THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

Case no: 898/10

In the matter between:

TRANSNET LTD Appellant

and

THE OWNER OF THE MV 'ALINA II' Respondent

Neutral citation: *Transnet Ltd v The Owner of the Alina II* (898/10) [2011] ZASCA 129 (15 September 2011)

Coram: BRAND, PONNAN, MALAN, THERON and WALLIS JJA.

Heard: **29 August 2011**

Delivered: **15 September 2011**

Summary: Vessel arrested in actions in rem – thereafter plaintiff seeking an attachment *ad fundandam et confirmandam jurisdictionem* of vessel in respect of same claims – whether permissible – whether owner of vessel had submitted to jurisdiction of the South African court for purposes of an action in personam in respect of claims.

ORDER

On appeal from: Western Cape High Court, Cape Town (Griesel J sitting as court of first instance in the exercise of the court's admiralty jurisdiction) it is ordered that:

The appeal is dismissed with costs.

JUDGMENT

WALLIS JA (BRAND, PONNAN, MALAN AND THERON JJA CONCURRING)

[1] This appeal raises a short but important question of admiralty law and practice. A plaintiff commences an action in rem by way of the arrest of a vessel on the basis of the owner's personal liability for the claim. The owner of the vessel delivers notice of intention to defend the action in order to contest its liability for that claim. Can the plaintiff then obtain the attachment of the vessel to found and confirm jurisdiction[1] in separate proceedings in personam against the owner in respect of the same claims? The appellant, Transnet Ltd, says that it can, but the respondent, the owner of the *Alina II*, disputes this. The question arises in the following circumstances.

[2] Transnet is the port authority at Saldanha Bay and trades as Transnet Port Terminals and Transnet National Port Authority. It is responsible for the operation of the Langebaan Iron Ore Terminal at Saldanha Bay. On 29 October 2009 the *Alina II*, a bulk carrier, berthed at

[1] *Ad fundandam et confirmandam jurisdictionem.*

one of the two berths at the terminal and commenced loading a cargo of about 175 902 mt of Sishen iron ore fines. The vessel completed loading on 31 October 2009. It was then observed that it had taken on a port list and it was down by the head by about 50cm. Investigations revealed that this was due to the ingress of water into the No 2 Double Bottom port ballast tank caused by a fracture at frames 227-228.

[3] After this discovery the vessel remained at the berth until her cargo had been transhipped. This took time and it only left Saldanha Bay on 27 March 2010. Transnet contends that it has suffered damages in consequence of the vessel's occupation of the berth during this period. On 13 January 2010 Transnet caused the *Alina II* to be arrested in two actions in rem with a view to recovering those damages. There is no significant difference between the two and henceforth I will treat them as a single action. The owner of the vessel caused a notice of intention to defend to be delivered on 27 January 2010 and on 19 February 2010 Transnet delivered its particulars of claim. It suffices for present purposes to note that it advances claims in both contract and delict. The contractual claim is said to arise from a contract between Transnet and the owner of the vessel. The delictual claim is based on a legal duty allegedly owed by the owner to Transnet and a negligent breach of that duty by the owner, either personally or acting through the master and crew for whom the owner is said to be vicariously liable. Accordingly Transnet's claims are squarely based on the personal liability of the owner and are pursued in rem by virtue of the provisions of s 3(4)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act).

[4] On 19 March 2010 the vessel was again arrested in an action by four companies in the Kumba Mining group advancing claims of nearly

$275 million. This prompted the attorney acting for the owner[2] to send an e-mail to all the other parties having actual or potential claims against the vessel saying:

'Please be advised that:

1. Any security which the owners may put up should be limited to the value of vessels;

2. Let us know what you need in order to make a valuation of the vessel before she departs;

3. Be informed that any security which we provide to enable the vessel to depart is without prejudice to our rights to apply in due course to (1) reduce the security and/or (2) substitute it for security to cover all the claims against the vessel.'

This stance precipitated the application by Transnet for an attachment of the vessel *ad fundandam et confirmandam jurisdictionem*. The reason, as explained by Transnet's attorney in the founding affidavit, was that it believed that if it attached the vessel to commence an action in personam against its owner the vessel could only be released against the provision of security for the full amount of Transnet's claims.[3] The application was brought *ex parte* and without notice to the owner or its attorney in order to forestall a submission to the jurisdiction. The attachment order was made on 23 March 2010 and served on the master of the vessel the same day, the sheriff recording in his return of service that he explained 'the contents, nature and exigency thereof' to the master. He also affixed a copy to the windscreen of the superstructure of the vessel.

[5] On 26 March 2010 the vessel's P & I club provided a letter of undertaking in respect of the full amount of Transnet's claims and in

[2] Presumably in reliance on admiralty rule 4(7)(a)(ii).

