THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 376/18

In the matter between:

SEASPAN HOLDCO 1 LIMITED **FIRST APPELLANT**

SEASPAN CORPORATION **SECOND APPELLANT**

MV 'SEASPAN GROUSE' **THIRD APPELLANT**

and

MS MARE TRACER SCHIFFAHRTS GMBH & CO KG **FIRST RESPONDENT**

MS MARE TRAVELLER SCHIFFAHRTS GMBH & CO KG **SECOND RESPONDENT**

Neutral citation: *MV Seaspan Grouse: Seaspan Holdco 1 Ltd v MS Mare Traveller Schiffahrts GmbH* (376/18) [2019] ZASCA 02 (1 February 2019)

Coram: Maya P, Wallis, Molemela, Makgoka and Schippers JJA

Heard: 12 November 2018

Delivered: 1 February 2019

Summary: Admiralty – s 3(4) of Admiralty Jurisdiction Regulation Act 105 of 1983 (AJRA) – *in rem* action based on *in personam* liability of owner of ship – arrest of associated ship – s 3(7) of AJRA requiring that associated ship be owned at commencement of action by person personally liable on claim – s 1(2) of AJRA – commencement of action date on which process instituting action served in terms of s 1(2)(*a*)(i).

ORDER

On appeal from: KwaZulu-Natal Division, Durban, of the High Court, exercising its admiralty jurisdiction (Gyanda J sitting as court of first instance) reported *sub nom*:

Seaspan Grouse:

Seaspan Holdco and Others v MS Mare Tracer Schiffahrts and Another 2018 (5) SA 284 (KZD):

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

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

'It is ordered that:

(a) The arrests of the *Seaspan Grouse* under case numbers A69/2016 and A70/2016 be and are hereby set aside.

(b) The Registrar of the High Court, Durban, is directed to release the cash held as security for the respondents' claims to an account nominated by the applicants' attorney of record within five court days.

(c) The respondents are to pay the costs of this application.'

3 The period of five days in para (b) of the High Court's order in para 2 of this order is to run from the date of this order.

JUDGMENT

Wallis and Schippers JJA (Maya P and Molemela JA concurring):

[1] Under the Admiralty Jurisdiction Regulation Act 105 of 1983 (the AJRA), a claimant may issue a summons *in rem* and warrant of arrest in respect of a vessel, or obtain an order for its attachment to found and confirm jurisdiction (*ad fundandam et confirmandam jurisdictionem*), before the vessel named in the summons or attachment order comes within the area of jurisdiction of a South African court. It is therefore possible for a change in ownership of the vessel to occur between the time when the summons is issued, or the attachment order is granted, and the arrest or attachment. This appeal addresses the consequences of that occurring in the context of a summons and warrant of arrest issued against an associated ship. However, it was accepted in argument that the position would be no different in the case of a summons *in rem* and warrant of arrest issued against the ship in respect of which the maritime claim arose.

[2] In the *Monica S*[1] the Admiralty judge, then Brandon J, was confronted with this issue. He held that in English admiralty law the action commenced with the issue of the writ. The right of the claimant to assert a statutory right of action *in rem* arose from that time and was enforceable by the arrest of the named vessel. A change in ownership of the vessel after the issue of the writ made no difference to the claimant's entitlement to arrest the vessel. For obvious reasons such writs have come to be referred to as protective writs. Although it has been questioned insofar as its exposition of the historic position is concerned, writers in this field

[1] *The Monica S* [1967] Lloyd's Rep 113 (QB Adm); [1967] 3 All ER 740 (QBD).

have accepted it.[2] Counsel for the appellant did not question its application in English law, although it is not clear that it is as widely accepted as suggested by counsel for the respondents.[3]

[3] In the present case, Gyanda J, sitting in the KwaZulu-Natal Division, Durban of the High Court, in the exercise of its admiralty jurisdiction, held that the *Monica S* correctly reflected the position in our law. In a case raising the same issue in the Western Cape Division of the High Court, exercising its admiralty jurisdiction, Burger AJ reached the opposite conclusion.[4] It falls to this court to decide which was correct. The appeal is before us with leave granted by Gyanda J.

The facts

[4] The facts are uncontroversial. The first and second respondents (the respondents) are German registered companies. They owned the motor vessels, *Mare Tracer* and *Mare Traveller* respectively, and chartered them to Hanjin Shipping Co Ltd (Hanjin Shipping). Each respondent had a claim for unpaid charter hire against Hanjin Shipping arising out of those charters.

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[2] Derrington and Turner *The Law and Practice of Admiralty Matters* 11-12, para 2.07 describe this as a characteristic of the action *in rem*. See also Nigel Meeson and John Kimbell *Admiralty Law and Practice* (4th ed, 2011) paras 3.90 to 3.93.

[3] Damian J Cremean *Admiralty Jurisdiction, Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (3rd ed, 2008) 189 said that it is doubtful whether it applies in Australia arising from the operation of ss 6 and 15 of the Admiralty Act 1988 (Cth), but the *Monica S* could possibly apply in New Zealand, Singapore and Hong Kong. The same passage appears in *Admiralty Jurisdiction, Law and Practice in Australia, New Zealand, Singapore, Hong Kong and Malaysia* (4th ed 2015) 186 with the same possibility extended to Malaysia. The correctness of Brandon J's decision was left open by the Court of Appeal in *In re Aro Co Ltd* [1980] 1 Ch 196 at 208-9, but there are clear indications in the judgment of Brightman LJ that he regarded it as correct. It was apparently initially followed in Singapore, but rejected in *Dauphin Offshore Engineering and Trading Pte Ltd Inc v Owners of the Vessel Capricorn* [1999] 2 SLR 390 at 398 a judgment not available to us. It has been followed in Cyprus. *Demetriou Pampos and Others v SS Sapphire Seas* (2000) 1 CLR 1680. In view of the approach adopted in argument we have not further explored this question.

[4] *MS Mare Traveller Tebtale Marine Inc v MS Mare Traveller Schiffahrts GmbH & Co KG* 2018 (2) SA 490 (WCC).

[5] Hanjin Shipping was at one stage South Korea's largest container line and one of the world's top ten container carriers in terms of capacity. On 1 September 2016 the Seoul Central District Court granted an order commencing rehabilitation proceedings in respect of Hanjin Shipping. The following day the respondents caused summonses *in rem* and warrants of arrest, referred to in argument as protective writs, to be issued out of the KwaZulu-Natal Division, Durban and various other divisions of the High Court in an endeavour to enforce their claims. These cited various associated ships as defendants, including the vessel that is the subject of this appeal, the *Seaspan Grouse*, formerly the *Hanjin Gdynia*.

[6] The registered owner of the *Hanjin Gdynia*, when the appellants issued their protective writs, was J O O Shipping SA. This was a one ship company, the sole shareholder of which was an employee of Hanjin Shipping, who was entirely under the direction of his employer. After Hanjin Shipping commenced rehabilitation proceedings, the mortgagee of the *Hanjin Gdynia*, Societé Generale, exercised its rights under the mortgage to take effective possession of the vessel. It caused J O O Shipping to sell it to Seaspan Holdco 1 Limited (Seaspan), the first appellant, in terms of a Memorandum of Agreement (MOA) dated 14 December 2016. Delivery pursuant to the MOA occurred on 29 December 2016. The purchase of the *Hanjin Gdynia* occurred simultaneously with the purchase of three other vessels the *Hanjin Atlanta*, the *Hanjin Kingston* and the *Hanjin Monaco*. Seaspan's purpose in acquiring these vessels was to re-sell them at a profit, which it has done in respect of the *Hanjin Gdynia*. All of this occurred before Hanjin Shipping was declared bankrupt on 17 February 2017.

[7] The South Korean courts have held that structuring the ownership of a vessel in the manner described in para 6 is lawful and valid. The effect is that the employee, who is the registered owner of the shares in the ship-owning company, is entitled to dispose of the vessel. A creditor may not go behind the employee's

ownership to his employer, Hanjin Shipping. Accordingly, there was no dispute before us that the sale of the *Hanjin Gdynia* to Seaspan was an arms-length and bona fide transaction. Seaspan became the registered owner of the vessel, now renamed the *Seaspan Grouse*, before the vessel was arrested and without knowledge of the protective writs.

[8] On 23 August 2017 the respondents arrested the *Seaspan Grouse* in Durban pursuant to the protective writs they had issued nearly a year earlier. The arrests were discharged after security, in the form of cash was lodged with the Registrar of the High Court, Durban. On 18 September 2017 Seaspan and its holding company, the second appellant, applied to set aside the arrest and to procure repayment of the security. The High Court dismissed the application for the reasons already described.

The issue

[9] The respondents' claims against Hanjin Shipping were claims *in personam*, based on obligations arising under the two charterparties. Under the AJRA maritime claims may be pursued in two ways, either by way of an action *in personam* against the person liable in respect of the claim, or by way of an action *in rem*. The respondents could have followed either course in pursuing their claims, but elected to proceed by way of an action *in rem*.

