposition that the underlying nature of the claim *in casu*, falls to be classified as a commercial loan as the essential character of the loan agreement is not maritime in nature. According to the argument

[2] **2015 (3) SA 55 (KZD)**

advanced, the purpose of the loan was to finance Meltt, to provide working capital and to pay for improvements to the Defendant. It was further contended, the fact that the loan was to be repaid out of the proceeds of the ferry operations is of no assistance to the Plaintiff to have his claim determined in admiralty as it does not properly fall within the purview of admiralty proceedings. It was also argued that if the Plaintiff wanted to ensure an enforceable claim *in rem* then the Plaintiff ought to have ensured that a mortgage was registered over the Defendant as such security for the claim would have created the requisite right to proceed *in rem.* Counsel further argued the boundaries of the admiralty jurisdiction would be stretched too far and well recognised principles will be diluted and the rationale for separate admiralty jurisdiction would be undermined, if the Plaintiff's claim is seen as a maritime claim.

[13] The principal contentions advanced by Counsel for the Plaintiff, Mr PA van Eeden, SC, were the following, that:- the POC read together with the annexures thereto have demonstrated the Plaintiff's claim has a direct link to the ship (Madiba 1) as defined in terms of sub-sections 1(1)(c) and (1)(1)(q) of the AJRA; Para 5 of the POC read with paras 2, 3 and 4 sufficiently establish that the capital loan amount was advanced to pay for the design, construction, repair and equipment of the Defendant as contemplated in sub-s (1)(1)(q); the relationship between the claim and the proceeds of the Defendant's employment as a ferry has been established by the allegation that the vessel was to be put into service for the transportation of passengers

to and from Robben Island and thus the claim falls under sub-s 1(1)(c) of the AJRA. Furthermore, it was contended that the reliance by the Defendant on the dictum in MVF El Shaddai[3] is misguided as the alleged maritime claim in that matter differ significantly from the claim advanced *in casu.* Furthermore, it was argued that a loan agreement can be regarded as a maritime claim provided that the necessary link had been established. For the latter proposition, reliance was placed on the dictum in MV Guzin S (No 1) 2002 (6) SA 105 NPD.

The Law

[14] Admiralty Rule 9(5)(b)(i) provides that:

> *"(i) Where any pleading lacks averments which are necessary to sustain an action or defence, the opposing party may within 10 (ten) days of the receipt of the pleadings deliver and Exception thereto and may cause it to be set down for hearing".*

[15] The sub-sections relied upon by the Plaintiff to aver that his claim constitutes a maritime claim, namely sub-ss 1(1)(c) and (q) of the ARJA, provide as follows: -

> …….
> *'maritime claim' means any claim for, arising out of or relating to –*
> *(a)….;*
> *(b)….;*

[3] **Supra ft 2**

(c) any agreement for the sale of a ship or a share in a ship, or any agreement with regard to the ownership, possession, delivery, employment or earnings of a ship;

(d) ….. (p);

(q) the design, construction, repair or equipment of any ship.

[16] The manner in which the Legislature has circumscribed the jurisdiction of the High Court in the exercise of its admiralty jurisdiction is to confine such jurisdiction which are exhaustively defined in s1(1) of the AJRA. Most of the expressions used in the definition have of course, been the subject of interpretation by courts in various contexts. I have been referred by counsel to a number of decisions in this regard. What does emerge clearly from all the authorities, however, is that the meaning to be assigned to the expression in any particular case must be determined from the context in which it appears.

[17] The question which must ultimately be considered is whether the claim is such that its relationship with 'marine or maritime' matters is sufficiently close, that it is necessary to be heard as a maritime claim in this court. 'That requires that there must be a meaningful maritime connection between the maritime claim, the ship and the owner of the ship to impart to the claim a maritime character which would render it appropriate to adjudicate the claim in accordance with maritime law'.[4] Each case must be decided upon its own facts. An important consideration is thus whether, given the subject matter of the claim, it is indeed a maritime claim as envisaged in the AJRA[5].

