IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No 139/99
REPORTABLE

In the matter of

THE mv "FORUM VICTORY"
AND THE FUND CONSTITUTING THE PROCEEDS OF
THE SALE OF THE mv "FORUM VICTORY"

between:

DEN NORSKE BANK ASA	***Appellant***

and

HANS K MADSEN C V	***1st Respondent***
E L M H LIMITED	***2nd Respondent***
I SEBAGLOU - S KAKARINOS O E	***3rd Respondent***
GRIFFIN MARINE SA	***4 t h Respondent***

CORAM	***:***	***VIVIER, HARMS, SCOTT, STREICHER et CAMERON JJA***
HEARD	***:***	***8 MARCH 2001***
DELIVERED	***:***	***23 MARCH 2001***

Interpretation of s 11 (4) (c) of Act 105 of 1983 - when does a claim arise within the meaning of the section

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J U D G M E N T

***SCOTT* JA:**

[1] Section 11 (4) (c) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Act") refers to "a claim which arose not earlier than one year before the commencement of proceedings to enforce it or before the submission of proof thereof .." The question in issue in this appeal is whether, for the purposes of the section, a claim is to be regarded as *arising* when it comes into existence or when it becomes due and payable. The appellant says the former; the respondents say the latter.

[2] The facts may be stated shortly. The mv *Forum Victory* was arrested in Durban harbour at the instance of a creditor, Hans K Madsen C V. Further arrests followed and the vessel and her bunkers were sold on 26 February 1997 in pursuance of an order in terms of s 9 of the Act. A fund was constituted with the

proceeds and a referee appointed to investigate claims which were required to be submitted by no later than 4 April 1997. The referee lodged a report containing his recommendations as to the ranking of claims in terms of s 11 of the Act. On 18 September 1997 a *rule nisi* was issued calling on interested parties to show cause why the referee's recommendations, subject to certain modifications, should not be confirmed. Den Norske Bank ASA (the ship's mortgagees and the present appellant) objected on various grounds. For the purpose of this appeal the only relevant one is that the claims of various creditors, including those of the respondents whose claims would otherwise fall within the ambit of s 11 (4) (c) (v) quoted below, arose more than one year before the commencement of proceedings to enforce them or before submission of proof to the referee.

[3] Accordingly, so it was contended, these claims were not claims within the meaning of that section and had to be ranked at the back of the queue and after

the claim of the appellant. The size of the appellant's claim, however, is such that it will swallow up the fund and leave nothing for the claims ranking after it. On the extended return day of the *rule nisi* the issue of ranking was ordered to be argued and decided separately from the remaining issues. On the appointed day the presiding judge was informed that there were conflicting decisions of the Natal Provincial Division on the point and he accordingly referred the matter for argument before the Full Court. That Court found in favour of the respondents, hence the present appeal which is with the leave of the Court *a quo*.

[4] In order to better appreciate the contextual setting of s 11 (4) (c) it is convenient to quote the first seven subsections of s 11.

> "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;

(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."

[5] It will be observed that the claims participating in a fund (as provided for in s 3 (11)) are listed in s 11 (4). The order of their ranking is given in s 11 (5). (The provisions dealing with the ranking of "associated ship" claims are contained in s 11 (11) but are not relevant to the question in issue.) The claims listed in s 11

(4) (c) include claims giving rise to maritime liens and, 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 a mortgagee which is dealt with in s 11 (4) (d). If, however, a claim referred to in s 11 (4) (c) (i) to (viii) (with the exception of the claim referred to in (vi)) 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).

[6] The claims of the respondents (and other creditors who have an interest in the outcome of this appeal) are claims of the kind referred to in s 11 (4) (c) (v). If they "arose" when they became due and payable they would have arisen "not earlier than one year before the commencement of proceedings ... or before the submission of proof" and would constitute claims within the meaning of s 11 (4) (c). If, on the other hand, they "arose" when the work was done, the goods

were supplied or the services rendered, as the case may be, they would not have arisen within the period referred to and would not constitute claims within the meaning of that section but would rank under s 11 (4) (f).

[7] The first respondent, Hans K Madsen C V, has settled its claim with the appellant, as has the third respondent. Nonetheless, the issue remains alive in relation to the claims of the second and fourth respondents as well as in relation to the claims of various other creditors of the fund.

[8] Section 11 of the Act was substituted by s 9 of Act 87 of 1992. Under the repealed section the provision corresponding to the present s 11 (4) (c) was s 11 (1) (c), which read:

> "claims which arose within one year before the commencement of the proceedings, in respect of -"

Of particular significance as far as the present case is concerned was the introduction into the new s 11 (4) (c) of the words "or before the submission of

proof thereof". This is a reference to the submission of claims for proof to a referee in terms of s 10 A of the Act which was inserted by s 8 of the same amending Act, 87 of 1992. Section 10 A gave recognition to the practice of appointing a referee to make recommendations regarding the distribution of a fund and provided *inter alia* for the proof of claims to a referee. Subsections (1) and (2) (a) read:

> " (1) The court may make an order with regard to the distribution of a fund or payment out of any portion of a fund or proof of claims against a fund, including the referring of any of or all such claims to a referee in terms of section 5 (2) (e).
>
> (2)(a) If an order is made referring all such claims to a referee or if the court so orders, all proceedings in respect of claims which are capable of proof for participation in the distribution of the fund shall be stayed and any such claim shall be proved only in accordance with such order."

