

IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN  
(In the exercise of its Admiralty Jurisdiction)

Case No: A11/2016

Name of ship: MV 'Smart'

In the matter between:

The Owners and Underwriters of the MV 'Smart' Plaintiff

and

The National Ports Authority a Division of  
Transnet (SOC) Limited Defendant

The Council for Scientific and Industrial Research

(In the application in terms of the s 5(5) of the

Admiralty Jurisdiction Regulation Act, 1983). Second Respondent

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Judgment

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Lopes J

[1] On the 19<sup>th</sup> August 2013 the MV Smart ('the ship'), a Capesize bulk carrier ran aground as it left Richards Bay harbour. The ship then broke up and was lost. The owners of the ship ('the Owners') were directed by the South African Maritime Safety Authority to remove the wreck of the ship from where she lay to the north of the Richards Bay harbour entrance. This was done. At the time the ship grounded and broke up she was fully laden with 147 650 metric tons of steamed coal ('the cargo').

[2] The following legal actions were instituted as a result of the loss of the ship:

- (a) On the 1<sup>st</sup> February 2016 under case number A11/2016 the Owners instituted action against the National Ports Authority, a Division of Transnet (SOC) Limited ('TNPA') for damages as the result of alleged breaches of the legal and statutory duties imposed upon TNPA by the National Ports Act, 2005 and the Port Rules together with alleged breaches of the legal duty owed by TNPA to the Owners. The damages claimed include the loss of the hull, the loss of the bunkers, the Owners' loss of their use of the ship, and the costs involved in the removal of the wreck. These damages totalled \$110 336 669.88. In addition, the Owners seek to have TNPA pay the reasonable costs of removing the coal from the sea bed and to compensate the Owners for claims which they may be liable to pay to cargo interests arising out of the loss of the ship and the cargo.
- (b) On the 29<sup>th</sup> June 2016 the Owners instituted action against TNPA under case number A56/2016 claiming damages as a result of the lost cargo.
- (c) On the 16<sup>th</sup> August 2016 the charterers of the ship instituted action against TNPA for an indemnity for the charterer's liability to the Owners in the charterparty arbitration which was taking place in London. This action has been stayed pending the outcome of the arbitration proceedings by the Owners against cargo interests and the charterers of the ship.

[3] The present action has been characterised by a number of interlocutory applications brought by one or other of the parties. The latest round of these interlocutory applications include the following three applications:

- (a) An application by TNPA against the Owners to compel proper discovery by them.
- (b) An application by the Owners to compel TNPA to produce further documents in terms of rule 35(3) of the Uniform Rules of Court which are made applicable in admiralty proceedings in terms of rule 24 of the Admiralty Proceedings Rules.
- (c) An application in terms of s 5(5) of the Admiralty Jurisdiction Regulation Act, 1983 ('the Act') compelling the second respondent in that application, the Council for Scientific and Industrial Research ('the CSIR') to make available to the Owners for the purpose of examination a computer system described as DMAX together with certain relief in relation to the examination of that system. It is common cause that the system was operating in Richards Bay harbour on the day that the ship was lost. The system provides real-time information and enables a predictive function to be performed in relation to the safety of ships entering and leaving the harbour.

[4] The parties managed to produce some 700 pages of documents in these three applications, excluding heads of argument, practice notes, etc. The three applications were all heard on the same day, the 7<sup>th</sup> February 2020. I have decided to deal with all three applications in one judgment, as that appears to me to be the most sensible approach.

TNPA's application for proper discovery:

[5] Mr *Wragge SC*, together with Mr *MacKenzie*, appeared for TNPA and submitted that TNPA raised two objections to the discovery affidavits which had been delivered by the Owners:

- (a) The identity of the deponents to the affidavits.
- (b) The nature and description of documents reflected in the second part of the first schedule to the discovery affidavits.