[18] In interpreting a statutory provision, the approach adopted in Natal Joint Municipal Pension Fund v Endumeni Municipality[6] is equally applicable in this instance.

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[4] See Peros v Rose 1990 (1) SA 420 (N) at 426E; Minesa Energy (Pty) Ltd v Stinnes International AG 1988 (3) SA 903 (D) at 906 G; MVF El Shadddai, supra at 58 B.

[5] In this regard see G Hofmeyr, Admiralty Jurisdiction Law and Practice in South Africa 2nd Edition at 21.

[6] 2012 (4) SA 593 SCA, [17]- [25].

Discussion:

[19] As a result of the view I have taken in this matter, it is unnecessary to discuss all the cases alluded to by Counsel. In the MFV El Shaddai case, the common cause facts can be summarised as follows: Aston Seafood SA (Aston), a company incorporated in accordance with the laws of the Republic of Uruguay, but having its principal place of business in Chile, loaned and advanced certain moneys to, *inter alia*, the owner of the ship Braxton Security Services CC (Braxton); the purpose of the loan was to conduct a commercial enterprise in the waters surrounding the Republic of South Africa; an acknowledgment of debt was signed on behalf of Braxton, acknowledging the payment to it in the sum of $ 2 270 678; that acknowledgement of debt had set out how the amount loaned was to be repaid by Braxton, by way of instalments calculated by reference to the income received by Braxton from the proceeds of the sale of fish sold pursuant to the fishing enterprise; the acknowledgement of debt was the document upon which the applicants' claims in the Montevideo court was based.

[20] The applicants in seeking to arrest the ship, relied on a maritime claim as defined, *inter alia*, in sub-s (1)(1)(aa) and also (1)(1)(ee) of the AJRA. The first provision was a claim in respect of any judgment or arbitration award relating to a maritime claim. The latter is the section that relates any matter which by virtue of its nature or subject matter is a marine or maritime matter, the so-called catch all section.

[21] The Court, in assessing the underlying cause of action (the acknowledgment of debt) had to determine whether the claim achieved the purpose of establishing a link between the maritime claim, the ship and the owner of the ship. The Court, concluded that the fact that the funds were provided pursuant to a contract of loan may have been used for a fishing venture in South Africa, does not in itself characterise the contractual

relationship between parties as maritime claim, albeit that it is one having a maritime flavour'[7].

[22] The Court further concluded that the nature of the agreement between the parties was a loan and its purpose was to finance a company and that the nature and purpose were not altered by the fact that the company was to repay the loan out of the proceeds of its fishing operations.

[23] The facts in the MFV El Shaddai, are certainly not on all fours with the matter *in casu* as contended by the Defendant and is distinguishable. In the present instance the Plaintiff's claim is clear. He loaned money to Meltt to fund the design, construction and equipping of the Defendant, and to provide working capital, to enable the deployment of Defendant as a ferry. The loan was to be repaid out of the proceeds of the ferry operations. Iscorp, the owner of the Defendant, guaranteed the obligations of Meltt. In Clause 4.1.4.1 of the Loan Agreement, Iscorp further agreed and acknowledged that improvements were being made to the Defendant and incorporated an architectural drawing of the Defendant in a completed state.

[24] In assessing the underlying cause of the action, in the present instance, the Loan Agreement has clearly achieved the purpose of establishing a link between the ship, the owner of the ship and the maritime claims, namely the design, construction, repair or equipment of the ship and the earnings of the ship.

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[7] See MVF El Shadddai, supra at paras 24-25.