[10] A maritime claim may be enforced by way of an action *in rem* if the claimant has a maritime lien over the ship in respect of which the claim arose (the ship concerned), or if the owner of the ship concerned would be liable in an action *in personam* in respect of that claim.[5] We do not need to concern ourselves with

[5] Section 3(4) of the AJRA. An action in rem may be pursued against property other than the ship concerned in certain circumstances, but for present purposes it suffices to approach the matter as though an action in rem may only be brought against a ship.

cases where the claimant has a maritime lien over the property to be arrested. Our law recognises only a limited number of maritime liens[6] and the nature of the maritime lien is that it is enforceable against the ship notwithstanding a change in ownership.[7] Accordingly the problem in this case does not arise where the claimant has a maritime lien. Here the *in rem* procedure was invoked on the basis that the claimant had a claim *in personam* against the owner of the property to be arrested.

[11] Section 3(6) of the AJRA provides that an action *in rem* may be brought by the arrest of an associated ship instead of the ship concerned.[8] Section 3(7) provides that:

(7) For the purposes of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose–

(i) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or

(ii) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or

(iii) owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.'

[12] The critical words in each of these subsections are 'owned, at the time when the action is commenced'. It is common cause that the respondents' claims were claims *in personam* against Hanjin Shipping and that all of the Hanjin vessels named in the protective writs were at the time of their issue controlled by Hanjin Shipping. Accordingly, if the respondents' actions against the *Seaspan Grouse* commenced when the protective writs were issued on 2 September 2016,

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[6] *Transol Bunker BV v MV Andrico Unity and Others; Grecian-Mar SRL v MV Andrico Unity and Others* 1989 (4) SA 325 (A) at 331G-H and 354F-H.

[7] *MV Andrico Unity*, ibid, 331H- 332A.

[8] *Owners of the MV Silver Star v Hilane Ltd* (*The Silver Star*)[2014] ZASCA 194; 2015 (2) SA 331 (SCA) para 14.

the change in ownership of the vessel occurred after the actions commenced. In that event the respondents remained entitled to cause the vessel to be arrested in pursuance of their claims, notwithstanding the change in ownership. If the actions only commenced when the summons and warrant of arrest were served, they were not, because at that time the vessels were not owned by a person identified in any of the subsections of s 3(7).

[13] The AJRA provides in s 1(2)(*a*) for when an action commences. It contains four subsections describing the commencement of an admiralty action in different circumstances. The respondents submitted that s 1(2)(*a*)(iii) was applicable and that their actions commenced when the protective writs were issued. Seaspan contended that s 1(2)(*a*)(i) was applicable and that the action commenced when the process instituting the action was served. As J O O Shipping SA no longer owned the vessel at that date it submitted that the arrests of the *Seaspan Grouse* fell to be set aside. The issue is which is correct.

The arguments

[14] Counsel for Seaspan submitted that the correct approach to s 1(2) was first to identify the relevant purpose for which it was necessary to determine when an admiralty action commenced. There are two places in the AJRA itself where this is relevant, namely, in determining whether a vessel is an associated ship in terms of s 3(7)(*a*) and in the ranking of claims in terms of s 11(4)(*c*). However, the section's scope of operation is far wider, because many maritime contracts contain clauses that require action to be instituted or suit to be brought within a particular time. There are also international maritime conventions such as the Hague Rules[9] and its successors, principally the Hague-Visby Rules,[10] and the

[9] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules" and Protocol of Signature (Brussels, 25 August 1924).
[10] The Hague Rules as amended by the Brussels Protocol, 1968 now a schedule to the Carriage of Goods by Sea Act 1 of 1986; Article 3(6).

Salvage Convention,[11] that contain limitation or time bar provisions, the operation of which is dependent upon when claimants commence an action to pursue their claims. Some of these may be compulsorily applicable to maritime contracts. In addition there is the general law governing prescription, or limitation of actions as it is described in some jurisdictions.

[15] Counsel submitted that, where it is necessary to determine when an admiralty action commenced, the appropriate commencement date under s 1(2) must be selected having regard to the relevant purpose. These commencement dates overlap, so it is necessary to choose which is applicable in every situation. The proper interpretation of s 1(2) is a matter of South African law in accordance with established principles of interpretation of statutes[12] and there is no need to have regard to English or other foreign authority in that regard. The action *in rem* against an associated ship is a unique institution existing nowhere else in the world and it is therefore necessary to pay close attention to the principles underpinning the AJRA in determining whether a vessel is an associated ship. There is little point in having regard to English law as to the nature and effect of issuing a writ in proceedings *in rem*, when we are construing a South African statute that differs materially from its English counterpart.

[16] He contended that this construction preserved the underlying purpose of the associated ship, which is that liability should be imposed where it properly lies by virtue of common ownership or common control.[13] Accepting that the purchaser of a vessel may be unaware of the existence of a maritime lien, he submitted that it was inappropriate to extend the potential liabilities of purchasers

[11] International Convention on Salvage, 1989 now a schedule to the Wreck and Salvage Act 94 of 1996; Article 23.
[12] *Natal Joint Municipal Pension Fund v Endumeni Municipality* (*Endumeni*) [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18 approved as correctly reflecting our law in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33 para 29.
[13] *Euromarine International of Mauren v The Ship 'Berg' and Others* 1986 (2) SA 700 (A) at 712A.

to statutory rights *in rem* arising from a lengthy and indeterminate[14] list of maritime claims, going considerably beyond those identified in the Arrest Convention.[15] Finally, he submitted that, s 39(2) of the Constitution requires the court to construe the AJRA in a manner that best promotes the spirit, purport and objects of the Bill of Rights. A construction of s 3(7) that permitted the arrest of vessels as associated ships, even though there was no connection at all between the person liable *in personam* on the claim and the ship being arrested, was not the interpretation that best promoted the spirit, purport and objects of the Bill of Rights and in particular s 25 thereof dealing with the right to property.

[17] Counsel for the respondents adopted a different approach. He submitted that there is no overlap between the different subsections of s 1(2) and that the only provision relevant to the present case is s 1(2)(*a*)(iii). He relied upon the judgment in this court in the *Jute Express*[16] to contend that s 1(2)(*a*)(i) applies only to claims *in personam* and not proceedings *in rem*. The purpose of the AJRA was to assist maritime claimants by facilitating the arrest of vessels, not only the ship concerned, but also associated ships.[17] A maritime lien travels with the ship notwithstanding a change in ownership and there is no reason why the same should not be true of claims giving rise to a statutory right *in rem*. This is particularly so given that, in countries such as the United States of America,[18] maritime liens are by statute afforded to a far wider group of claims than in the United Kingdom. There is no harm in this because the issue of protective writs and the application of the principle in the *Monica S* is a well-recognised feature of maritime commerce, so that purchasers insure against the risk of such claims

[14] See s 1(1) of the AJRA sv 'maritime claims' especially sub-para (*ee*).
[15] Convention for the Unification of Certain Rules Relating to the Arrest of Sea Going Ships (Brussels 1952).
[16] *MV Jute Express v Owners of the cargo lately laden on board the MV Jute Express* 1992 (3) SA 1 (A) at 17B.
[17] *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* [1999] ZASCA 44; 1999 (3) SA 1083 (SCA) para 6 (per Smalberger JA); *Northern Endeavour Shipping (Pty) Ltd v Owners of MV NYK Isabel* 2017 (1) SA 25 (SCA) paras 44-45.
[18] Federal Maritime Liens Act 46 U.S.C. § 31301 – 31343.

being pursued against the vessels they purchase. The purchaser of a vessel usually has no means of ascertaining whether it is burdened by a maritime lien. The position is different in regard to statutory rights of action *in rem* arising by virtue of the issue of a protective writ, because in South Africa there is a separate register of admiralty actions and it is commonplace for attorneys to be instructed to undertake searches to check for the existence of protective writs.

[18] Counsel submitted that the existence of the statutory right of action *in rem* had been recognised from the time that the jurisdiction of the Admiralty Court in England had been extended by the statutes of 1840 and 1861.[19] This was the effect of the judgment in the *Monica S* and it had never been challenged in any jurisdiction that, like South Africa, originally derived its admiralty jurisdiction from England via the Colonial Courts of Admiralty Act.[20] The *Monica S* was applicable in South African admiralty proceedings prior to the AJRA and there was no reason for it not to form part of our admiralty law under the AJRA.

[19] He contended that s 1(2)(*a*) served to identify one fixed date of commencement of an action in all cases and that it was absurd to speak of an action having several different commencement dates depending upon different purposes. Once an action has commenced it has commenced for all purposes. The word 'relevant' could not be taken to detract from the impact of the word 'any', which in its ordinary connotation means 'each and every' and encompasses all purposes. The 1992 amendments to the AJRA had been formulated in the light of the decision in the *Jute Express* and the court should be guided by what was decided in that case in construing the amended section.

[19] Admiralty Court Act, 1840 (3 & 4 Vict. c. 65) and Admiralty Court Act, 1861 (24 Vict. c. 10).
[20] Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict).

[20] In the heads of argument counsel drew attention to the approach to construing the expression 'maritime lien' in the AJRA in the *Andrico Unity*.[21] The court held that in terms of s 6(1)(*a*) of the AJRA it was bound to apply English admiralty law to that question, because the matter before it was whether the plaintiffs had maritime liens over the *MV Andrico Unity*. He contrasted this with *The Silver Star*.[22] There the issue was whether the ship concerned in relation to the maritime claim that had given rise to an arbitration award, was also the ship concerned for the purposes of the award itself. The court said this was a matter of statutory interpretation of the relevant provisions of the AJRA, and that no question of resorting to s 6(1)(*a*) arose. The submission advanced, somewhat tentatively, was that, if the *Andrico Unity* remained good law, the question in this case fell to be answered by resort to English law.

