

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA**

CASE NO: A16/2006

(EXERCISING ITS ADMIRALTY JURISDICTION)

NAME OF VESSEL: **MV “MADAGASCAR”**

In the matter between

JACOBUS RITCHEE MAREE N.O.

APPLICANT

And

**THE FUND CONSTITUTED FROM THE
PROCEEDS OF THE SALE OF THE
MV “MADAGASCAR”**

FIRST RESPONDENT

FRITRA LIMITED

SECOND RESPONDENT

**SHATIEK SHIPPING SA
APPLICANT**

FIRST INTERVENING

FRANS DERUYTER

**SECOND INTERVENING
APPLICANT**

MONALISA SA

THIRD RESPONDENT

JUDGMENT

Deliver

ed on: 18 January 2010

JAPPIE J

[1] This is an interlocutory application by Shatiek Shipping SA which is the “first intervening applicant”, (and hereinafter referred to as “the owner”) and Frans DeRuyter who is the “second intervening applicant”, (and is hereinafter referred to as “DeRuyter”), for an order that:

- (i) The first and second intervening applicants be given leave to intervene in the main application.
- (ii) The recommendations in respect of the distribution of the first respondent fund contained in the report of the referee, Andrew Jack Pike, dated 20th September 2008 (be) confirmed by authorising and directing the Registrar to make payment from the first respondent fund to the first and second intervening applicants in the following amounts:
 - (a) ZAR2,040,968.45 together with interest in the amount of ZAR168,142.25 and costs in the sum of ZAR25,281.30, ranked in terms of section 11(4)(a) of the Admiralty Jurisdiction Regulation Act, 1983 (‘the Act’);
 - (b) US \$115,162.16 together with interest thereon in the sum of US \$9,487.47, which is ranked in terms of section 11(4)(a) of the Act;

- (c) US \$62,500.00 together with interest thereon in the sum of US \$ 5,148.97, this claim to be ranked in terms of section 11(4)(a) of the Act.
- (iii) The first and second intervening applicant's cost in bringing this application be paid from the first respondent fund on an attorney and own client scale in accordance with the ranking in terms of section 11(4)(a) of the Act, alternatively, by any person who opposes the application.

[2] The order sought is opposed by Fritra Limited which is "the second respondent", (and hereinafter referred to as "Fritra"), and Monalisa SA which is "the third respondent", (and is hereinafter referred to as "Monalisa"). Fritra and Monalisa are claimants against the fund constituted from the proceeds of the sale of the MV "Madagascar" which is "the first respondent", (and is herein referred to as "the fund"). Their share in the fund will be affected in the event of the claims submitted by the owner and DeRuyter being allowed.

BACKGROUND

[3] The MV MADAGASCAR referred to hereinafter as ("the vessel") was owned by Shatiek Shipping SA, a company incorporated in Liberia. DeRuyter is the sole shareholder of the owner of the vessel. He acquired the shares in March 2005 when the vessel was being

refitted and refurbished in Odessa in the Ukraine. Fritra was appointed by the owner of the vessel as it's agent for the purposes of procuring, contracting for and overseeing the refit and refurbishing of the vessel. The vessel was subsequently brought to Durban and on the 2nd December 2005 she was arrested for a claim *in rem* by Fritra which asserted various claims against it out of its appointment as the agent of the vessel's owner. As the vessel sat in Durban and after her arrest on the 2nd December 2005 various other creditors joined in the arrest of the vessel in respect of their claims.

[4] On the 25th March 2008 and in terms of section 9 of the Act, an order for her judicial sale by auction was granted. This order provided for the appointment of a referee, namely, Mr Andrew Pike, and further set out the process for the submission of claims against the fund constituted from the proceeds of the sale of the vessel, as well as any objections to whatever claims there were and for the referee to make recommendations with regard to the payment of the claims.

[5] The vessel was subsequently sold for approximately \$930 000 and the sale was confirmed by order of Court on the 23rd April 2008. On the 23rd May 2008, DeRuyter filed his claim with the referee. Thereafter, Fritra and Monalisa objected to DeRuyter's claim. On the 21st September 2008 the referee filed his report. On the 8th November 2008 the Sheriff launched the main application for the

payment out of the fund and which commenced the present proceedings.