[3] As held in *Yorigami Maritime Construction Company Limited v Nissho-Iwai Co Limited* 1977 (4) SA 682 (C). It is unnecessary to consider whether that judgment remains good law. See Malcolm Wallis *The Associated Ship & South African Admiralty Jurisdiction* (2010) at 348, fn 25.

respect of both the in rem and the in personam actions. This allowed the vessel to sail. Thereafter the owner opposed the confirmation of the attachment order. It did so on essentially two grounds. The first was that the attachment constituted an abuse of the process of the court. The second was that such an attachment was impermissible because, prior to the grant of the order or at least prior to the vessel being attached pursuant to that order, the owner had submitted to the court's jurisdiction and such submission precluded an attachment *ad fundandam et confirmandam jurisdictionem*.[4] It advanced this second contention on three bases. First it said that there had been an express submission in a letter of undertaking ('LOU') relating to potential pollution and wreck claims drafted and agreed between the owner's P & I club, Transnet, the South African Maritime Safety Association and the Department of Environmental Affairs, but never implemented because the need for it fell away. Second it relied on its having entered appearance to defend the in rem actions and the procedural steps it had taken pursuant thereto. Third it contended that, whilst the sheriff served the attachment order, he did not attach the vessel and there was a clear submission to the jurisdiction immediately the owner learned of the existence of the order.

[6] In the high court Griesel J upheld both the abuse of process and submission to the jurisdiction arguments, the latter on the footing that the submission was embodied in the LOU. Transnet appeals with his leave. It contends that the Act specifically contemplates and countenances a plaintiff pursuing its claims both by an action in rem and by an action in personam. These are said to be two totally distinct forms of

[4] In those circumstances an attachment is impermissible. *Jamieson v Sabingo* 2002 (4) SA 49 (SCA); *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 (SCA); *Tsung v Industrial Development Corporation of SA Limited* 2006 (4) SA 177 (SCA) paras 6 and 13.

proceedings so that the actions of the owner in relation to the in rem actions cannot amount to a submission to the jurisdiction in relation to the in personam claims against it. In advancing this argument submissions were made in regard to the nature of the action in rem and the effect of admiralty rule 8(3). In regard to the service of the attachment order it was said that the owner was incorrect in contending that in addition to service of the order it was necessary for the sheriff to serve a writ of attachment and accordingly service of the order sufficed to effect the attachment.

[7] In his heads of argument, counsel for the owner dealt with the effect of the owner defending the in rem actions under the rubric 'abuse of process/*lis pendens*'. The argument was that by defending those actions the owner had submitted to the jurisdiction of the court and in substance had become the defendant. Accordingly it was contended that, as there were already in existence actions against the owner to recover the same claims as were being pursued in the in personam action, the commencement of the latter action by way of the attachment was an abuse of process. It was a situation where there was a pending action involving the same parties, the same subject matter and the same causes of action (*lis pendens*) and this provided a proper basis for concluding that to permit a further action was an abuse of process.[5]

[8] These conflicting approaches resulted in a considerable debate in the heads of argument and before us about the true nature of the action in rem in South African admiralty procedure; the application in this country of what was said to be the principle laid down in *The Dictator*;[6] and the impact of admiralty rule 8(3) on that decision, so far as our

[5] *Hudson v Hudson and another* 1927 AD 259 at 268.
[6] *The Dictator* [1892] P 304.

admiralty law is concerned. Interesting though these issues are, the dispute between the parties is capable of being resolved on a narrow footing, without resolving all of them, and it is preferable to do so and to leave the remaining questions to be dealt with when they more pertinently arise.

[9] It is generally accepted that a claimant whose claim has not been satisfied after proceeding in rem is entitled thereafter to pursue a claim in personam for the balance. (This is of course only so if the owner is personally liable on the claim.) Put differently the judgment in rem does not merge in a judgment in personam.[7] This illustrates the point that it is possible to conceive of circumstances in which resort may be had to both forms of action, without oppression or abuse and for entirely legitimate reasons. Thus, for example, if the owner as the person liable in personam on the claim does not defend the action in rem and it is perfectly clear that the claim will not be satisfied in full, because it exceeds the value of the vessel (or the fund arising from its sale), the claimant may wish to pursue the claim in personam against the owner and to that end attach an asset to found the jurisdiction of the court. I am not satisfied that the Act precludes the claimant from doing that.[8] Certainly it seems an odd result to say that the in personam action can be pursued once the in rem action is complete, as is undoubtedly the case, but cannot run simultaneously. Accordingly for present purposes, I assume without deciding, that

[7] *The Cella* (1888) 13 PD 82 at 85; *The Rena K* [1979] 1 All ER 397 (QBD (Adm Ct)) at 416; *Republic of India & another v India Steamship Co Ltd (The " Indian Grace")(No 2)* [1996] 2 Lloyd's Rep 12 (CA) at 23.

[8] There are textual indications in the Act and the admiralty rules that this is permissible. In s 3(4) it is said that the right to institute proceedings in rem exists 'without prejudice to any other remedy that may be available to a claimant'. Rule 22(5) provides that the heading of documents in admiralty proceedings shall reflect whether the proceedings are in rem or in personam or in rem and in personam. Whilst one does not normally construe a statute by reference to the rules made under it the admiralty rules were drafted at the same time as the Act by the same person (Mr D J Shaw QC), albeit that for reasons unconnected with their contents they were not promulgated until three years after the Act came into force. As such the rules may be a guide to the thinking underlying the Act.

Transnet is correct in saying that the Act recognises two forms of procedure, namely the action in rem and the action in personam, and contains no prohibition on a person having resort to both in order to recover its claims.