[21] The point was not taken any further in the course of oral argument and rightly so, although it was again raised in supplementary heads of argument, delivered after the hearing in response to a question by the court. In the application of s 6(1) in the present case the 'matter' was when the actions *in rem* against the *Seaspan Grouse* commenced, for the purpose of its arrest as an associated ship. That involved the interpretation of s 1(2) of the AJRA, which for any relevant purpose deals with when an admiralty action commences. Even assuming that determining the date of commencement of an action *in rem* was a matter, in respect of which a South African court of admiralty would have had jurisdiction under the Colonial Courts of Admiralty Act, s 6(2) of the AJRA provides that nothing in s 6(1) shall derogate from the provisions of a South African law applicable to that matter. Here there is an express provision of the AJRA dealing with the very question and we are enjoined to interpret and apply

[21] *The Andrico Unity* at 334A-335C.
[22] Op cit, fn 9, para 31.

that provision, whatever may have been the previous position in English admiralty law.

Section 1(2) of the AJRA and the *Jute Express*

[22] The competing submissions of counsel were closely bound up with the history of this section and the judgment in the *Jute Express*, which dealt with it as originally enacted. Some consideration must therefore be given to the original text of s 1(2) and to what was decided in the *Jute Express.*

[23] Prior to its amendment in 1992, s 1(2) provided:

'For the purposes of any law, whether of the Republic or not, relating to the prescription of or the limitation of time for the commencement of any action, suit, claim or proceedings, an admiralty action shall be deemed to have commenced–

(a) by the making of an application for the attachment of property to found jurisdiction if the application is granted and the attachment carried into effect;

(b) by the issue of any process for the institution of an action *in rem* if that process is thereafter served;

(c) by the service of any process by which that action is instituted.'

[24] The ambit of the section was considerably narrower than in its present form. Its only concern was to deal with statutory regimes governing prescription or limitation of actions in respect of maritime claims.[23] In the forefront of the minds of those who drafted the AJRA was the provision of Article 3(6) of the Hague and Hague-Visby Rules, which provided, in relevant part, that:

'... the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered.'

These rules applied by statute in many countries in relation to contracts for the carriage of goods from those countries and, as such, the question of when 'suit is

[23] D J Shaw QC *Admiralty Jurisdiction and Practice in South Africa* 34.

brought' was one well recognised in maritime circles in South Africa when the AJRA was enacted. It had arisen specifically in relation to an attachment, where the court held that the making of the application amounted to the bringing of suit for the purpose of the Hague Rules.[24] Not surprisingly, therefore, that situation was dealt with in s 1(2)(*a*).

[25] The *Jute Express* did not raise an issue under s 1(2). No process had been issued and no arrest of the vessel had been effected, because security for the claim had been given to prevent its arrest in terms of s 3(10)(*a*) of the AJRA. However, the summons was only issued (and served) more than a year after security had been furnished. The owners of the vessel raised a special plea that the claim was time-barred in terms of the contractual incorporation of the Hague Rules in the bill of lading, as suit had not been brought within one year of the claim arising. The issue was whether obtaining security amounted to the bringing of suit, because of the provision in s 3(10)(*a*) of the AJRA that if security had been given the vessel was deemed to have been arrested and to be under arrest.

[26] The claimants argued that s 3(5) of the AJRA provided that an action *in rem* shall be instituted by the arrest of the vessel. Section 3(10)(*a*) deemed the vessel to have been arrested and to be under arrest if security was given to prevent its arrest. The object of the deeming provision was to bring about the same situation as would have prevailed had the vessel actually been arrested. Accordingly, the claimants should be deemed to have instituted an action and to have brought suit as required by Article 3(6).[25] The counter argument was that s 3(5) reflected the requirement that an action *in rem* required the arrest of the vessel, not that the action was commenced (suit was brought) by the arrest. The latter was inconsistent with both English admiralty and South African procedure.

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[24] *Dave Zick Timbers (Pty) Ltd v Progress Steamship Co Ltd* 1974 (4) SA 381 (D).
[25] *Jute Express* pp 11C-E and 15I.

This approach was consistent with the provisions of s 1(2) as it then stood. There was nothing in s 3(10)(*a*) to indicate that an action was deemed to commence by the giving of security to prevent the arrest of the vessel. That would create an anomaly, where an action might have commenced, notwithstanding the fact that no court exercising admiralty jurisdiction was in any way seized of the matter or had any knowledge of its existence. Such a conclusion was inconsistent with the entire notion of bringing suit as embodied in the Hague Rules.[26]

[27] The judgment began by saying that the question in issue was whether an action *in rem* is commenced by arrest or by the issue of summons.[27] The central concern of the parties was whether suit had been brought in terms of Article 3(6) of the Hague Rules. The court accepted that to bring suit was to commence appropriate proceedings for enforcing the claim.[28] The claimants contended that the institution of the action *in rem* in terms of s 3(5) of the AJRA constituted the commencement of the proceedings.

[28] Howie AJA, who gave the judgment of the court, rejected this contention, giving eight reasons for doing so.[29] In summary they were these:

- In South African procedure all actions commence with the issue of summons.[30]
- Where the legislature thought it necessary to deal with the commencement of an action, in the context of interrupting prescription or limitation provisions, it did so in s 1(2), departing from the ordinary position in our law.[31]

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[26] *Jute Express*, p 10F-11B.
[27] *Jute Express*, p 11I-J.
[28] *Jute Express*, p 13I-J.
[29] *Jute Express*, p 16H-19H.
[30] *Marine and Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D; *Labuschagne v Labuschagne; Labuschagne v Minister van Justisie* 1967 (2) SA 575 (A) at 584.
[31] *Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (A).

- The claimant's argument created a contradiction between s 1(2)(*b)* which provided that an action *in rem* commenced by the issue of process for its institution, and s 3(5), which required the action to be instituted by an arrest.
- The purpose of s 3(5) was to make arrest an essential requirement of an action *in rem.*
- The distinction between the Afrikaans translation of 'commenced' in s 1(2) ('n aanvang te geneem het') and 'instituted' in s 3(5) ('word ingestel') made it plain that in speaking of the institution of the action the legislature was not concerned with its commencement.
- In the old practice under the Colonial Courts of Admiralty Act, action was commenced by the issue of summons, and there was no reason to alter the situation when enacting the AJRA.
- Holding that the action was commenced by an arrest or deemed arrest gave rise to anomalies. On the one hand, until the vessel was arrested there would be no action, notwithstanding the existence of a summons. On the other, where security was given to prevent an arrest, there would be an action without a summons and there can be no action without a summons.
- Lastly, construing the AJRA as meaning that the action commenced with the issue of summons was in accordance with established procedure and created no inconsistencies or incongruities.

[30] It is helpful to point out what was not decided in the *Jute Express*. The court did not decide that an arrest, actual or deemed, was unnecessary in order to institute an action *in rem*. Nor did it express any view on the consequences of issuing a summons, beyond saying it was the commencement of an action, and accordingly necessary for the purpose of bringing suit in terms of Article 3(6) of the Hague Rules.

[31] The AJRA and ss 1(2) and 3(7) in particular were amended by way of the Admiralty Jurisdiction Regulation Amendment Act 87 of 1992, which was passed on 18 June 1982 and commenced on 1 July 1982. Mr Mullins suggested that the amendments to s 1(2) were precipitated by the decision in the *Jute Express*. That cannot be correct. The Bill giving rise to the amending Act and containing s 1(2) in its current form was tabled in Parliament on 26 February 1992, a month before the judgment. The explanatory note reveals that it had been debated by the Maritime Law Association and considered by several judges president and legal bodies. It made comprehensive changes to the AJRA in a number of areas. It seems more likely that in the debates leading up to the Bill's preparation the issue raised in the *Jute Express* was considered, possibly in the light of the judgment in the court below handed down over a year earlier.[32]

The amended s 1(2)

[32] The section reads as follows:

'(*a*) An admiralty action shall for any relevant purpose commence –

(i) by the service of any process by which that action is instituted;

(ii) by the making of an application for the attachment of property to found jurisdiction;

(iii) by the issue of any process for the institution of an action *in rem*;

(iv) by the giving of security or an undertaking as contemplated in section 3(10)*(a)*.

(*b*) An action commenced as contemplated in paragraph *(a)* shall lapse and be of no force and effect if-

(i) an application contemplated in paragraph *(a)* (ii) is not granted or is discharged or not confirmed;

(ii) no attachment is effected within twelve months of the grant of an order pursuant to such an application or the final decision of the application;

(iii) a process contemplated in paragraph *(a)* (iii) is not served within twelve months of the issue thereof;

[32] *Owners of the Cargo lately laden aboard the MV Jute Express v MV Jute Express* 1991 (3) SA 246 (D).

(iv) the property concerned is deemed in terms of section 3(10) *(a)* (ii) to have been released and discharged.'