Subsection 10A (4) (a) is of particular importance. It provides:

> "A claim which is subject to a suspensive or resolutive condition or otherwise not yet enforceable or is voidable may be proved, where appropriate, on the basis of an estimate or valuation, but no distribution shall be made in respect thereof until it has become enforceable or no longer

voidable."

The subsection featured largely in the arguments of counsel in this Court and I shall return to it later.

[9] In arriving at the conclusion it did, the Court *a quo* elected to follow the decision of Wilson J in *Banque Paribas v The Fund Comprising Proceeds of Sale of the MV Emerald Transporter* 1985 (2) 452 (D) in preference to that of McLaren J to the contrary in *MV Golden North Governor and the Company of the Bank of Scotland v Fund Constituting the Proceeds of the Judicial Sale of the MV Golden North (Maritime Technical Co Ltd Intervening*) 1999 (1) SA 144 (D). In the former case Wilson J was concerned with the expression "claims which arose" in s 11 prior to its substitution. He held that the claims referred to were claims which were due and enforceable and not those which had merely come into existence. The sole basis for arriving at this conclusion was the dictionary meaning

of “claim”, being a demand for something “due” (at 463 A - E). This reasoning was criticised by McLaren J in the *Golden North* who pointed out that the real question was what was meant by the expression “claims which arose” and not the word “claim” without qualification (at 149 A - B). It was necessary, he said, that -

> “...one must have regard to the context in which the word is used and to the nature, scope and apparent purpose of the legislation in which it appears in order to determine its meaning.” (At 149 I - J)

This is undoubtedly so. I am accordingly unable to agree with the view of Hurt J (with whom Howard JP and Combrinck J concurred) in the Court *a quo* that there was much to be said for Wilson J’s “uncomplicated interpretation of section 11 (1) (c)”. The *Emerald Transporter* was in any event decided prior to the insertion of s 10 A into the Act which, as I shall attempt to show, provides a strong indication of what the legislature intended.

[10] Hurt J in the Court below furthermore found support for the

construction he placed on s 11 (4) (c) in the provisions of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926, and the subsequent Convention with the same title of 1967. (The material provisions of both are conveniently reproduced in Thomas *Maritime Liens* para 603 *et seq*.) Article 8 of the latter Convention admittedly contains the expression "when the claims ... arose" but I must confess to being unable to find anything of assistance in either Convention. In this Court counsel on neither side sought to rely on the Conventions.

[11] In the *Golden North* McLaren J referred to the use of the expression "when the maritime claims arose" in s 3 (7) of the Act and by way of hypothetical examples sought to demonstrate the anomalies that could arise were that expression to be construed as referring to a claim which was due and payable. Having found that the purpose of the legislature would be better achieved` if that expression were

interpreted to mean "when the claim came into existence" (at 152A), the learned judge found that this lent support to the construction he placed on s 11 (4) (c) having regard, no doubt, to the presumption that similar words in a statute, unless the context indicates otherwise, are to be given a similar meaning. The Court *a quo* rejected this line of reasoning and counsel for the appellant disavowed any reliance upon it. I think counsel was correct to do so. The expression "when the maritime claim arose" in s 3 (7) is perhaps no less ambiguous than the expression "claim which arose" in s 11 (4) (c). In these circumstances there would seem little to be gained by attempting to interpret the one, in its different contextual setting, in order to serve as an aid in the interpretation of the other.

[12] Against this background it is necessary to examine sections 11 (4) (c) and 10 A (4) (a) in greater detail. Claims falling within the ambit of s 11 (4) (c) clearly include those which are due and payable, and hence enforceable . This much

is clear from the words "before the commencement of proceedings to enforce it". But, as previously indicated, the reference to "the submission of proof" of a claim in s 11 (4) (c) relates to the submission of claims to a referee as contemplated in s 10 A. In other words, there can be no doubt that a claim submitted to a referee may be one which falls within the ambit of s 11 (4) (c). It is apparent from s 10 A (4) (a), however, that a claim submitted to a referee need not yet be enforceable. In the absence of some clear indication to the contrary, it would follow, I think, that a claim referred to in s 11 (4) (c) similarly need not be enforceable. (A claim which had come into existence but which was not yet enforceable would, of course, even on the respondents' construction, not have arisen earlier than the year referred to.) However, once it is accepted that a claim which is not yet enforceable can be one within the meaning of s 11 (4) (c), it seems to me that the construction most likely to have been intended was that the expression "a claim which arose" is to be

understood as a reference to a claim which came into existence rather than to a claim which became enforceable. In other words, regardless of whether the claim was enforceable or not, the period of one year was intended to commence when the claim first came into existence.

