THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 242/2006

NAME OF SHIP: *OLYMPIC COUNTESS*

In the matter between:

FORTIS BANK (NEDERLAND) N V **APPELLANT**

and

ORIENT DENIZCILIK TURIZM SANAYI VE TICARET A S **RESPONDENT**

Coram: **SCOTT, FARLAM, HEHER, COMBRINCK JJA *et* HURT AJA**

Date of hearing: **23 August 2007**

Date of delivery: **21 September 2007**

Summary: Ranking of claims in terms of s 11 of Act 105 of 1983 – s 11(4)(c)(v) does not include the claim of the person who pays the person who renders services to the ship

Citation: This judgment may be referred to as *The Olympic Countess* [2007] SCA 115 RSA

SCOTT JA/….

SCOTT JA:

[1] On 8 January 2004 the passenger liner, *Olympic Countess*, was arrested at the instance of numerous creditors in the port of Durban. She was subsequently sold in pursuance of an order in terms of s 9(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act'). A fund was constituted with the proceeds and a referee appointed to investigate claims. Both the appellant, to which I shall refer as 'the Bank' and the respondent, to which I shall refer as 'Orient', submitted claims. The Bank's claim was in respect of a mortgage over the vessel and consequently ranked as a claim in terms of s 11(4)(d) of the Act. Orient contended that its claim ranked as a claim in terms of s 11(4)(c)(v). If its contention were to be upheld its claim would enjoy priority over the Bank's claim. But for Orient's claim and a costs order in favour of another creditor for which provision had been made, the Bank would be entitled to the entire proceeds of the fund. It is not disputed that the Bank's claim is valid and that it is a claim ranking in terms of s 11(4)(d). The Bank, however, disputed the ranking claimed by Orient; it also disputed that Orient's claim was a 'maritime claim' within the meaning of s1(1) of the Act.

[2] Orient applied to the High Court, Durban, for an order for the payment of its claim out of the fund on the basis of its claimed ranking. The first respondent was the fund. The Bank intervened as second respondent and opposed the relief claimed. It not only disputed many of the material allegations made by Orient in its founding papers but contended that in any event and even on Orient's own version the latter was in law not entitled to payment. It contended that on Orient's own version, one part of the claim was not a 'maritime claim' and the other part, at best for Orient, ranked as a claim in terms of s 11(4)(f) of the Act and hence below that of the mortgagee's claim. The parties accordingly agreed that the court would be asked to decide first the two legal issues based on Orient's version of the facts and only in the event of their being decided in favour of Orient would the matter be referred for the hearing of oral evidence. The matter came before Balton J who

acceded to the request to separate the issues and decided both legal issues in favour of Orient. The learned judge granted leave to appeal on one, ie the issue whether one part of the claim was a maritime claim, but not on the other. However, leave to appeal on the latter issue was subsequently granted by this court.

[3] As the decision on appeal hinged exclusively on specific issues of law, the parties prepared a truncated record of the proceedings in the court below as well as an agreed statement in terms of SCA Rule 8(8)(a) reflecting the facts alleged by Orient and the issues arising therefrom. The facts so agreed are shortly as follows. On 20 March 2003 Orient and Royal Olympic Cruise Lines Limited ('ROC'), the owner and operator of the *Olympic Countess*, entered into a written agreement in terms of which Orient was appointed as port agent for the former's vessels at the port of Istanbul for a minimum period of 5 years. In terms of clause 3.2 of the agreement, Orient undertook to pay the sum of US$517 000 on behalf of ROC 'in partial settlement of debts previously incurred' in respect of various vessels including the *Olympic Countess*. In pursuance of this undertaking Orient made the following payments:

'(i) US$21,558.43 to Kiyi Emniyet for light services furnished by Kiyi Emniyet to the Olympic Countess between August and October 2001;

(ii) US$501,500.24 to Turkiye Den Isletmeleri (TDI) for port services rendered by TDI to the Olympic Countess in 2001;

(iii) US$17,109.87 to TC Saglik Bak for sanitary services rendered to the Olympic Countess by TC Saglik Bak in the period June to September 2001;

(iv) US$10,060.17 to International Turizim Servis (ITS) for sanitary services provided to the Olympic Countess by TC Saglik Bak in the period June to September 2001 and paid for by ITS as the then agent of the vessel;

TOTAL US$550,228.71'

ROC failed to pay certain instalments due to Orient in terms of the agreement or to maintain the agreement for a period of 5 years as it was obliged to do. As a result, so Orient alleged, an amount in excess of the sums advanced aforesaid became repayable to it by ROC. Orient caused the vessel to be

arrested and lodged a claim with the referee. The claim was confined to the amounts paid by it as set out above.

[4] It is necessary to quote the first eight subsections of s 11 of the Act.

'11. **Ranking of claims. –** (1) (*a*) If property mentioned in section 3 (5) (*a*) to (*e*) is sold in execution or constitutes a fund contemplated in section 3 (11), the relevant maritime claims mentioned in subsection (2) shall be paid in the order prescribed by subsections (5) and (11).