[33] The immediate question is whether the section fixes a single commencement date for every admiralty action, being the date first occurring among the alternatives in s 1(2)(*a*), or whether there is a choice of commencement date, depending upon the purpose for which the date of commencement of the action is relevant.

[34] The enquiry inevitably commences with the language of the section[33] and particularly the words 'for any relevant purpose'. Prior to its amendment s 1(2) was only concerned with the commencement of an admiralty action in the context of statutory time bars and limitation periods. Now it applies to any relevant purpose. While the word 'any' usually connotes 'all', meaning must be given to the word 'relevant'. It cannot be ignored as suggested by counsel. Even if it were, it would not lead inevitably to the conclusion that the date of commencement of the action would be the same for every purpose arising in relation to a particular claim. Whenever there is more than one date that could apply a choice must be made.

[35] The phrase 'any relevant purpose' emphasises that the previous restriction to statutory time bars and limitation periods has been removed and that the section now encompasses all circumstances where the date of commencement of the action is relevant. Semantically, the addition of the word 'relevant', suggests that the purpose for which the enquiry has to be made affects which of the four possibilities listed in the subsections of s 1(2) applies in any given situation.

[33] *Endumeni*, op cit.

There is nothing linguistically to indicate that the earliest date must be chosen and any later ones ignored.

[36] Mr Mullins contended that subsections (i) to (iv) deal with separate and distinct situations. He relied upon the following passage from the *Jute Express*:[34]

'In the normal course, prescription is not interrupted by the issue of summons but by the service of summons … and, as already mentioned, an action is not commenced by the service of summons but by the issue of summons. Manifestly the Legislature intended to unify the moment of commencement in relation to prescription on the one hand and statutory time limitations on the other. One finds, therefore, that in the case of an action *in rem* the moment of commencement is deemed to be the issue of process and, *in the case of an action in personam, the service of process (see s 1(2)(c))*' (Emphasis added.)

[37] With respect, the deeming provisions to which reference was made did not unify the moment of commencement in respect of prescription and statutory time limitations. Prescription commences running when the debt is due, not when summons is either issued or served. It appears that Howie AJA had in mind the interruption of prescription and the bringing of suit and like expressions in other statutory limitation periods. Even then the deeming provision did not unify the two. Prescription would be interrupted and a time bar defeated by service of a summons in actions *in personam*, other than one where an attachment was necessary. In actions *in personam* where an attachment was necessary, prescription would be interrupted and a time bar defeated by making the application for attachment. In an action *in rem* the same time bar on the same claim would be defeated without service by the mere issue of a summons. This was hardly satisfactory.

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[34] *Jute Express* 17A-B.

[38] Mr Mullins submitted that in the last sentence of this passage the court drew a distinction between an action *in rem*, where the issue of summons would commence the action, and an action *in personam* where service was necessary. As the present s 1(2)(*a*)(i) is in the same terms as the former s 1(2)(*c*), he argued that it could not be invoked in regard to an action *in rem*. We do not think that is correct. It reads into the subsection a restrictive limitation that is not to be found in its language. The preamble refers generally to 'an admiralty action', which includes both an action *in rem* and an action *in personam*. It goes on to provide that the action will commence by the service of process 'by which *that action* is instituted'. There is no warrant for reading that as if the words 'that action' read 'an action *in personam*'. It also ignores the provisions of s 1(2)(*a*)(ii) dealing specifically with when proceedings commence in the case of an action *in personam* instituted by an attachment. In our view, Howie AJA was doing no more than contrasting cases where no attachment was necessary, because the defendant was an *incola*, or had consented or submitted to the jurisdiction, or was a company with a registered office in South Africa, with an action *in rem*. In those cases s 1(2)(*c*) would determine when the action commenced and, in accordance with established procedural law governing prescription, that would be on service of summons. The court was well aware that in those cases the action would procedurally have commenced when the summons was issued.

[39] There was no need for Howie AJA to consider whether s 1(2)(*c*) might also apply in some instances to actions *in rem*. If he had, an obvious example would have been where a warrant was obtained without issuing a summons where a court ordered the issue of the warrant. In that event, there seems to be no reason, linguistic or practical why, in order to defeat a time bar, or interrupt prescription, the action should not have commenced by service of the warrant in terms of the former s 1(2)(*c*). One can readily imagine a scenario where a vessel came into port unexpectedly, to take on bunkers or collect urgently needed spare parts, and

it was necessary both to secure its arrest before it left and defeat an imminent time bar. In that situation there might not be an adequate opportunity to prepare a summons. We can think of no good reason why the service of the warrant of arrest in those circumstances would not defeat the time bar, when service of an attachment order would have done so.

[40] Reverting to the present s 1(2), Mr Mullins sought to bolster his argument that s 1(2)(*a*)(i) related only to actions *in personam*, by submitting that there was a clear correspondence between ss 1(2)(*a*)(ii) and ss 1(2)(*b*)(i) and (ii); between ss 1(2)(*a*)(iii) and ss 1(2)(*b*)(iii); and ss 1(2)(*a*)(iv) and ss 1(2)(*b*)(iv). There was no need for a provision that the action would lapse after service of process in terms of ss 1(2)(*a*)(i) because the action would then be before the court. That would be the situation with an action *in personam*, but an action *in rem* would commence earlier and therefore it was necessary to provide for the situation where the summons was not served.

[41] There were two problems with this submission. The first was the one to which we have already drawn attention, namely that in some circumstances, admittedly unusual, a warrant of arrest could be authorised without the issue of summons. The second is that the point of correspondence between the subsections of s 1(2)(*a*) and those of s 1(2)(*b*) was raised in the minority judgment in the *Cape Spirit*,[35] but not in the reported argument of counsel, and the majority did not accept it. It is not in our view sound.

[42] Turning to the subsections, s 1(2)(*a*)(i) speaks of service of process by which the action is instituted. Section 3(5) of the AJRA, (which was not amended

[35] *MT Cape Spirit: Owners of the cargo lately laden on board the mt Cape Spirit v mt Cape Spirit and Others* 1999 (4) SA 321 (SCA) para 27.

in 1992) says an action *in rem* shall be instituted by an arrest. There is no reason at the level of language for saying that these should not correspond. The same applies to s 3(2)(*c*), which says that an action *in personam* may be instituted against a person whose property has been attached. The fact that in both cases there are other provisions of s 1(2)(*a*) that could apply does not affect this. There is no reason to confine subsection (i) to actions *in personam* as submitted by the respondents.

[43] The other three subsections of s 1(2)(*a*) provide a date earlier than service of process and concurrent attachment or arrest as the date of commencement of an admiralty action. The only significant difference between them and the earlier version of the section is the inclusion of subsection (iv), making the giving of a security or an undertaking under s 3(10)(*a*) a ground for the commencement of an admiralty action. Nothing suggests that their inclusion was not primarily directed at prescription, limitation provisions and time bars, as had originally been the case. The reference to giving security or an undertaking dealt with the situation that arose in the *Jute Express*. The difference between the different subsections emphasises the likelihood that different relevant purposes might require different dates of commencement of the action.

[44] There is a further difficulty. On the respondents' argument, s 1(2)(*a*)(iv) creates a situation where an action has commenced, but no court is seized of it or is even aware of its existence. The court in the *Jute Express* characterised that as 'compatible with neither logic nor established practice'.[36] Clearly that is so. It points in favour of a construction of s 1(2)(*a*) that requires the court to choose the commencement date that is appropriate to the relevant purpose. Interruption of prescription or a time bar is one thing, but the entitlement to arrest an associated

[36] *Jute Express* 19C-F.

ship that has changed ownership since the warrant was issued is an entirely different matter.

[45] A significant anomaly is created on the respondents' approach. It flows from the provisions of s 1(2)(*b*), which provide for the lapsing of actions commenced in the circumstances set out in s 1(2)(*a*)(ii) to (iv). That is a novel concept in our civil procedure. Actions may be dismissed for non-prosecution, but nowhere do they lapse automatically. Where there has been service of the process by which the action is instituted, there is no mention of the action lapsing in any circumstance. In the context of time bar and limitation provisions, as well as under our own law governing prescription,[37] the requirement that suit be brought, or action instituted, or prescription be interrupted by the commencement of action, carries with it an obligation, express or implied, that the suit or action is continued to finality. If it is withdrawn or lapses, the time bar, limitation period or prescription can be invoked to defeat the claim in subsequent proceedings as if there had been no interruption. This implies that the primary purpose of the provisions of ss 1(2)(*a*)(ii) to (iv) is to assist claimants to comply with time bars or limitation periods by bringing proceedings timeously.

[46] Finally, there is manifestly an overlap between the different subsections of s 1(2)(*a*), in the sense that in any one case more than one of the situations described in those subsections may arise. It would have been relatively easy and obvious in those circumstances to say in the section that the action would commence in all cases when the first occurring of those situations occurred. We appreciate that this is something of a makeweight point, but it does provide a pointer as to the proper construction of the section.

[37] Prescription Act 68 of 1969, s 15(2).