[10] The mere fact that the Act does not prohibit a party from pursuing its claims by both forms of procedure is not decisive of the question of abuse of process. However, the power of the court to prevent a party from pursuing an otherwise legitimate course on the grounds of abuse of process is one to be exercised with caution.[9] That being so, it is preferable in the first instance to consider the arguments based on submission to the jurisdiction, because if there was such a submission in respect of these claims prior to the attachment being effected then the attachment order was correctly set aside. That is accepted by both parties.[10]

[11] Transnet's action in rem commenced with the arrest of the *Alina II* on 13 January 2010. On 27 January 2010 notice of intention to defend was delivered. The notice reflects that 'the Defendant' – ostensibly the ship – 'hereby gives notice of its intention to defend' and the attorneys described themselves as 'Defendant's attorneys'. However, that nomenclature arises from the manner in which the defendant in an action in rem is cited under admiralty rule 2(4). The instructions to give this notice could only have come from a natural or juristic person. In this case they came from the owner of the vessel. Had there been any confusion over this – and there is none, the allegation that the instructions came from the owner being admitted – it was open to Transnet to clarify this by invoking admiralty rule 22(4)(b)(i) in order to ascertain the identity of the

[9] As illustrated by the decision of the House of Lords in *Ashley & another v Chief Constable of Sussex Police* [2008] 3 All ER 573 (HL).
[10] See the authorities in fn 4.

party giving the notice of intention to defend. Although there was a submission that in this form it was unclear who had given the notice it is plain on the facts of this case that there was no confusion and Transnet was well aware that the notice was given on behalf of the owner of the vessel.

[12] By giving notice of intention to defend the action the owner of the *Alina II* came to the South African court to resist allegations that it was in breach of contractual obligations or alternatively guilty, directly or vicariously, of negligence for which it was liable in delict. The issues to be determined in the action were issues concerning the liability of the owner. The notice of intention to defend was given because the owner intended to defend itself against those allegations and to resist the claim that it was legally liable to compensate Transnet for the damages that it alleges it suffered in consequence of the *Alina II* being delayed in Saldanha Bay.

[13] It is of fundamental importance to the proper resolution of this case to recognise that the issue is whether the owner of the *Alina II* submitted itself to the jurisdiction of the South African court in respect of these claims and that such a submission may occur without any proceedings yet having been brought against the owner. That is an entirely different question from whether the entry of appearance to defend entitles the owner to challenge the jurisdiction of the court in the action in rem. Thus the plea in the action in rem places in issue whether the claims advanced by Transnet are maritime claims. The consequences of that point being upheld depend upon matters such as the proper interpretation of s 7(2) of the Act. It is unnecessary for those matters to be considered here, because we are not concerned with whether a judgment in rem can be granted

against the *Alina II* or even with whether the court has jurisdiction in the in rem actions. All we are concerned with is whether the owners have submitted to being sued in personam in South Africa.

[14] In *Mediterranean Shipping Co v Speedwell Shipping Co Ltd & another*[11] Van Heerden J said:

'Submission to the jurisdiction of a court is a wide concept and may be expressed in words or come about by agreement between the parties. *Voet* 2.1.18. It may arise through unilateral conduct following upon citation before a court which would ordinarily not be competent to give judgment against that particular defendant. *Voet* 2.1.20. Thus where a person not otherwise subject to the jurisdiction of a court submits himself by positive act or negatively by not objecting to the judgment of that court, he may, in cases such as actions sounding in money, confer jurisdiction on that court. Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 30; Pollak *The South African Law of Jurisdiction* at 84 *et seq.*'

It follows that the question of submission depends on the facts. It may be constituted by the terms of an agreement prior to litigation commencing. Thus, nominating a South African *domicilium citandi et executandi* in a contract, in conjunction with a choice of South African law, was held to constitute a submission to the jurisdiction in respect of any claims flowing from that contract.[12] Submission may arise from conduct in litigation commenced against a person before a court that lacks jurisdiction in respect of that person or that claim.[13] In the *Mediterranean Shipping* case it was said that:

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[11] *Mediterranean Shipping Co v Speedwell Shipping Co Ltd & another* 1986 (4) SA 329 (D) at 333E-G. The passage was approved by this court in *Purser v Sales; Purser & another v Sales & another* 2001 (3) SA 445 (SCA) para 13.

[12] *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd*, supra, paras 14 and 15.

[13] See the examples in *Du Preez v Philip-King* 1963 (1) SA 801 (W) at 803H-804G. In some of those cases participation in litigation up to the stage of *litis contestatio* was seen as crucial. That does not apply in a case where the question is whether the owner of a ship, by conduct in relation to an action in rem in which it has not been cited, has submitted to the jurisdiction of the court. In such a case the question is simply whether the conduct amounts to a submission, whatever stage the proceedings in rem have reached.

'Anyone who invokes the jurisdiction of this Court for relief under the Act must be taken – and can hardly be heard to contend otherwise – to have submitted to that jurisdiction …'[14]

There it was held that the attachment of a ship constituted a submission by the attaching party to the court's jurisdiction in respect of a claim for damages flowing from that attachment.