THE INTERVENING APPLICANT'S CLAIMS

[6] DeRuyter seeks payment of three amounts. These amounts are:

1. R2 040 968.45 together with interest in the amount of R168 142.25
and costs in the amount of R25 281.30.
2. US \$115 162.16 together with interest thereon in the amount of US \$9 487.47, and
3. US \$62 500 with interest thereon in the amount of US \$5 148.97.

The referee has allowed DeRuyter's claims in respect of two amounts for R2 040 968.45 and US \$115 162.16. These two amounts he ranked in terms of section 11(4)(a) of the Act. However, he made no finding in regard to whether DeRuyter was entitled to interest on the said amounts.

[7] Although the referee has recommended payment to DeRuyter of the aforesaid amounts of R2 040 968.45 and US \$115 162.16, both Fritra and Monalisa have objected to this. The assertions De Ruyter makes in support of his claim have been met on the papers before me by denials and counter-assertions by Fritra and Monalisa. There is, therefore, an irresoluble dispute of fact as to the amounts paid by DeRuyter and therefore there is a dispute as to whether or not he is entitled to payment of the said amounts claimed by him, let alone to any interest on the aforesaid amounts.

[8] However, the question I am called upon to decide and to which the arguments presented before me were confined relates to the sufficiency in law of the allegations made on the affidavits by DeRuyter to sustain a cause of action. That is to say that I am to treat the opposition by Fritra and Monalisa in the matter before me as an exception to the claim of DeRuyter.

[9] The objection to the claim submitted by DeRuyter is summarised in paragraph 47.1 in the affidavit of Anisa Govender. It reads as follows:

“The claim is bad in law and in principle as Frans DeRuyter as sole shareholder of the erstwhile owning company of the vessel, Shatiek Shipping SA, in incurring the expenditure now being claimed against the

fund, was merely capitalising an asset of the owning company. His claim lies rightly against Shatiek Shipping SA.”

DERUYTER’S CAUSE OF ACTION

[10] In the affidavit in support of his claim, DeRuyter explained the reason he bought the shareholdings in the owner of the vessel rather than the vessel, was that he had been advised that while the transfer of the shares in the owner of the vessel was relatively safe for, the transfer and registration of the vessel into his name or that of any other entity in which he was the sole shareholder would be far more complex. He further explained that the owner of the vessel had no assets or books of account. He therefore, “personally undertook the settlement of most of the vessels creditors. I was prepared to do so on the basis that the funds expended would, I believed, result in considerable enhancement in the value of the sole asset of the owner, namely the vessel. Hence, by expending funds of the vessel, I believe I was directly increasing the value of my shareholdings in the owner.”

[11] As the matter is to be treated as if it were an exception, it follows that the allegations made by DeRuyter must be accepted as correct and it is these allegations that must be considered as to whether they make out a claim in law.

[12] When a vessel is sold pursuant to an Order in terms of section 9(1) of the Act, section 9(2) provides:

“The proceeds of any property so sold shall constitute a fund to be held in court or to be otherwise dealt with, as may be provided by the rules or by any order of court.”

The fund now stands in place of the ship and any party asserting a claim against the fund must have a claim against the ship being either, a maritime claim or a claim *in personam* against the owner of the ship.

[13] DeRuyter alleges that his claim against the fund is for a maritime claim. The two amounts, namely R2 040 968.45 and US \$115 162.16 were monies he caused to be disbursed in settlement of most of the vessel’s creditors. If he had not disbursed or caused to disburse the aforesaid amounts to the vessels creditors then the owner of the vessel would otherwise have been liable for the same. The referee allowed the claim in respect of the two aforesaid amounts. The referee gave his reason for this (at page 48 line 18 onwards) as follows:

“The vital questions, therefore, are:

- Whether the loans by shareholder to his company for purposes of operating the company’s sole asset, a ship are, a maritime claim;

- Whether such loans can rank in terms of section 11 of the Act;
- When monies are not lent directly to the company by the shareholder, but are rather paid directly to the suppliers, what difference does this make?