(b) Property other than property mentioned in paragraph (*a*) may, in respect of a maritime claim, be sold in execution, and the proceeds thereof distributed, in the ordinary manner.

(2) The claims contemplated in subsection (1) (*a*) are claims mentioned in subsection (4) and confirmed by a judgment of a court in the Republic or proved in the ordinary manner.

(3) Any reference in this section to a ship shall, where appropriate, include a reference to any other property mentioned in section 3 (5) (*a*) to (*e*).

(4) The claims mentioned in subsection (2) are the following, namely –

(*a*) a claim in respect of costs and expenses incurred to preserve the property in question or to procure its sale and in respect of the distribution of the proceeds of the sale;

(*b*) a claim to a preference based on possession of the property in question, whether by way of a right of retention or otherwise;

(*c*) a claim which arose not earlier than one year before the commencement of proceedings to enforce it or before the submission of proof thereof and which is a claim –

(i) contemplated in paragraph (*s*) of the definition of "maritime claim";

(ii) in respect of port, canal, other waterways or pilotage dues, and any charge, levy or penalty imposed under the South African Maritime Safety Authority Act, 1998, or the South African Maritime Safety Authority Levies Act, 1998;

(iii) in respect of loss of life or personal injury, whether occurring on land or on water, directly resulting from employment of the ship;

(iv) in respect of loss of or damage to property, whether occurring on land or on water resulting from delict, and not giving rise to a cause of action based on contract, and directly resulting from the operation of the ship;

(v) in respect of the repair of the ship, or the supply of goods or the rendering of services to or in relation to a ship for the employment, maintenance, protection or preservation thereof;

(vi) in respect of the salvage of the ship, removal of any wreck of a ship, and any contribution in respect of a general average act or sacrifice in connection with the ship;

(vii) in respect of premiums owing under any policy of marine insurance with regard to a ship or the liability of any person arising from the operation thereof; or

(viii) by any body of persons for contributions with regard to the protection and indemnity of its members against any liability mentioned in subparagraph (vii);

(*d*) a claim in respect of any mortgage, hypothecation or right of retention of, and any other charge on, the ship, effected or valid in accordance with the law of the flag of a ship, and in respect of any lien to which any person mentioned in paragraph (*o*) of the definition of "maritime claim" is entitled;

(*e*) a claim in respect of any maritime lien on the ship not mentioned in any of the preceding paragraphs;

(*f*) any other maritime claim.

(5) The claims mentioned in paragraphs (*b*) to (*f*) of subsection (4) shall rank after any claim referred to in paragraph (*a*) of that subsection, and in accordance with the following rules, namely ─

(*a*) a claim referred to in the said paragraph (*b*) shall, subject to paragraph (*b*) of this subsection, rank before any claim arising after it;

(*b*) a claim of the nature contemplated in paragraph (*c*) (vi) of that subsection, whether or not arising within the period of one year mentioned in the said paragraph, shall rank before any other claim;

(*c*) otherwise any claim mentioned in any of the subparagraphs of the said paragraph (*c*) shall rank *pari passu* with any other claim mentioned in the same subparagraph, irrespective of when such claims arose;

(*d*) claims mentioned in paragraph (*d*) of subsection (4) shall, among themselves, rank according to the law of the flag of the ship;

(*e*) claims mentioned in paragraph (*e*) of subsection (4) shall, among themselves, rank in their priority according to law;

(*f*) claims mentioned in paragraph (*f*) of subsection (4) shall rank in their order of preference according to the law of insolvency;

(*g*) save as otherwise provided in this subsection, claims shall rank in the order in which they are set forth in the said subsection (4).

(6) For the purposes of subsection (5), a claim in connection with salvage or the removal of wreck shall be deemed to have arisen when the salvage operation or the removal of the wreck, as the case may be, terminated, and a claim in connection with contribution in respect of general average, when the general average act occurred.

(7) A court may, in the exercise of its admiralty jurisdiction, on the application of any interested person, make an order declaring how any claim against a fund shall rank.

(8) Any person who has, at any time, paid any claim or any part thereof which, if not paid, would have ranked under this section, shall be entitled to all the rights, privileges and preferences to which the person paid would have been entitled if the claim had not been paid.'

[5] It will be observed that the claims participating in a fund are listed in s 11(4). The order of their ranking is given in s 11(5). The claims listed in s 11(4)(c), save for the claim referred to in s 11(4)(c)(vi) (salvage) which is given preference, rank *pari passu*. Significantly, they rank ahead of the claim of the mortgagee, which is dealt with in s 11(4)(d). But if a claim referred to in s 11(4)(c)(i)-(v) or s 11(4)(c)(vii) and (viii) is 'a claim which arose' earlier than one year before the commencement of proceedings to enforce it or before the submission of its proof, it falls to be ranked under s 11(4)(f). The words 'a claim which arose' have been held to mean 'a claim which came into existence' and not 'a claim which became enforceable'. (See the MV *Forum Victory* 2001 (3) SA 529 (SCA).)