[15] The conduct of the owners in entering appearance to defend the in rem action unequivocally proclaimed their willingness to submit to the judgment of the South African court on the claims raised by Transnet. Their entry of appearance was not qualified or limited in any way. There is nothing in it to suggest that they were entering appearance for any purpose other than disputing the claims on their merits and that, as already noted, meant that they were entering into the question of their own liability to Transnet in respect of those claims. Thereafter (and before the application for attachment) they insisted on strict compliance with the time limits in respect of the filing of the particulars of claim; gave an undertaking to preserve documents; asked what security Transnet required in order to secure the release of the vessel; gave a notice under the rules requiring the production of documents; and, when this was not complied with, gave notice of their intention to apply to compel delivery, alternatively to strike out Transnet's claim. On the ordinary principles applied by our courts in regard to submission to jurisdiction the owners submitted themselves to the jurisdiction of the South African court in relation to these claims.

[16] What is said to make a difference is that all this occurred in proceedings in rem against the *Alina II* where, according to the contention

[14] At 334A.

on behalf of Transnet, the ordinary principles are inapplicable, because of the special character of such an action. This proposition encounters an immediate difficulty in that in English admiralty law, from which South Africa first acquired the action in rem, it was held in 1892 in *The Dictator*[15] that the effect of the owner of a ship entering appearance to defend an action in rem, where the owner is personally liable on the claim, is that the owner submits to the jurisdiction of the court in respect of that claim and any judgment given thereafter is capable of being executed against the owner personally. The plaintiff is not confined to the ship or execution against the bail given to secure the release of the vessel. Cognisant of this difficulty it was submitted in heads of argument on behalf of Transnet that the:

'… purpose of Admiralty Rule 8(3) was to reverse in its entirety the English rule originally formulated in *The Dictator* that once a defendant in an admiralty action in rem has entered an appearance in such action, he has submitted himself personally to the jurisdiction of the English Admiralty Court and the result is that the action thereafter continues against him not only as an action in rem, but also as an action in personam'.

[17] In order to consider this submission it is necessary to have regard to what was decided in *The Dictator*. It was a case concerning a claim for salvage. The owners of the ship and its cargo put in an appearance to defend the action and put up bail for £5 000, which was the full amount of the claim. Thereafter judgment was granted in an amount of £7 500. The issue was whether the plaintiff could simply proceed to execution against the owners on this judgment or whether they were restricted to executing against the bail for £5 000 and proceeding in a fresh action against the owners for the balance. The argument for the owners was that

[15] Footnote 6, supra.

in an action in rem judgment could not be given for more than the value of the vessel. At the outset Sir Francis Jeune said that:

'It is necessary to consider whether in an action in rem, *where a personal action would lie against the owners*, judgment can be enforced for more than the value of the res; because, if it can, no doubt it can be enforced for more than the amount of the bail.'[16] (Emphasis added.)

The stress on the existing personal liability of the owner is repeated throughout the judgment, which concerns only the effect of an appearance to defend being given by such an owner. The argument that the judgment could not be executed against the owner and that the balance of the claim should be pursued by a separate action in personam against the owners was based solely on the alleged admiralty practice. That practice, so it was said, precluded the engrafting of an action in personam on to an action in rem. Jeune J responded to this suggestion by saying:

'I cannot help thinking that the fallacy lies in considering that to enforce a judgement beyond the value of the res against owners who have appeared *and against whom a personal liability enforceable by Admiralty process exists,* is the grafting of one form of action on to another. The change, if it be a change, in the action is effected at an earlier stage, namely, when the defendant by appearing personally, introduces his personal liability.'[17] (Emphasis added.)

The conclusion he reached was that when owners defend an action in rem, in circumstances where they are personally liable on the claim, the judgment is one that can be enforced against the owners personally. That was based on the owner's existing personal liability and the submission to the jurisdiction of the court involved in entering appearance to defend the action, as well as on the form of process then

[16] At 310.
[17] At 319.

applicable in admiralty proceedings, which cited the vessel and all parties interested therein.

[18] The decision by Jeune J was challenged in the Court of Appeal in *The Gemma.*[18] That was a case of a claim for damages arising from a collision. After the vessel was arrested the owners entered appearance to defend and in due course put in a defence and a counterclaim. Smith LJ said of this:

'That the defendants then submitted to the jurisdiction of the Court I cannot doubt …'[19]

It is plain from a later reference to persons, whose ship has been arrested, appearing to fight out 'their liability'[20] that the court was concerned only with the position of the owner who was personally liable on the claim and who entered appearance to defend it. On that basis the court held that the judgment in the action could be enforced against the owners directly. In doing so it expressly approved the decision in *The Dictator*.

[19] These two cases were decided on the basis that the owners were personally liable on the claim. Their entry of appearance was taken as a submission to the court's jurisdiction. From that submission, and the mode of citation in admiralty, flowed the consequence that the judgment was against them personally and could be enforced to its full extent against all their property. There is no suggestion in either judgment that a party who entered appearance for the purpose of defending their interest in the vessel, but who was not personally liable in respect of the claim, thereby undertook liability for anything beyond the costs of the litigation.

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[18] *The Gemma* [1899] P 285.
[19] At 291.
[20] At 291.

In other words it was not suggested that entering appearance created a liability for the claim that did not otherwise exist.

[20] Whilst these decisions were subjected to criticism in *Williams and Bruce's Admiralty Practice*[21] they have been uniformly followed in England.[22] Nearly 100 years later Lord Brandon of Oakbrook said that:

'By the law of England, once a defendant in an Admiralty action in rem has entered an appearance in such action, *he has submitted himself personally to the jurisdiction of the English Admiralty Court*, and the result of that is that, from then on, the action continues against him not only as an action in rem but also as an action in personam …'[23] (Emphasis added.)