I believe that such loans are maritime claims in terms of section 1(1)(o) of the Act which states:

“... any claim for, arising out of or relating to...payments or disbursements by...any other person for or on behalf of or on account of a ship or the owner...of the ship.” (my emphasis)

If a third party had lent money to a shipowner to enable the latter to operate his vessel, that would be a maritime claim. I see no reason in this sub-section to distinguish between a shareholder and an independent person.”

[14] In my view, the reasoning of the referee cannot be faulted. Section 1(1)(o) provides:

“In this Act, unless the context indicates otherwise – maritime claim means any claim for, arising out of or relating to – payments or disbursements by a master, shipper, charterer, agent or any other person for or on behalf of or on account of a ship or the owner or charterer of a ship.”

DeRuyter alleges that he personally undertook the settlement of most of the vessels creditors. In the event of DeRuyter being successful in establishing that he had disbursed or caused to disburse monies in settlement of the vessel's creditors then, in my view he would have established a maritime claim against the fund as defined in section 1(1)(o) of the Act. There is nothing in the Act which suggests that DeRuyter is barred from relying on the aforesaid section in asserting a maritime claim. There is nothing to suggest that DeRuyter does not fall within the meaning of the words, "any other person", as it appears in the subsection.

[15] The ranking of the various amounts claimed will of course depend upon the purpose for which the various amounts were disbursed. The referee has ranked the amounts in dispute falling under section 11(4)(a) of the Act. Fritra has objected to this ranking. As the issue of the ranking of the disputed claims is a factual dispute, it is a matter that can only be resolved by oral evidence.

[16] The referee has disallowed the claim in the sum of US \$62 500. DeRuyter claimed that this amount represents monies disbursed by him in respect of wages for the crew. He claims ranking in terms of section 11(4)(a) of the Act. According to the referee, the only supporting documentation for this claim was a handwritten document which reflected the sum of US \$62 500 written upon it together with a

bank statement which shows a debit of R400 000.00 against the bank account of Mrs S. DeRuyter. The referee concluded:

“Accordingly, in the absence of any form of documentation other than a remittance to the agent, and in the absence of a formal confirming affidavit from the agent, I agree with Fritra’s objection and recommend that US \$62 500 should not be allowed.”

[17] It is apparent that the referee had disallowed the claim of US \$62 500 for lack of clear proof. Fritra’s objection before me is to the effect that even if DeRuyter could prove that he had paid the crews wages in the amount of

US \$62 500, the claim is nevertheless not a maritime claim, and for that reason the claim should be disallowed. It is contended that DeRuyter’s claim amount in substance to claims of the owner of the vessel, and the owner of the vessel is not given a substantive right against the fund independent of any claim that it would otherwise have to the residue of the fund after other claims have been paid.

[18] DeRuyter relied on section 11(8) of the Act for his assertion that he has a maritime claim. This section reads as follows:

“Any person who has, at any time, paid any claim or any part thereof which, if not paid, would have ranked under this section, shall be entitled

to all the rights, privileges and preferences to which the person paid would have been entitled if the claim had not been paid.”

Counsel for Fritra and Monalisa have submitted that section 11(8) of the Act does not provide a substantive right against the fund independent of any claim that the person who paid would otherwise have had. It was argued that the owner who pays its own debt to suppliers to its vessel cannot subsequently assert claims for repayment from the fund. It is submitted that this then must be true for any third party, like DeRuyter, who pays the owner’s debts without otherwise acquiring a claim against the owner. It was further submitted that to interpret section 11(8) of the Act in the manner suggested on behalf of DeRuyter would be patently unfair. Clearly, DeRuyter had paid the debts of the owner of the vessel. As sole shareholder of the owner of the vessel in seeking reimbursement for the amounts he had disbursed leads to an anomalous situation that the owner of the vessel claims reimbursement for its own debts. Therefore, to allow DeRuyter’s claim would be to allow DeRuyter to steal a march on what in effect are his own creditors.