[47] All of these factors, in our view, support the notion that s 1(2)(*a*) provides a flexible standard for determining when an action commences, depending upon the relevant purpose for which that enquiry has to be made. Turning from there to the wider context, s 3(4) is important. It says that a maritime claim may be enforced by an action *in rem* if the claimant *has* a maritime lien over the property to be arrested. There can be no doubt that the lien must exist at the time of the arrest. It may also be enforced by an action *in rem* if the owner of the property to be arrested would be liable *in personam* on the claim. The words 'to be arrested' speak to the situation at the time of the arrest. It is the owner of that property who must be liable *in personam*, not its former owner. The respondents' arguments create a disjuncture between the arrest and the underlying liability. In turn s 3(4) is linked to the requirement in s 3(5) that an action *in rem* is instituted by the arrest. This caused Shaw[38] to write that:

'In view of the provisions of s 3(5) that the action is instituted by the arrest of the property, that is the moment when it is required that the owner [of the property to be arrested] be liable to the claimant in the action in personam referred to in s 3(4).'

The respondents' approach gives no effect to the provision in s 3(5) that the action is instituted by the arrest.

[48] Both textually and contextually therefore, the approach to s 1(2)(*a*) advanced by Seaspan is to be preferred. It gives effect to all the words used and avoids the anomalies inherent in the approach of the respondents. In addition, we bear in mind the injunction in s 39(2) of the Constitution that we should prefer an interpretation that best gives effect to the spirit, purport and objects of the Bill of Rights. Given that the contentions by the respondents potentially raise a question of their compatibility with the provisions of s 25 of the Constitution, that provides a further reason for preferring the construction advanced by Seaspan. We

[38] Shaw, op cit, fn 23.

therefore hold that in applying the section the court must first identify the relevant purpose under consideration and then select the appropriate commencement date.

The appropriate commencement date in applying s 3(7)

[49] The relevant purpose was the arrest of the *Seaspan Grouse* as an associated ship. That required that, at the commencement of the action, the *Seaspan Grouse* was owned by a company controlled at that time by Hanjin Shipping.[39] Whether that was so depended on whether, for that relevant purpose, the date of commencement of the admiralty actions was the date of issue of the protective writs (s 2(1)(*a*)(iii)) or the date of the arrest (s 2(1)(*a*)(i)). In our view it was the latter.

[50] In the first place, using the date of service of the summons is consistent with the provisions of ss 3(4) and (5) in two respects. It ensures that the owner of the property to be arrested is also the person liable to the claimant in an action *in personam*. It also co-ordinates the commencement of the action and the institution of the claim.

[51] Second, that approach accords with the basic purpose of the associated ship jurisdiction. From the outset it was directed at resolving the difficulties occasioned by the dramatic shift to owning vessels in separate one-ship owning companies after the Second World War.[40] This was explained in the Law Commission Report[41] leading to the passage of the AJRA. There is nothing in the AJRA to suggest that it was intended to render liable to arrest vessels having no connection at the time of arrest, either by way of common ownership or by way

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[39] In terms of s 3(7)(*c*) of the AJRA Hanjin Shipping is deemed to have been the owner of the *Mare Trader* and the *Mare Traveller* at the time that the respondents' maritime claims arose. In order to arrest the *Seaspan Grouse* the respondents had to show that, at the commencement of the admiralty actions *in rem*, the *Seaspan Grouse* was owned by a company (J O O Shipping SA) that was controlled by Hanjin Shipping.
[40] M J D Wallis *The Associated Ship and South African Admiralty Jurisdiction* 41-43.
[41] South African Law Commission, Project 32, 15 September 1982, para 7.3.

of common control, to either the ship concerned in the case of an associated ship, or the person liable *in personam* on the claim.

[52] Third, considerable difficulties arise if, instead of proceeding *in rem*, whether against the ship concerned or an associated ship, the claimant seeks to enforce its claim *in personam*, commencing with the *attachment ad fundandam et confirmandam jurisdictionem* of the same vessel.[42] On the respondents' approach, s 1(2)(*a*)(ii) means that the commencement of the action for the purposes of the attachment would be when application was made for an order. If arrests and attachments are to be dealt with in a consistent fashion, it should follow that, having obtained an order in advance of the vessel's arrival, the claimant would be entitled to attach it, notwithstanding any change in ownership between that date and the execution of the attachment order.

[53] This would involve a profound change in our law governing such attachments. Corbett JA in *Lendalease*,[43] said:

'It is clear law that an applicant seeking the attachment of his debtor's property *ad fundandam jurisdictionem* must satisfy the Court, on a balance of probabilities, that the property to be attached belongs to the debtor. The *onus* is upon the applicant to do so. The Court will not order the attachment of the property of another for the purpose of founding jurisdiction because to do so would be futile and of no effect.'

[54] We do not think that the AJRA as originally enacted had that result. Section 4(4) demonstrates that, when it was thought necessary to alter the law governing attachments in admiralty cases, this was done expressly. Neither s 4(4) in its original form, nor s 1(2), had that effect expressly. There is no warrant for saying that a change of this significance was brought about indirectly. It would have

[42] AJRA s 4(4) has permitted this since the amendments in 1992.
[43] *Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola & others* 1976 (4) SA 464 (A) at 489B-C.

been inconsistent with the Law Commission's report on the review of the law of admiralty,[44] which drew attention to the fact that the existing situation, where one court applied two separate systems of law to essentially similar matters, depending on whether the case was brought in the ordinary courts or before the courts sitting as colonial courts of admiralty, was unsatisfactory. Although the existing admiralty law was to be the basis of reform,[45] the report recognised 'that the rules of Roman-Dutch law ought, so far as is possible, to be preserved and that concepts foreign to the South African legal system ought not to be introduced …'.[46]

[55] Two fundamental changes were made to the established Roman Dutch law in regard to attachments *ad fundandam et confirmandam jurisdictionem*.[47] The first, in s 4(4)(*a*), varied the rule that an attachment could only be obtained by a *peregrinus*[48] against another *peregrinus* if there existed, in addition, some other ground of jurisdiction (*ratione jurisdictionis*).[49] The second, in terms of s 4(4)(*b*), permitted an application for an attachment to be brought notwithstanding that the property to be attached was not yet within the area of jurisdiction of the court. In that event the attachment order could be served when the property, almost invariably a ship or its bunkers or stores, came within the jurisdiction. There was nothing to suggest that over and above these changes an attachment order procured in advance of the vessel's arrival could be executed notwithstanding a change in ownership in the interim.

[56] The AJRA placed attachments on the same footing as arrests. Where the basis of the claim was *in personam* liability, the claimant had a choice of remedy.

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[44] South African Law Commission, Project 32, 15 September 1982.
[45] Ibid, para 6.4.
[46] Ibid, para 6.3.
[47] Shaw, op cit, pp 49-50.
[48] A person not residing in South Africa. See *Tick v Broude and Another* 1973 (1) SA 462 (T) at 467C-471E.
[49] *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) at 258I-259D.

In both it was permissible to set in train the proceedings that would lead to the arrest or attachment, before the ship arrived in the court's area of jurisdiction and execute the process after it had done so. Either step could be taken a considerable period in advance of the ship's arrival. That was consistent with the fact that proceedings by way of arrest and attachment serve the same purposes of founding or confirming jurisdiction and of providing security for the claim.[50] In South African law once security has been obtained, by way of the attachment or arrest, a person taking transfer of ownership of the vessel does so subject to the prior rights afforded thereby – *qui prior est tempore potior est iure*.[51] There was no mechanism whereby a right taking precedence over that of a bona fide new owner could be created before attachment.

[57] The amendments effected in 1992 did not affect the matter. Section 1(2) was amended; ownership of the associated ship was expressly required to be when the action commenced; and, the power to attach was extended to associated ships. None of these addressed directly the question of a change in ownership between the date on which the application for an attachment order was made and the date of service of that order.

[58] In their supplementary heads of argument respondents' counsel did not contend for such a revolutionary change. They accepted that if there were a bona fide change in ownership between the date on which an attachment order was obtained, and the date upon which it could be executed it would no longer be lawful to attach the ship. Applying that to this case would mean that, if an

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[50] *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 697H-698E; *MT Argun: Sheriff of Cape Town v MT Argun, her Owners and All Persons Interested in Her and Others; Sheriff of Cape Town MT Argun, her Owners and All Persons Interested in Her and Another* 2001 (3) SA 1230 (SCA) para 30, p 1244E-F.

[51] *Krause v Van Wyk en andere* 1986 (1) SA 158 (A) at 171G-J; *Wahloo Sand BK en Andere v Trustees, Hambly Parker Trust en Andere* 2002 (2) SA 776 (SCA) paras 12-15. It was suggested at one point in the argument that an attachment or an arrest gives rise to a *pignus judiciale*, or judicial pledge, but this is incorrect as that arises from an attachment in execution. *Union and Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 549 at 558-559.

application for an attachment order had been made on 2 September 2016, the date when the summonses *in rem* were issued, the *Seaspan Grouse* could lawfully have been arrested in Durban in an action *in rem*, but could not have been attached in the action *in personam*. That is absurd when dealing with the same claim, the same *in personam* liability, and the same ship or associated ship.

[59] Counsel submitted that there was a further difficulty in relation to a security arrest of an associated ship in terms of s 5(3) of the AJRA. Such an arrest is neither an action *in rem* nor an action *in personam*, but an arrest ordered by the court for the purpose of providing security for a claim. Section 5(3) empowers the court to order the arrest of any property 'if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property'. This includes an associated ship on the basis that the claimant has an action *in rem* against the vessel. In order to arrest the vessel as an associated ship it is necessary to determine who owned it when the 'action is commenced' against it. Having regard to the definition of 'admiralty action' in s 1, he submitted that the application for the security arrest is an admiralty action.