[21] In English admiralty law therefore, after entry of appearance to defend an action in rem, the action proceeds as both an action in rem and as an action in personam against the party giving the notice. Fletcher-Moulton LJ said that the decisions in *The Dictator* and *The Gemma* treat the entry of appearance as introducing the characteristics of an action in personam and described the position of the owner entering appearance in the following terms:

'It is an action in which the owners may take part, if they think proper, in defence of their property, but whether or not they will do so is for them to decide, and if they do

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[21] Mr Justice Bruce and Charles Fuhr Jemmett, assisted by George Grevill Phillimore, *A Treatise on the Jurisdiction and Practice of the English Courts in Admiralty Actions and Appeals being a Third Edition of Williams' and Bruce's Admiralty Practice* 3 ed (1902) at 18-26.

[22] *The Dupleix* [1912] P 8 at 15; *The Jupiter* [1924] P 236 at 242; *The Banco: Owners of the motor vessel Monte Ulia v Owners of the ships Banco & others* [1971] 1 All ER 524 (PDA and CA) at 531f-g. The position is the same in Australia. *Caltex Oil v The Dredge Willemstad* (1976) 136 CLR 529 at 539. After appearance in an action in rem 'the action proceeds as if it were an action in personam (without ceasing to be an action in rem) against that person. Once a relevant person files an appearance, the plaintiff will file a statement of claim "on each party who has entered an appearance" and the relevant person becomes liable to have judgment entered against it personally and to the full extent of the claim, not limited by the value of the ship …' per Allsop J in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* 2006 FCAFC 192 para 109, (2006) 238 ALR 457, (2006) 157 FCR 45. The position in Singapore is the same. *Kuo Fen Ching v Dauphin Offshore Engineering and Trading Pte Ltd* [1995] 3 SLR 721 at 726, 1999 SGCA 95.

[23] *The August 8* [1983] 2 AC 450 (PC) 456.

not decide to make themselves parties to the suit in order to defend their property, no personal liability can be established against them in that action.'[24]

[22] In a later case it was said that, when the owner who is personally liable enters an appearance, the action in England has a hybrid form, both in rem and, as against the owner, in personam.[25] It is important to note that in part at least this conclusion flowed from the form of the writ under which actions in rem were and still are instituted in that jurisdiction. The writ was addressed to the vessel and 'all persons claiming an interest in' the vessel. Accordingly when a person claiming such an interest entered appearance to defend they submitted to the jurisdiction in relation to a writ in which they were already cited. As Lord Wright put matters in *The Cristina*:[26]

'… under the modern and statutory form of a writ in rem, a defendant who appears becomes subject to the liability in personam. Thus the writ in rem becomes in effect also a writ in personam.'

[23] Lastly in this review of the English position, Hobhouse J in *The Nordglimt*[27] dealt with the position in the following terms:

'Unless and until anyone appears to defend an action in rem, the action proceeds solely as an action in rem and any judgment given is solely given against the res … An action in rem may be defended by anyone who has a legitimate interest in resisting the plaintiff's claim on the res. Such a person may be the owner of the res but equally it may be someone who has a different interest in the res which does not amount to ownership, or again it may be simply someone who also has a claim in rem against the res and is competing with the plaintiff for a right to the security of a res of

[24] *The Burns* [1907] P 137 at 149. There is of course nothing to prevent that personal liability from being established in other proceedings
[25] *The "Maciej Rataj"* [1992] 2 Lloyd's Rep 552 (CA) at 559 and 561.
[26] *Compania Naviera Vascongado v Steamship "Cristina" and Persons Claiming an Interest Therein* [1938] AC 485 (HL) at 505.
[27] *The Nordglimt* [1988] 2 All ER 531 (QBD) at 545e-g. Although that case was overruled in *Republic of India & another v India Steamship Co Ltd (The "Indian Grace")(No 2)* [1998] 1 Lloyd's Rep 1 (HL) the correctness of this passage was not questioned.

inadequate value to satisfy all the claims that are being made on it. It will also be understood from what I have said and from a general understanding of the law of maritime liens that the owner or other person defending the action may be under no personal liability to the plaintiff.

… Unless and until a person liable in personam chooses to defend an action in rem, the action in rem will not give rise to any determination as against such a person of any personal liability on his part, nor will it give rise to any judgment which is enforceable in personam against any such person.'

[24] There is thus a consistent stream of authority in English admiralty law, commencing with *The Dictator*, that holds that the entry of appearance to defend an action in rem is a submission to the jurisdiction of the court and that thereafter any judgment given is one both against the res and in personam against the person entering appearance, where that party is personally liable for the claim. That authority was undoubtedly binding on South African courts sitting as Colonial Courts of Admiralty prior to 1 November 1983, where they were required to apply the law as applied by the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction. Had any such issue arisen,[28] they would have been bound to apply the decision in *The Dictator*. Transnet's case is, however, that this is no longer so.