[13] Counsel for the respondents submitted, however, that there is indeed an indication to the contrary; he contended that if "a claim which arose" is so construed, s 10 A (4) (a) would be rendered redundant as it would be apparent from s 11 (4) (c) alone that a claim submitted to a referee need not be due and payable. I do not think this is correct. Section 10 A (4) (a) goes further than simply stating that a claim which is not enforceable may be proved. Apart from dealing, in addition, with conditional and voidable claims, it sets out how such claims are to be dealt with.

[14] It follows that, in my view, a reading of s 11 (4) (c) together with s 10

A (4) (a) strongly suggests that the expression “a claim which arose” in s 11 (4) (c) is to be understood as referring to a claim which came into existence, and not to a claim which became enforceable. Such a construction is moreover supported by the recognition in our law of a distinction between a claim coming into existence or, as it is frequently said, a claim arising, on the one hand and a claim which is due and payable on the other. The distinction was explained by Miller J in *Apalamah v Santam Insurance Co Ltd and Another* 1975 (2) SA 229 (N) at 232 E - G as follows:

> “Although it is true that in many cases the date upon which a debt ‘becomes due’ might also be the date upon which it ‘arose’, that is obviously not true of all cases. There is a vital difference in concept between the coming into existence of a debt and the recoverability thereof. There can be little doubt, if any, that the purpose of the Legislature in enacting sec 12 (1) of the new Prescription Act was to crystallize that difference; thenceforth prescription in terms of that Act began to run not necessarily when the debt arose but only when it became due.”

(See also *List v Jungers* 1979 (3) SA 106 (A) at 121 C - E; *The Master v I L Back*

and Co Ltd and Others 1983 (1) SA 986 (A) at 1004 D - G.) The distinction is hardly one which would have been unknown to the legislature. If the construction which the respondents would place on s 11 (4) (c) is indeed the one intended, it is difficult to imagine why the legislature would not have used words such as "which became due" rather than "which arose", particularly having regard to the provisions of s 10 A (4) (a).

[15] Counsel for the respondents pointed to certain anomalies that could arise if the section were to be construed in the manner I have indicated it should. In particular, he referred to the circumstances of the fourth respondent which had been precluded from commencing proceedings because its claim had not become due on account of a delay caused by the death of a surveyor before making his final adjustment in respect of work done to the ship. In any system of ranking with cut-off dates and arbitrary rules it is perhaps inevitable that situations will arise which

appear anomalous. Indeed, the order of ranking is in itself somewhat arbitrary. A creditor whose claim falls within the ambit of s 11 (4) (c) (v), which has its origin in the old claim for necessaries, now ranks *pari passu* with most of the creditors having maritime liens and ahead of the mortgagee. It might well be asked why this should be so. The mortgagee would probably say it is unfair. Under the common law the claim of the necessaries man enjoyed a low priority. It ranked below that of mortgagees, save for subsequent mortgagees, and generally approximated that of the claim referred to in s 11 (4) (f) of the Act. (See *Mak Mediterranee Sarl v The Fund Constituting the Proceeds of the Judicial Sale of the M C Thunder (S D Arch, Interested Party)* 1994 (3) SA 599 (C) at 608 E.) In these circumstances there is little to be gained by attempting to construe s 11 in the light of possible hard cases and what might seem fair or unfair from the point of view of a particular creditor or class of creditors.

[16] Finally, counsel for the respondents referred to the deeming provision in s 11 (6) and submitted that it served to support the meaning which he said had to be given to s 11 (4) (c). In short, the contention was that in terms of the section certain claims were "deemed to have arisen" in circumstances in which they ordinarily would have come into existence in any event. Therefore, so the argument went, they must have "arisen" at some other stage, namely when they became enforceable. I cannot agree with the inference counsel seeks to draw. The object of the provision seems to me to be no more than to remove any doubt that may arise as to when a claim in respect of salvage or for a contribution in respect of general average comes into existence. In the absence of s 11 (6) there could well be uncertainty.

[17] It follows that in my judgment the words "a claim which arose" in s 11 (4) (c) of the Act are to be construed as meaning "a claim which came into

existence" and not "a claim which became enforceable". The appeal must accordingly succeed.

The following order is made:

(a) The appeal is allowed.

(b) The order of the Natal Provincial Division is set aside and there is substituted for that order an order declaring that, for the purposes of section 11(4)(c) of the Admiralty Jurisdiction Regulation Act 1983 as amended, the claims of the Respondents arose when the goods were supplied or the services rendered or the repairs effected as the case may be notwithstanding any postponement of the due date of payment.

(c) The Respondents are ordered to pay the costs of the appeal and the Appellant's costs in the proceedings in the Natal Provincial Division including the proceedings in the Durban and Coast Local Division in which the matter was referred for argument before the Full Court of the Natal Provincial Division. The costs in each case are to include the costs consequent upon the employment of two counsel.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

VIVIER JA
HARMS JA
STREICHER JA
CAMERON JA