[60] In the ordinary course a security arrest would only be sought once the vessel was in port,[52] and the earliest date for commencement of that action, on the respondents' argument, would be when the application papers were issued after the vessel arrived in port. A protective writ could have been issued at a much earlier stage, in which case, if a change in ownership had occurred between the date of issue of the protective writ and the date of issue of the application papers in the security arrest, the vessel could be arrested in an action *in rem*, but could

[52] We understand that on occasions when the vessel's arrival was imminent and the duration of its stay likely to be brief, orders for security arrests were issued conditional on the vessel's arrival and subject to an affidavit being lodged with the Registrar of the court when it arrived, after which the arrest order would be issued. There is no provision in the AJRA providing for this procedure, but it is unnecessary for us to decide whether it is permissible.

not be arrested as security for the same claim. That is a further significant anomaly, recreating as it would the situation where vessels were arrested in actions *in rem* purely for the purpose of obtaining security for proceedings elsewhere and not in order to pursue a claim before a South African court.[53]

[61] All these difficulties are avoided by selecting the date in s 1(2)(*a*)(i) as the date of commencement of the action for the purposes of all associated ship arrests. That would accord with the view of Shaw, cited above in para 47, in relation to the ship concerned. Our attention was drawn to a summary of the previous position in regard to associated ship arrests in the *Pericles GC*,[54] which suggested that under the original s 3(7)(*a*)(i), dealing with sister ships,[55] the relevant date for ownership of an associated ship was the date upon which the maritime claim arose. The summary appeared to be based on a concession by counsel in the heads of argument and the example given would not in any event have altered the outcome of the case. In *The Heavy Metal*[56] this court unanimously approved the statement by Shaw[57] that:

'If, therefore, A, at the relevant time (that is, at the time of the arrest) owns a ship, that ship will be an associated ship if A, at the time when the maritime claim arose, was the owner of the ship concerned. Changes of ownership in the ship concerned after the time when the maritime claim arose are irrelevant, as is the question whether the ship which is an associated ship was owned by A at the time when the maritime claim arose.'

In our view the latter statement was a correct description of the original position in regard to associated ships and the amendments to s 3(7) were merely confirmatory of the existing position.

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[53] *The Eleftheria* (1969) 2 All ER 641 (PDA) at 645; *Intercontinental Export Company (Pty) Limited v m.v. "Dien Danielsen"* 1982 (3) SA 534 (N) at 541D-H.
[54] *National Iranian Tanker Co v MV Pericles GC* 1995 (1) SA 475 (A) at 480E-F, 481C-D and 485D-F.
[55] Ships having the same owner. Under the Arrest Convention provision was made for the arrest of a sister ship in place of the ship in respect of which the maritime claim arose.
[56] *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* [1999] ZASCA 44; 1999 (3) SA 1083 (SCA) para 49.
[57] Shaw, op cit, 37-38.

[62] It must be borne in mind that the *Monica S* only affords a claimant a security interest because it permits the vessel to be arrested where there has been a change in ownership between the issue of the writ and its service when the vessel is arrested. Hofmeyr[58] explains why in South Africa a security interest does not accrue before an arrest:

'The issue of process for the institution of proceedings *in rem* will not serve to protect the creditor from the effects of the owner's sequestration or liquidation or the intervention of business rescue proceedings. That protection will accrue only when the creditor secures its position by making an arrest. The notion that the security interest or charge accruing pursuant to an action *in rem* attaches to the *res* at different times depending on whether or not insolvency or business rescue proceedings has intervened is, from a jurisprudential point of view, less than satisfactory. Moreover, the purposes of arrest are to obtain jurisdiction over the res and to provide security for the claim. Neither result is achieved unless an arrest is made. Pending arrest jurisdiction is not obtained and the security interest can be no more than a contingent one. In these circumstances it seems artificial to regard the *res* as being burdened with the security interest before arrest. Admittedly the charge created by the maritime lien is also contingent on arrest but the maritime lien is an exceptional legal phenomenon and has always been treated as *sui generis*.'

[63] In the face of these considerations the reliance placed on the *Monica S* was misplaced. Accepting that the decision correctly reflected the English law under the Colonial Courts of Admiralty Act, and therefore South African admiralty law prior to 1983, the AJRA defined the circumstances in which an action *in rem* can be brought, whether against the ship concerned or an associated ship. It also preserved the action *in personam* based on the attachment *ad fundandam et confirmandam jurisdictionem*, which does not exist in English law. The arrest provisions of the AJRA are incompatible with the decision in the *Monica S* and therefore that judgment cannot apply in South African admiralty law, whether in relation to the arrest of the ship concerned or an associated ship. That does not mean that protective writs cannot be issued in South Africa and served when the

[58] Gys Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed 2012 at 129, footnotes omitted.

vessel comes within the jurisdiction. It merely means that such a writ gives no protection to a claimant against an intervening bona fide change of ownership.

Conclusion

[64] The appeal must succeed. We make the following order:

1 The appeal of the first and second appellants is upheld with costs, such costs to include those consequent upon the employment of two counsel.

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

'It is ordered that:

(a) The arrest of the *Seaspan Grouse* under case numbers A69/2016 and A70/2016 be and are hereby set aside.

(b) The Registrar of the High Court, Durban, is directed to release the cash held as security for the respondents' claims to an account nominated by the applicants' attorney of record within five (5) court days.

(c) The respondents are to pay the costs of this application.'

3 The period of five days in para (b) of the High Court's order in para 2 of this order is to run from the date of this order.

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M J D WALLIS

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A SCHIPPERS

JUDGES OF APPEAL

Makgoka J (Dissenting)

[65] I have had the privilege of reading the erudite judgment prepared by my colleagues Wallis JA and Schippers JA (the first judgment). Regrettably, I respectfully disagree with their construction of the relevant provisions of the AJRA. On my interpretation of those provisions, the right to arrest the vessel pursuant to the action in rem accrues as at the date on which an action in rem commences – the date of issue of the writ of summons, alternatively, such writ and the arrest. I would thus dismiss the appeal with costs. Below is a brief exposition of my reasons for that conclusion.

[66] The relevant facts giving rise to the dispute are common cause, and have been admirably set out in the first judgment. Thus, they will not be repeated here. The relevant sections of the AJRA are ss 1(2), 3(4), 3(5), 3(6), 3(7) and 6. The AJRA was amended on 1 July 1992 by the Admiralty Jurisdiction Regulation Amendment Act 87 of 1992 (the Amendment Act) in several respects.

[67] Before I consider the relevant provisions, I will briefly state the following: the nature and purpose of a maritime lien; the broad interpretational principles within which the provisions should be construed; a consideration of the state of our law as at the date of the enactment of the AJRA; and the policy considerations underlying the AJRA. I consider these, in turn.

[68] The nature and purpose of a maritime lien was aptly described by Binnie J in *Holt Cargo Systems Inc v ABC Containerline N.V (Trustees of)* [2001] SCC 90; [2001] 3 SCR 907 para 26:

‘Broadly speaking, a maritime lien arises without registration or other formality when debts of a specific nature are incurred by or on behalf of a ship. The lien creates a charge which “goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages” (*The Tolten*, [1946] P.135 (C.A), per Scott L.J., at p.150). It may be described, in that sense, as a “secret lien.”

As to the necessity for such a lien, the learned judge explained in para 27:

'The reason for this privileged status for maritime holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships. . . Merchant seamen will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage. The Master may be embarrassed for lack of funds, but the ship itself is assumed to be worth something and is readily available to provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence. The appellant Trustees' claim to "international comity" in matters of bankruptcy must therefore be weighed against competing considerations of a more ancient and at least equally practical international system – the law of maritime commerce.'

[69] South Africa has not been insulated from the practical difficulties and considerations referred to above. In the *Jute Express*[59] this court, with reference to Shaw *Admiralty Jurisdiction and Practice in South Africa* at 25 *et seq* and several English authorities, observed that the primary purpose of an arrest in an *in rem* action is 'to give the action utility and effectiveness by affording the plaintiff pre-judgment security'.

[70] The principles which should inform the interpretation of relevant provisions of the AJRA, are trite. They must be construed by a conventional process of statutory interpretation. This includes giving consideration to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provisions appears; the apparent purpose to which they are directed and the material known to those responsible for the enactment of the AJRA. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

[71] Section 39(2) of the Constitution enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. Where

[59] Supra fn 16.

the court is faced with two interpretations, one constitutionally valid and the other not, the court must adopt the constitutionally valid interpretation provided that to do so would not unduly strain the language of the statute. See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2000 (10) BCLR 1079;* 2001 (1) SA 545 (CC) paras 23-25. On the other hand, where a provision is reasonably capable of two interpretations, the one that better promotes the spirit, purport and objects of the Bill of Rights should be adopted. See *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) paras 46, 84 and 107. Courts must also adopt a generous and purposive approach as explained by the Constitutional Court in *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) para 46.