[25] The first stage at which South African admiralty law could have departed from the position in England and *The Dictator* was when the Act was passed. Whether that occurred would depend upon the terms of the Act itself. The question can be disposed of shortly as it is not a contention that Transnet advanced. When the Act was passed the action in rem was maintained because it was internationally recognised as a mode of bringing proceedings in maritime cases. Other than the introduction of the

[28] I am not aware of any case where the issue arose nor is there a reported judgment dealing with it.

associated ship there is nothing to suggest that the Act was intended to bring about a fundamental alteration in the nature and effect of the action in rem. Nor is there anything in the language of the Act itself to indicate that this was its purpose. As one commentator pointed out it would have been impractical to abandon the jurisprudence that created the concept of the action in rem whilst retaining the action.[29] That is plainly correct.

[26] Transnet's argument is that the departure from *The Dictator* arises from the provisions of admiralty rule 8(3), as it now is, formerly admiralty rule 6(3).[30] The case was presented on the footing that this change occurred when the Act came into operation on 1 November 1983, but that overlooked the fact that for the first three years of the Act's operation, up until 1 December 1986, the rules applicable to admiralty proceedings were the Rules of the Vice-Admiralty Courts,[31] which applied also to the Colonial Courts of Admiralty. Those rules followed the rules and forms applicable in admiralty proceedings in England in the High Court of Justice sitting in the exercise of its admiralty jurisdiction. A writ of summons[32] was addressed:

'To the owner and all others interested in the ship [her cargo and freight &c., *or as the case may be*].'

Under rule 19 a party entering appearance would file the appearance at the place directed in the writ. The appearance had to be signed by the party appearing and state his name and address and an address for service.[33] If the party appearing had a set-off or counterclaim against the plaintiff he was entitled to endorse on the appearance a statement of the

[29] Gys Hofmeyr 'Admiralty Jurisdiction in South Africa' 1982 *Acta Juridica* 30 at 47.
[30] The two are in the same terms. The original rules came into force on 1 December 1996 and they were repealed and replaced on 18 April 1997. For most present purposes it suffices to refer to rule 8(3) as if it applied throughout the relevant period.
[31] Promulgated under an Order in Council dated 23 August 1883.
[32] Form 4.
[33] Rule 22.

nature thereof and of the relief or remedy required, and of the amount if any of the set-off or counterclaim.[34] It is plain from the rules dealing with parties[35] that the 'party' referred to in these rules is not the ship but the person, such as the owner, charterer, mortgagee and insurer, who had entered appearance to defend an action.

[27] Bail for the release of the vessel was to be given by sureties.[36] Under rule 55 actions would ordinarily be heard without pleadings[37] but if pleadings were required the plaintiff and the party defending the action, who was referred to in the rule as the defendant, filed them. All the rules dealing with the conduct of proceedings refer to a 'party' and this is always a reference to the plaintiff or the party defending the action, not the vessel. In other words, the rules in force under the Act, from the date it came into force on 1 November 1983, were entirely consistent with the continued application in South Africa of the approach adopted in *The Dictator* that the entry of appearance to defend by an owner personally liable for a claim amounted to a submission to the jurisdiction and the action would thereafter continue as both an action in rem and an action in personam against the owner.

[28] The argument that when rule 6(3) came into force on 1 December 1986 it altered the position, raises certain major difficulties. It is however unnecessary to address these as I am satisfied that on a proper construction of rule 8(3)[38] it does not have the suggested effect. The rule reads:

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[34] Rule 21.
[35] Rules 23 to 26.
[36] Rules 39 to 46.
[37] As was the case of *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (A).
[38] This rule replaced rule 6(3) with effect from 19 May 1997 but is in identical terms.

'A person giving notice of intention to defend an action in rem shall not merely by reason thereof incur any liability and shall, in particular, not become liable in personam, save as to costs, merely by reason of having given such notice and having defended the action in rem.'

On its plain language the rule is concerned only with whether the effect of entering an appearance to defend and defending an action in rem is to attract liability in respect of the claim. It provides that such liability will not arise 'merely' in consequence of the entry of appearance to defend. It says nothing about the position of the person whose liability in respect of the claim arose before the commencement of the action out of the circumstances giving rise to the claim. That was the view of Douglas Shaw QC, who wrote about the rule that:

'This rule does not affect any liability which might otherwise exist, a subject which has been dealt with. It merely provides that the procedural step of giving notice of intention to defend and defending the action is not to subject anyone to the greater liability.'[39]

[29] The reference in that passage to the question of liability is a reference to an earlier statement by Shaw that the entry of appearance to defend is 'a submission to the jurisdiction, not an acceptance of liability'.[40] That statement gives a clue to the problem that the rule addresses. It is the perception – I believe an erroneous perception – that the judgment in *The Dictator* held that a person who enters appearance in an action in rem thereby, and without more, attracts personal liability for

[39] D J Shaw QC *Admiralty Jurisdiction and Practice in South Africa* at 112.