[6] In the case of the first three of Orient's four claims listed in para 3 above, the entities paid by Orient were the entities that actually rendered the services to the vessel. It was common cause that those entities enjoyed maritime claims within the meaning of s1(1)(m) of the Act; that is to say, they were claims 'for, arising out of or relating to . . . the supplying of goods or the rendering of services for the employment, maintenance, protection or preservation of a ship'. In the case of the fourth claim, the entity paid by Orient was the entity that had paid the entity that had rendered the services. The Bank contended in the court *a quo* that even on Orient's own version its fourth claim was not a 'maritime claim' under any of the paragraphs in s 1(1). Whether it was or not was the first of the two legal issues the court was asked to decide. In this court, however, Orient conceded that the claim would in any

event rank after that of the mortgagee. For reasons that will become apparent when dealing with the other claims the concession was well made and it is unnecessary to say anything more about this claim.

[7] Counsel for the Bank, relying on *dicta* in *Weissglass NO v Savonnerie Establishment* 1992 (3) 928 (AD) at 941 D-F, submitted that notwithstanding the wide meaning of the words 'any claim for, arising out of or relating to' which preceded paragraph (m) in s 1(1), Orient's remaining three claims were not claims within the meaning of that paragraph. In view, however, of the conclusion to which I have come regarding the construction of s 11(4)(c)(v), it is unnecessary to decide the point and I shall assume, without deciding, that Orient's claims are, indeed, maritime claims within the meaning of s 1(1)(m). I shall also assume in Orient's favour that ROC's indebtedness to Orient arose directly as a result of Orient's payments to the entities rendering the services to the *Olympic Countess.*

[8] Counsel for Orient submitted that, having regard to the wide meaning of the phrase 'in respect of' in s 11(4)(c)(v), the section was to be construed as including not only the claims of the person who actually renders the services, but also the claims of the person who pays the person rendering the services. The latter claims, so it was argued, come into existence only when the person who renders the services is paid and as Orient in the present case paid the entities who rendered the services less than one year prior to submitting proof of the claims to the referee, the claims fell within the ambit of s 11(4)(c)(v) and ranked ahead of the mortgagee's claim.

[9] Counsel for the appellant drew attention to the distinction between the phrase 'in respect of' in s 11(4)(c)(v) and the phrase 'for, arising out of or relating to' in the definition of 'maritime claim' and submitted that the former conveyed a different and narrower meaning than the latter and that this was indicative of a change of intention on the part of the legislature. In *Mak Mediterranee SARL v The Fund Constituting the Proceeds of the Judicial Sale of the MC Thunder (S D Arch, Interested Party)* 1994 (3) SA 599 (C) at 609G-J it was said that given the indefinite meaning of expressions such as

'in respect of' and 'for, arising out of or relating to' overmuch weight ought not to be attached to this change of language and that more important when construing s 11(4)(c)(v) was the need to consider the provision in its context in the section and in particular in the light of s 11(8). However, as counsel emphasized, the definition of 'maritime claim' is 'a gateway provision' into admiralty jurisdiction and its object is to set the outer limits of that jurisdiction. The claims listed are accordingly couched in wide terms and many clearly overlap. By contrast, the ranking provisions seek to distinguish between different claims in order to establish their order of preference. Section 11 must therefore as far as possible be construed so as to avoid any overlapping between the different categories of claims listed.

[10] Section 11(8) makes it clear that the person who pays any claim of another which would have ranked under s 11 is entitled to all 'the rights, privileges and preferences' to which the person paid would have been entitled if the claim had not been paid. In other words, it is clear that the expression 'any claim' in s 11(8) must be understood as referring to the claim of the person who would in the first instance be the claimant under one of the categories listed under s 11(4). The claims of the entities who actually rendered the services in the present case would undoubtedly fall within the scope of s 11(4)(c)(v). But those claims arose earlier than 'one year before the commencement of proceedings to enforce [them] or before the submission of proof thereof'. They would accordingly not have ranked under s 11(4)(c)(v) but under s 11(4)(f). It is implicit in s 11(8) that the person who pays the claim of another cannot acquire a better right, privilege or preference than the person paid. Section 11(8) makes it clear therefore that the claim referred to in s 11(4)(c)(v) was not intended to extend to the claim of the person who pays the actual repairer, supplier or the person rendering the services. If the position were otherwise, the one-year limitation in s 11(4) could be defeated by the simple expedient of the claimant 'selling' the claim to another and thereby conferring on the claim an elevated ranking. Such a construction would be wholly inconsistent with s 11(8) and could never have been the intention of the legislature.

[11] It follows that in my view Orient is a 'person' who paid the claim of another within the meaning of s 11(8). Its claims accordingly ranked no higher than the claims of the entities it paid. Those claims fall to be ranked under s 11(4)(f) and Orient's claims must likewise be so ranked.

[12] The appeal is upheld with costs. The order of the court *a quo* is set aside and the following substituted in its stead:

> 'The application is dismissed and the applicant is to pay the intervening respondent's costs.'

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D G SCOTT

JUDGE OF APPEAL

CONCUR:

FARLAM JA
HEHER JA
COMBRINCK JA
HURT AJA