[72] At the outset, it is useful, for historical context to the AJRA, to establish the state of the law immediately prior to its promulgation. In this regard, s 6(1) is relevant. It provides that a court in exercise of its admiralty jurisdiction shall, with regard to any matter in respect of which a court of admiralty had jurisdiction immediately before the commencement of the Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such matter at such commencement, insofar as that law can be applied. Section 6(2) provides that the provisions of subsection (1) shall not derogate from the provisions of any other law of the Republic applicable to matters described in the subsection. Obviously, the AJRA is part of 'any other' law envisaged in s 6(2). Of course all these are subject to the Constitution.

[73] The principle entrenched in s 6 was accepted by this court in *Transol Bunker BV v MV Andrico Unity and Others: Grecian-Mar SRL v MV Andrico*

Unity and Others 1989 (4) SA 325 (SCA) at 334C-336B. The case concerned the recognition of foreign maritime liens in South Africa. It was held that when a South African court exercises its admiralty jurisdiction in terms of the AJRA, it was required to apply English admiralty law as it existed on 1 November 1983, including the relevant principles of English private international law. See also *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd and Others* 1995 (3) SA 663 (A) at 671H-J where this court had to decide on the conflict of laws, in particular which system of law governed the transfer of ownership of a ship. The court held that the issue had to be resolved by reference to the law applied by the English High Court exercising admiralty jurisdiction as at 1 November 1983.

[74] In *The Silver Star*[60] para 31 this court accepted that once the jurisdictional hurdles are overcome, the provisions of s 6 are applicable in the adjudication of maritime claims. There is no dispute that in this case the issue had moved beyond jurisdiction. It is common cause that the court a quo exercised admiralty jurisdiction to the 'matter' referred to in s 6(1), which related to whether the claimant had maritime lien over the property arrested, and thus whether the arrest orders should be set aside. This matter fell within the pre-existing jurisdiction of the court, which was enjoined to administer English law.

[75] In sum, therefore, by virtue of s 6(1) the law which would have applied immediately prior to the promulgation of the AJRA is the English admiralty law. It can be summarised as follows: With the institution of suit *in rem*, a contingent right of security is created upon the ship which will be brought into effect by the arrest of the ship, regardless of change of ownership between the issue and the arrest. This is the essence of the judgment in the *Monica S*[61], which was

[60] Supra fn 8.
[61] Supra fn 1.

underpinned by policy considerations to protect maritime claimants.[62] The judgment has been accepted and applied in a number of Commonwealth jurisdictions, including Hong Kong, Australia, and Singapore.

[76] In the court a quo, the parties, correctly in my view, accepted that the *Monica S* reflected our law prior to the promulgation of the AJRA, and that the latter mirrors that of its English and Commonwealth counterparts. That law is applicable unless it is incompatible with the AJRA or inconsistent with the Constitution. It is correct that the *Monica S* was based on the interpretation of the relevant provisions of English admiralty law. However, it assumes some importance by virtue of s 6(1). It also provides a useful historical context to the interpretation of the AJRA. Accordingly, the attempt by the appellants to minimise the significance of the judgment should not find favour.

[77] In the *Jute Express* this court was concerned with whether in terms of the AJRA (before the amendment in July 1992) an admiralty action *in rem* is commenced by arrest or by the issue of summons. An *in rem* arrest of a vessel had been pre-empted by the provision of security, giving rise to a deemed arrest in terms of s 3(10)(*a*). The court had regard to, among others, s 3(5) which provided that an action in rem is instituted by the arrest of property. Despite the wording of s 3(5), it was held that an admiralty action commenced with the issue of the *in rem* summons, and not with the arrest of the defendant vessel. With reference to Rule 5 of the rules made in terms of the English Vice-Admiralty Courts Act 1863 (in force in South Africa by virtue of the Colonial Courts of Admiralty Act 1890), the court concluded that an action *in rem* commences in all instances with the issue of summons. This was ‘either because of established

[62] A Mandaraka-Sheppard *Modern Maritime Law Volume 1: Jurisdiction and Risks* 3 ed (2013) at page 104.

procedural law or because of the terms of s 1(2)(*b*) of the Act' (at 20F). The latter section is the equivalent of the current s 1(2)(*a*)(iii). I shall return to this aspect.

[78] It is correct that the *Jute Express* did not express any view on the consequence of issuing a summons beyond saying it was a commencement of an action. However, the judgment remains relevant to the issue in dispute, for two reasons. First, it underlines the English heritage of South African maritime law, in particular the historical nature of an *in rem* action as it developed in English maritime law, which is stated in the *Monica S*. Second, it is significant in the manner in which it interpreted s 1(2)(*c*) in the original Act. It concluded that reference in that subsection to service of process by which the admiralty action is commenced, must be reference to the service of a summons *in personam*, and not *in rem*, because the commencement of an *in rem* action had been dealt with in s 1(2)(*b*).

[79] The *Jute Express* was delivered on 27 March 1992. As correctly pointed out in the first judgment, the Bill giving rise to the AJRA was tabled in parliament in February 1992, a month before the judgment, and that discussions around it had taken place many months before. It follows that the debates leading to the adoption of the Bill could not have been influenced by the *Jute Express*. However, the Bill was assented to by parliament on 18 June 1992, three and half months after the judgment was delivered. It is therefore more likely that before assenting to the Bill, parliament was aware of the judgment, in particular the construction this court had placed on s 1(2)(*c*) as stated above.

[80] It is safe to make this assumption because leading maritime law practitioners took a keen and active part in the shaping of the AJRA,[63] and

[63] See South African Law Commission's *Report on the Review of the Admiralty*, 1982.

presumably, the Amendment Act. The inference is thus almost irresistible that those who were responsible for the final draft of the Amendment Act must have had the *Jute Express* judgment before them when the Amendment Act was finally assented to. If that construction was at odds with its intention, the legislature would no doubt have clarified the point before the enactment of the Bill.

[81] What is more, there is no discernible suggestion in the Amendment Act to do away with the practice of issuing protective writs. The preamble to the Amendment Act states the purpose thereof as:

'To amend the Admiralty Jurisdiction Regulation Act, 1983, so as to define or define anew certain expressions; to further regulate court procedure; to extend the powers of the court regarding orders for the attachment of property to found jurisdiction; to make further provision for the sale of arrested property; to make express provision for referring claims against a fund to a referee; and to further regulate the ranking of claims; and to provide for matters connected therewith'.

[82] To my mind, therefore, the cumulative effect of s 6(1) and the *Jute Express* is a strong pointer that shortly before the commencement of the AJRA, the position of our admiralty law was as stated in the *Monica S*. That position, as already stated, was that an action *in rem* commenced with the issue of the writ of summons *in rem*, and could be enforced against the defendant vessel regardless of a change of ownership in the time before the arrest of the vessel.

[83] In construing the relevant provisions of the AJRA, it is important to bear in mind the important differences between the *in rem* and *in personam* procedures in the AJRA. As correctly pointed out in the respondents' supplementary written submissions, the *in rem* procedure is peculiar to admiralty jurisdiction, whereas the action *in personam* and attachment procedure derive their origins from the Roman-Dutch common law.

[84] Also, consideration should be given to the particular and unique difficulties which maritime claimants face in seeking to enforce their claims, and to the novel procedures which have developed over time to assist maritime claimants in this regard. These policy considerations have found expression in the AJRA, as accepted by this court in *The Heavy Metal*[64] and *The NYK Isabel*.[65]

[85] In *The Heavy Metal* at 1106I it was stated that the principal purpose of the AJRA is to assist the party applying for the arrest rather than the party opposing it. It was also observed at 1105G-H that the object of the associated ship arrest provisions was to enable the arrest of an associated ship instead of the guilty ship. Its purpose is to benefit the party applying for the arrest by providing it with a method of recovery against an alternative defendant. This affords the party relief to which it would otherwise not have been entitled.

[86] Similarly, in *The NYK Isabel* para 45, it was observed that the manifest purpose of the Act is to assist maritime claimants to enforce maritime claims. The provisions of the Act should therefore be given a generous interpretation consistent with that purpose. The appellants did not take issue with the policy consideration underlying the AJRA. Instead, their submission was that their construction of the relevant sections is not inconsistent with the said policy, and is moreover, constitutionally compliant.

[87] The above considerations, and the fact that the practice of issuing protective writs has been a long-standing practice in South Africa and a number of jurisdictions with which we share common-law heritage, largely influence my interpretation of the relevant sections of the AJRA, to which I now turn.

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[64] Supra fn 17.
[65] Supra fn 17.

[88] Before the amendment, s 1(2) read:

'For the purpose of any other law, whether of the Republic or not, relating to the prescription of or the limitation of time for the commencement of any action, suit, claim or proceedings, an admiralty action shall be deemed to have commenced –

(a) by the making of an application for the attachment of property to found jurisdiction if the application is granted and the attachment carried into effect;

(b) by the issue of any process for the institution of an action *in rem* if that process is thereafter served;

(c) by the service of any process by which that action is instituted.'