[40] At p 31. The same view appears to be held by Gys Hofmeyr SC in the draft of the relevant chapter of the second edition of his work *Admiralty Jurisdiction Law and Practice in South Africa*, a copy of which was made available to us by counsel, with his consent. In fn 74 he writes: 'A person who intervenes and defends the action – whether personally liable in respect of the claim or not – submits to the jurisdiction of the court to make orders relating to that defence, such as an order as to costs.' Where the person intervening is personally liable in respect of the claim there is no apparent reason why that should not be treated as a submission to the jurisdiction in respect of the claim. Whether the plaintiff wishes to take advantage of that or is content to pursue the matter in rem alone is for the plaintiff to decide.

the claim.[41] It is true that in a number of cases in England and elsewhere there are statements that, by entering appearance to defend, the owner introduces its personal liability, or statements to similar effect. In my view those statements are misleading insofar as they are taken to suggest that this is a liability arising from the fact of entering appearance to defend, as opposed to a pre-existing liability that can be enforced against the owner in those proceedings, by virtue of the owner's submission to the jurisdiction. In my view *The Dictator* is authority for only two propositions. The first is that, as Shaw says, entering appearance to defend (and, I would add, thereafter defending) an action in rem is a submission to the jurisdiction of the court. The second is that where the person entering appearance to defend is personally liable on the claim, under the forms of procedure then applicable in the English courts exercising admiralty jurisdiction, that person has been cited and submitted to the court's jurisdiction, and any judgment thereafter will be enforceable as a judgment in personam against that person.

[30] Under the present admiralty rules in South Africa the second of these consequences would not flow from the entry of appearance to defend and the defence of the in rem action. The reason is that in terms of admiralty rule 2(4), read with form 1 to the admiralty rules, the summons in rem is not addressed to and does not cite the owner or other persons having an interest in the vessel or other res arrested in order to commence the action. In this our rules have departed from the forms that applied in England, as referred to by Lord Wright in *The Cristina*, supra, and the forms previously applicable in South Africa, both when our courts sat as Colonial Courts of Admiralty and in the first three years of operation of

[41] There are passages in some academic writing as well as in certain judgments that suggest that some maritime lawyers held this view.

the Act.[42] One may therefore have a submission to the court's jurisdiction by a person not cited as a party.[43] However the problem, if it be one, is readily overcome by amending the summons to join that person and to reflect, as rule 22(5) contemplates, that the action will proceed as an action both in rem against the vessel and in personam against that person, with such consequential amendments as the circumstances may require. Alternatively a separate action in personam can be commenced on the basis of the submission to the court's jurisdiction. Some such procedural step seems to be necessary in this country in order that the action (and ultimately any judgment) reflects the party entering appearance as a party to the judgment. However, that is immaterial to the outcome of this case, where the only issue is whether the owners of the *Alina II* submitted to the jurisdiction of the South African court before the attachment order was granted.

[31] If, which I don't think is the case, *The Dictator* is authority for the further proposition that a person entering appearance in an action in rem thereby incurs personal liability on the underlying claim, irrespective of whether it is otherwise personally liable on that claim, that would not affect the understanding of rule 8(3). The only difference would be that it

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[42] In England in terms of Practice Directive 61.3.3 issued under CPR 61 the defendant must be described in the claim form. This requirement is satisfied by describing the defendant as 'the owners or demise charterers of the ship'. Nigel Meeson *Admiralty Jurisdiction and Practice* 3 ed (2003) para 4.5, p 126. In Australia admiralty rule 15(1) requires that process initiating an action in rem must specify a relevant person in relation to the maritime claim. The definition of relevant person in s 3(1) of the Admiralty Act 1988 (Cth) provides that it means a person who would be liable on the claim in proceedings in personam. Liability attaches by virtue of the express provisions of s 31(1) of the Admiralty Act 1988 (Cth). In New Zealand a notice of proceeding in rem under form 69 to the admiralty rules is addressed to 'the owners and all others interested in' the vessel or property to be arrested. The form of a summons in rem in Singapore and Hong Kong is similar. The relevant statutes, rules and forms are to be found in the appendices in Damien J Cremean *Admiralty Jurisdiction Law and Practice in Australia, New Zealand, Singapore and Hong Kong* 3 ed (2008). The difference in procedural forms between these countries and South Africa enables the action in them to continue as both an action in rem and an action in personam after the entry of appearance to defend, without the need for an amendment of the summons or the issue of some other form of process commencing action.

[43] Admiralty rule 8(4) provides for notice of intention to defend to be given by a person on whom the summons has not been served or even where there has been no service at all of the summons.

would then be addressed to a real rather than a perceived issue arising from that judgment. Whether the rule could validly have the effect of reversing this would then arise. That is no reason for treating the rule as affecting the question of submission to the jurisdiction.

[32] We were referred to three judgments in support of the contention that rule 8(3) reversed the decision in *The Dictator* in its entirety and is not limited to making it clear that entering appearance to defend and defending an in rem action does not create or impose a liability on the person entering the appearance. The first in point of time is that in *SA Boatyards CC (t/a Hout Bay Boatyard) v The Lady Rose (formerly known as the Shiza*[44] and reliance is placed upon a comment by Scott J that:

'The effect of the Rule would seem to be to re-establish the position which prevailed in England prior to *The Dictator* (cf Thomas *Maritime Liens* para 92) and the rule is probably the result of criticism levelled at the extension of the owner's liability which has occurred since the last decade of the previous century (cf Jackson *Enforcement of Maritime Claims* at 59;[45] *Shaw* (*op cit* at 31))'[46]

However that overlooks the next sentence where the learned judge said:

'It does not follow, however, that merely because the owner defending an action in rem does not incur personal liability (save for costs) he is necessarily to be regarded as a stranger to the suit and not entitled to counterclaim.'