[25] In MV Guzins (No 1), a vessel registered in the Turkish Registry, had been sold by an order of Court and the proceeds, some US $ 2 780 000, had been held as a fund in terms of s9 of the AJRA. One of the claims filed against the fund by the Applicant was for US $ 2 327 135, 97, being the balance owing to it on a loan secured by a first degree first rank Turkish mortgage registered over the vessel. The referee appointed to receive and report on the claims filed against the fund had recommended that the claim be paid in full and that it ranked under s 11(4)(d) read with s 11(5). The two intervening respondents opposed the Applicant's application for the confirmation of the referee's report and recommendations. Their attack focused on both the validity of the Applicant's claim and ranking. It was argued firstly that, if the Applicant's claim was based on a loan agreement, it did not fall within para (d) of the definition of 'maritime claim' in s 1(1) of the AJRA; secondly that, since the Applicant's claim was based on a loan and not a mortgage, it could not be ranked under s 11(4)(d) but should instead be ranked as 'any other maritime claim' under s 11(4)(f); and thirdly, that the Applicant could not rely on one cause of action (the loan agreement) for the submission and proof of its claim before the referee and upon another cause (the mortgage) for the ranking. Paragraph (d) of the definition of 'maritime claim' provides for 'any claim for, arising out of or relating to…..any mortgage, hypothecation, right of retention, pledge or other charge on or of a ship'. Section 11(4)(d) provides for 'a claim in respect of any mortgage'.

[26] The Court, in considering the nature of the Applicant's claim held at *(119G-H and 120B-C)* that it was clear from the terms of the loan agreement (which provided for the execution of a mortgage over the vessel as security) and from the terms of the Applicant's summons which has led to the arrest and subsequent sale of the vessel that the Applicant's claim against the fund had clearly been one of payment of an amount due under a loan agreement, which had been secured by a first degree first rank mortgage over the vessel.

[27] The Court further held at *(123 E)* that when s 11(4)(d) referred to a 'claim in respect of any mortgage', it must of necessity be intended to refer to a claim based on the principal obligation secured by the mortgage. Accordingly it was held that the referee's recommendations, the payment and ranking of the Applicant's claim had been correct.

[28] I am acutely aware that in general there is no justification for the extension of admiralty jurisdiction to matters having no meaningful maritime connection but in my view, the dictum in MV Guzins (No 1) on a proper reading does not support the Defendant's argument that the Plaintiff's Loan Agreement could only be regarded as a maritime claim if a mortgage was registered over the Defendant as, according to the argument, it is the mortgage which creates the requisite right to proceed *in rem* to enforce the loan secured thereby.

[29] The ultimate question in matters of this nature in my view remains whether, '*the claim is such that its relationship with 'marine or maritime' matters is sufficiently close that it is necessary to be heard as a maritime claim in this court. 'That requires that there must be a meaningful maritime connection between the maritime claim, the ship and the owner of the ship to impart to the claim a maritime character which would render it appropriate to adjudicate the claim in accordance with maritime law'*.[8] A loan may therefore clearly be regarded as a maritime claim provided that the necessary link is established. To view it differently, would essentially mean that a matter with meaningful maritime connection would be dealt with within the usual jurisdiction of the High Court. This in my view would undermine the 'special rules and procedures relating to the exercise of admiralty jurisdiction which are justified by, and intended to accommodate, the particular needs associated with maritime matters."[9]

[30] The contention therefore that the Plaintiff's Loan Agreement could only be regarded as a maritime claim if a mortgage was registered over the Defendant, is in my view unsound and not supported by case law.

[31] The Judgment in Peros v Rose[10] is of no assistance to the Defendant's primary argument in the present instance. That case was considered before the extension of the definition of a maritime claim and at that stage the

[8] See ft 4.
[9] See ft 5.
[10] supra

expression indicating the required relationship between the claim and subject of the claim varied from paragraph to paragraph.

[32] As a result of the abovementioned reasons, it follows that the exception raised by the Defendant cannot succeed. In view of what has been said, it is therefore unnecessary to deal with the Plaintiff's application for leave to amend its POC with paragraph 13A. I am also not convinced that a costs order is warranted in respect thereof against the Defendant.

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

The Defendant's exception is dismissed with costs.

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LE GRANGE, J