[89] After the amendment, s 1(2) reads:

'(*a*) An admiralty action shall for any relevant purpose commence-

(i) by the service of any process by which that action is instituted;

(ii) by the making of an application for the attachment of property to found jurisdiction;

(iii) by the issue of any process for the institution of an action *in rem*;

(iv) by the giving of security or an undertaking as contemplated in section 3(10)*(a).*

(*b*) An action commenced as contemplated in paragraph *(a)* shall lapse and be of no force and effect if-

(i) an application contemplated in (a)(ii) is not granted or is discharged or not confirmed;

(ii) no attachment is effected within twelve months of the grant of the order pursuant to such application or the final decision of the application;

(iii) a process contemplated in paragraph *(a)*(iii) is not served within twelve months of the issue thereof;

(iv) the property concerned is deemed in terms of section 3(10)*(a)*(ii) to have been released and discharged.'

[90] Section 3(4) provides for the enforcement of a maritime claim by an action *in rem*, subject to two alternate conditions: if the claimant has a maritime lien over the property to be arrested, or if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause

of action concerned. Section 3(6) provides for an action *in rem* to be brought by the arrest of an 'associated ship'. Section 3(7)(*a*) defines an 'associated ship'. Under the original definition, the person was required to own the associated ship when the maritime claim arose. In the amended version, ownership is required when the action is commenced.

[91] Before the amendment, s 1(2) was concerned only with statutory prescription or limitation of time for the action. In its amended form, it has been widened to include, in addition to those issues, the commencement date of admiralty action 'for any relevant purpose'. The amendment also retained the same requirement that the *in rem* summons be served or the attachment be put into effect, but incorporated relevant time limits in s 1(2)(*b*).

[92] On behalf of the appellants, it was submitted that the commencement date for a maritime claim by way of an action *in rem* may, for the relevant purpose, fall within ss 1(2)(*a*)(i) and 1(2)(*a*)(iii). Accordingly, although an admiralty action can only be commenced once, the actual commencement date must depend on the purpose relevant to that action. In terms of s 1(2) an action *in rem* is thus not only commenced by the mere issue of any process but also, in appropriate circumstances, 'by the service of any process by which that action is instituted.' Thus, submitted counsel, in the context of the commencement of an action in rem against an associated ship, the action commences either on the date upon the process instituting the action served, which date will coincide with the arrest of the vessel, or on the date of its deemed arrest (if security is given).

[93] I disagree. As counsel for the appellants accept, procedurally, an action can only commence once. The further difficulty with that contention is that there is a clear distinction between the two subsections. As correctly submitted on behalf of the respondents, properly construed, s 1(2)(*a*)(i) is restricted to an action *in*

personam, where it has not been necessary to attach property to found jurisdiction, and to any other proceedings which are not otherwise specifically provided for in s 1(2), but within the broad definition of admiralty action. Section 1(2)(*a*)(i) cannot possibly include an action *in rem* because such action is specifically provided for in ss 1(2)(*a*)(iii) and 1(2)(*b*)(iii).

[94] In the *Jute Express* reference was made to s 1(2)(*c*) – the equivalent of the current s 1(2)(*a*)(i) – as applying to an action *in personam*, distinct from s 1(2)(*b*) – the equivalent of the current s 1(2)(*a*)(iii) – which provides for an action *in rem*. Although s 1(2) has been amended, its essence remains the same post the amendment. There is therefore no reason why the construction adopted in the *Jute Express* in respect thereof should not be followed. It is a canon of interpretation that where the legislature employs words that have previously received judicial interpretation, and in a later statute uses the same language in dealing with the same subject matter, it intends that language so used by it be given meaning already judicially attributed to it. See *Ex Parte Minister of Justice: In re R v Bolon* 1941 AD 345 at 359-360.

[95] Section 1(2) must of course be read with the other relevant sections. With regard to s 3(4), it does not stipulate that the requirements set out in the subsection must be present at the time that the arrest is effected. It is therefore neutral in relation to when the requisite personal liability of the owner of the ship must be present for purposes of a direct action *in rem*. But, as stated already, s 1(2) provides that an admiralty action *in rem* commences, 'for any relevant purpose' with the issue of the *in rem* summons. Section 3(6) provides for an action *in rem* by the arrest of an associated ship, whereas s 3(7) – which defines an associated ship for the purposes of an action *in rem* – provides that the relevant time for determining the requisite control of the associated ship is when the action is commenced.

[96] On the appellants' construction, the relevant time for the determination of the requisite control of an associated ship would be different to the time for determining the requisite ownership of a ship which is the subject of a direct action in rem. It is difficult to accept that the legislature would have intended this. Properly construed, the better view seems to be that for purposes of an action *in rem*, the jurisdictional requirements must be present when the action commences, ie when the summons is issued, and the action *in rem* is thereby commenced. This construction is fortified by the wording of s 3(7) after the 1992 amendment. Whereas under the original definition the relevant time when the person or company, as the case may be, was required to own the associated ship was when the maritime claim arose, the section now provides that the relevant time is when the action is commenced. In any event, as already emphasised, this was our common law position as of 1 November 1983, derived from English law, as articulated in the *Monica S*.

[97] This leads me briefly to s 4(4)(d). It provides that a court may order the attachment of any ship, which, if the action concerned had been an action *in rem*, would be an associated ship. I must say this subsection does not seem particularly helpful in determining the relevant time when the jurisdictional requirements in an *in rem* action, should be present. Be that as it may, the attachment referred to in the subsection would found the court's jurisdiction for determination of the *in personam* liability of the ship concerned. This is because s 3(6) and s 3(7) do not relate for *in personam* liability of the associated ship's owner. It must be borne in mind that s 3(7) refers to 'when the action is commenced' in the definition of an associated ship. This must perforce refer to an action *in rem*, and not *in personam*.

[98] With regard to the constitutional injunction, it is instructive that the appellants, apart from not challenging the constitutionality of the AJRA, have not

identified any right likely to be infringed by the effect of a protective writ. However, the right likely to be implicated is in s 25 of the Constitution, which prohibits arbitrary deprivation of property. In the context of maritime law, and the peculiar difficulties associated with the enforcement of maritime claims, I am unpersuaded that the respondents' construction of the relevant provisions of the AJRA are not constitutionally compliant.

[99] The legislature would have been aware of the unique difficulties experienced by maritime claimants in enforcing their claims. Importantly, the legislature would have been aware of the long-standing practice of issuing protective writs *in rem* against defendant vessels to protect claimants against, among others, changes of ownership. As counsel for the respondents pointed out, the in personam debtor is in many instances, a peregrinus, and its vessels would be likely to call at a South African port sporadically, if at all. As such, a writ of summons in rem could be issued, but probably not served immediately.

[100] There is nothing in the AJRA that suggests that the legislature had intended a radical departure from the prevailing law as at the date of its enactment. And, once this is accepted that the *Monica S* principle reflected the law at that date, only the clearest intention of the legislature should gravitate us to the appellants' argument. At the risk of repetition, there is simply no such intention in the language of the AJRA as amended. I agree with counsel for the respondents that the process of issuing protective writs is entrenched, rather than done away with, in the AJRA.

[101] Thus, the construction contended for by the appellants would be a radical departure from the existing law, and would remove from the maritime claimants the right to issue protective writs, which had been a long-established practice.

Thus, absent a clear indication that the legislature intended to place South Africa on a radically different trajectory in admiralty law from the Commonwealth jurisdictions, it must be presumed to have intended to continue with the practice. The practical difficulties postulated in para 58 of the main judgment may point to inherent weaknesses in the AJRA. But they do not, in my view, lead to a result contrary to the intention of the legislature as shown by the context and other considerations referred to in this judgment. Put differently, those anomalies are not sufficient to deviate from the clear textual and contextual indications in the AJRA.

[102] Viewed in this light, the appellants' construction would be at odds with the presumption of statutory interpretation that the legislature is presumed not to intend changing the law more than is necessary, particularly when taking away existing rights. See *Cloete Murray N.O. and Another v Firstrand Bank Ltd* [2015] ZASCA 39; 2015 (3) SA 438 (SCA) para 40. In his work, *Interpretation of Statutes* (1992) 159, the learned author Devenish describes this as 'a seminal and pervasive presumption', which facilitates legal certainty and the administration of justice.

[103] The meaning that counsel for the appellants sought to assign to the relevant provisions of the AJRA is not supported by their plain wording, especially s 1(2), s 3(6) and s 3(7). Although the issue in dispute arises squarely for the first time in this case, how this court has interpreted related provisions previously provides some guidance. None of those cases support the appellants' interpretation, which, in my view, unduly strains the language of the Act. This is unnecessary, as the relevant provisions are clear and unambiguous, and permit only of the construction in favour of the respondents. The respondents' interpretation gives effect to the policy underlying the AJRA. Furthermore, it recognises the practical difficulties encountered by maritime claimants and the need for jurisprudential

comity among common-law jurisdictions. As trenchantly remarked by Rand J in *Laane and Balster v Estonian State Cargo & Passenger Steamship Line* [1949] SCR 530 at 545, in maritime commerce, 'rules of practical convenience commanding general assent are a virtual necessity'.

[104] In sum, I find the respondents' submissions far more compelling, especially given the historical context of the AJRA. For all these considerations I am impelled to the conclusion that the court a quo was correct in its interpretation of the relevant provisions of the AJRA. I would accordingly dismiss the appeal with costs, including costs of two counsel.

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T M MAKGOKA
JUDGE OF APPEAL

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