The issue in that case was whether an owner defending an action in rem was entitled to raise a counterclaim. Scott J held that he could, thereby recognising that the effect of entering appearance to defend is to bring before the court the party entering appearance.[47] The tentative comment that prefaced this lends no support to Transnet's contentions.

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[44] *SA Boatyards CC (t/a Hout Bay Boatyard) v The Lady Rose (formerly known as the Shiza* 1991 (3) SA 711 (C).
[45] Later editions of Professor Jackson's work do not contain any such criticism.
[46] At 715F-H.
[47] This was the position under the Vice-Admiralty Rules and is the present position under rule 10.

[33] The most pertinent judgment is that of Farlam J in *Bouyges Offshore & another v Owner of the MT Tigr & another*.[48] The issue in that case was the same as that in this case, namely whether an attachment to found and confirm jurisdiction should be confirmed in a case where there was already an action in rem against the *Tigr* that was being defended by its owners. Confirmation of the attachment was opposed on the grounds that the owner was liable in rem because its asset would be sold in order to satisfy any judgment and that English law as expressed in *The August 8*, supra, applied, so that after entering appearance to defend the action in rem proceeded also as an action in personam.[49] Having rejected an argument that the rule is invalid, the key to Farlam J's decision lies in the following passage:

'By our procedure, as set forth in the Rule, such an owner is not regarded as having submitted to the in personam jurisdiction of the Court. It follows further that first respondent did not, by taking the steps to which I have referred, submit to this Court's in personam jurisdiction.'[50]

[34] With great respect I cannot accept this as a correct statement of the law. First the rule does not say anything about the question of submission to the jurisdiction or about procedure. Its focus is solely and expressly on the liability of the person who enters appearance to defend and defends an action. That is an entirely separate issue from any question of submission to the jurisdiction. Second the distinction drawn between the in rem and the in personam jurisdiction of the court is fallacious. The jurisdiction conferred on our courts under the Act is set out in s 2 of the Act and is a jurisdiction to hear and determine maritime claims as defined in s 1 of the

[48] *Bouyges Offshore & another v Owner of the MT Tigr & another* 1995 (4) SA 49 (C).
[49] As pointed out in para 30, that could not be the case without an amendment to join the owner as a party in personam.
[50] At 67J-68B.

Act. The action in personam and the action in rem are dealt with in s 3 of the Act under the heading 'Form of proceedings'. They are the modes by which maritime claims can be enforced before a court having jurisdiction but it is erroneous to treat the court as exercising two separate and distinct jurisdictions, one in personam and the other in rem. The question is simply whether there has been a submission to the jurisdiction of the court in respect of those claims. That question is to be addressed in accordance with ordinary principles governing submission to the jurisdiction of the courts. In this case there clearly was such a submission.

[35] The third judgment is *MT Argun: MT Argun v Master and Crew of the MT Argun & others*.[51] That dealt with the effect of the lapsing of an arrest. After quoting the passage from *The August 8* cited in para 20, Farlam JA said:

'If the present case had been heard in England, therefore, on the lapsing of the arrest of the vessel the actions would at the very least have continued as actions in personam against the vessel's owner. That that is not our law is clear from Rule 8(3), the material provisions of which are quoted in para [20] of this judgment.'[52]

Our law on this differs from English law because in English law the form of citation in an action in rem requires the identification and citation of the defendant, so that procedurally, once there is a submission to the jurisdiction by the defendant, that person is fully before the court. In our procedure only the vessel is cited so that, until there is an amendment of the summons, the party entering appearance to defend is not as such before the court. The difference is not ascribable to the provisions of rule 8(3) and the dictum to that effect is not correct.

[51] *MT Argun: MT Argun v Master and Crew of the MT Argun & others* 2004 (1) SA 1 (SCA).
[52] Para 26.

[36] For those reasons the proposition that admiralty rule 8(3) reverses that aspect of the decision in *The Dictator* that held that, when a person enters an appearance in an admiralty action in rem, that is a submission to the jurisdiction of the court, is incorrect. The rule is silent on the question of submission to the jurisdiction and there is no reason why that should not be dealt with in admiralty proceedings in the same way in which our courts deal with it in the exercise of their ordinary jurisdiction. On the facts set out in para 15 the owner of the *Alina II* had submitted to the court's jurisdiction in respect of the claims by Transnet prior to the order for attachment being obtained. That order should not therefore have been granted and the high court was correct not to confirm it.

[37] In arriving at that conclusion it is unnecessary to express any final view on any other aspect of the decision in *The Dictator*, or the nature of the action in rem, or to consider whether the judgment of Lord Steyn in *The Indian Grace (No 2)*[53] should be followed in South Africa. It is also unnecessary to decide whether there may be circumstances in which a party may enter appearance to defend an action in rem on such terms as to avoid submitting to the court's jurisdiction in respect of that person's personal liability on the claim. It suffices to say that on all the facts of this case there was a submission to the court's jurisdiction. That conclusion renders it unnecessary to consider the other points debated in argument.

[38] The appeal is dismissed with costs, such costs to include those consequent on the employment of two counsel.

[53] Footnote 27 ante.

M J D WALLIS

JUDGE OF APPEAL

Appearances

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