[19] Prior to the promulgation of the present Act, DeRuyter would not have otherwise have had a maritime claim. In the case of *The Petone*,¹ it was held that the person in position of a volunteer who has

¹ [1917] P198 At P208

made payment in discharge of seaman's wages do not thereby acquire the seaman's maritime claim. Mr Justice Hill stated the position as follows:

“But I know of no principle in English law which says that one who being under no compulsion and under no necessity to protect his own property, but as a volunteer, makes a payment to a privileged creditor, is entitled to the rights and remedies of the person whom he pays. That is the position of the plaintiffs. They choose as volunteers to pay off debts which constitute a maritime claim upon the ship. They did not, in my opinion, thereby acquire any maritime claim.”

The promulgation of the present Act has changed the position considerably. In *MAK MEDITERRANEE SARL v THE FUND CONSTITUTING THE PROCEEDS OF THE JUDICIAL SALE OF THE M C THUNDER (S D Arch interested party)*² the following appears:

“A question which caused some difficulty in the past was whether a person who voluntarily pays a seaman's claim for wages acquired the latter's lien and priority. By the early 20th century, however, and particularly following the judgment of Hill J, in *The Petone* [1917] P 198, it had become established that a person who voluntarily pays the claim of the seaman does not acquire the latter's lien and priority unless, before

² 1994 (3) SA 599 (C) at 607H-608B

making such payment, he obtains the leave of the Court. In other words, without the consent of the Court, the seaman's maritime lien with all its advantages is not transferable. [See *Roscoe (op cit* at 218); *Thomas (op cit* paras 474-6)].

Seen against this background, it would appear likely that the purpose of s 11(8) was to obviate the need of a person who voluntarily pays the claim of a lienee, such as a seaman, to have to obtain the leave of the Court before being able to step into the shoes of the lienee. But the subsection does not extend to the person who lends money to another to enable that other person to pay the seaman's wages claim, and this, to my mind, makes it clear that the Legislature did not intend the claim referred to in s 11 (4)(c)(i) to include the claim of such a person."

[20] It is alleged by DeRuyter that he directly caused the payment of or paid the crew's wages. It is not suggested that he loaned this amount to the owner of the vessel. In my view, the broad scope of the wording of section 11(8) of the Act namely, "**any person who has, at any time, paid any claim or any part thereof** – steps into the shoes of the person who would have been entitled to all the rights, privileges and preference to which the person paid would have been entitled if the claim had not been paid. It appears to me that the claim for wages which the crew had which was paid by DeRuyter is a maritime claim and is ranked under section 11(4)(c)(v) of the Act.

[21] The fact that DeRuyter's motive was to enhance the value of the only asset of the owner (viz the ship) and the fact that he is the sole shareholder of the owner of the vessel is not a bar to him taking advantage of the broad meaning of the wording of section 11(8) of the Act.

[22] In the result I am persuaded that DeRuyter is entitled to a maritime claim for monies disbursed by him or such monies which he caused to be disburse for or on behalf of the owner of the vessel and such monies that he did disburse in payment of the wages for the crew. In the result the Order that I make is as follows:-

1. The first and second intervening applicants are given leave to intervene in this application;
2. The claim of the second intervening applicant for the following amounts:-
 - (a) R2 040 968.45 which is ranked in terms of section 11(4)(a) of the Act;
 - (b) US \$115 162.60 together with interest thereon which is ranked in terms of section 11(4)(a) of the Act and US \$62 500 together with interest thereon

is ranked in terms of section 11 (4)(c)(v) of the Act,
is referred to trial;

(c) The second intervening applicant is directed to
deliver a declaration within twenty days from the
date of this Order, and;

(d) The cost of the interlocutory application is to be
cost in the cause at the trial.

Date of Hearing:	14 August 2009
Date of Judgment:	18 January 2010
Counsel for the Applicant:	Advocate Shaw QC with Advocate Smart
Instructed by:	Attorneys A.D. Millar & Kimber
Counsel for the Respondent:	Advocate Stewart
Instructed by:	Attorneys Shepstone & Wylie