[6] In the action proceedings the plaintiff, is described as the ‘Owners and Underwriters of the MV Smart’. That description is notionally deceptive because there are in fact four plaintiffs comprising ‘the plaintiff’. They are:

- (a) The registered owner of the ship, Alpha Marine Corporation (‘Alpha Marine’).
- (b) The North of England P&I Association Limited (‘North of England’), who are the protection and indemnity underwriters of the ship.
- (c) Alvada Insurance Incorporated (‘Alvada Insurance’), the underwriters of the hull and the machinery to the extent of 95 per cent.
- (d) ERGO Versicherung AG (‘Ergo’), the underwriter of the hull and machinery, to the extent of 5 per cent.

[7] It is a particular feature of admiralty jurisdiction that a plaintiff may be cited in the manner set out above. I shall continue to refer to the four plaintiffs as ‘the Owners’, or by their individual names, as is appropriate. It is always open to the defendant to request, and be provided with, details of the identity of the Owners.

[8] The complaint about the documents discovered by the Owners is primarily that the first discovery affidavit was deposed to on the 16<sup>th</sup> April 2018 by Mr Sean Durr, a deputy director of the North of England, who purported to depose to the affidavit on behalf of the Owners. Mr Durr points out that the facts to which he deposes are not all within his personal knowledge but have been made known to him from discussions with, and correspondence and documentation sent or copied to him or otherwise referred to him by, various named parties. He expresses the view that he believes the facts to which he deposes to be true and correct.

[9] Mr *Wragge* conceded that a practical approach is required to be adopted where very large organisations litigate and it is necessary to obtain discovered documents from a great number of people. TNPA complains, however, that there is no reference by Mr Durr to the other three plaintiffs.

[10] Mr *Wragge* pointed out that the probabilities are that Alpha Marine is a brass-plate company in Panama, and consequently nothing more than a registered address. He submitted that if this was so, TNPA was entitled to be told. In not doing so, the discovery affidavit by Mr Durr was manifestly not in accordance with the provisions of Uniform rule 35(3). In effect the other three plaintiffs, Alpha Marine, Alvada Insurance and ERGO are not parties to the discovery affidavit initiated by Mr Durr.

[11] After the first discovery affidavit was deposed to by Mr Durr, further discovery affidavits were delivered as follows:

- (a) The first supplementary discovery affidavit deposed to on the 22<sup>nd</sup> November 2018.
- (b) The second supplementary discovery affidavit deposed to on the 18<sup>th</sup> December 2018.
- (c) The third, fourth, fifth and sixth supplementary discovery affidavits which were deposed to thereafter on dates which are not clear from the application papers (although the dates themselves are unimportant).
- (d) The 7<sup>th</sup> supplementary discovery affidavit deposed to on the 22<sup>nd</sup> July 2019.

[12] All the supplementary discovery affidavits were deposed to by Mr Edwards, a partner in Shepstone & Wylie who represent the Owners. With regard to the complaints in the correspondence about the fact that Mr Edwards deposed to the supplementary discovery affidavits, it was pointed out by the Owners that if he did not do so, Mr Durr would have to have done so in each of the seven supplementary discovery affidavits. There seemed little point in that because the documents have been gathered from different sources and the documents have all ended up under the control of Mr Edwards.

[13] Mr *Wragge* submitted that this was simply not good enough and that it was necessary that the affidavits complied with the provisions of Uniform rule 35(2) which provides that a party required to make discovery must do so on

affidavit, as near as may be in accordance with Form 11 of the first schedule, specifying separately:

- (a) Documents and tape recordings in the deponent's possession or that of his agent, other than documents referred to in sub-paragraph (b).
- (b) Documents and tape recordings which the party has a valid objection to producing.
- (c) Documents and tape recordings which the deponent or the deponent's agent had, but no longer has, in his possession as at the date of the affidavit. Documents in this category are deemed to be sufficiently specified if they are described as being one of a bundle of documents of a specified nature, which have been initialled and consecutively numbered by the deponent. Statements of witnesses taken for the purpose of proceedings, communications between attorney and client, and between attorney and advocate, pleadings, affidavits and notices in the action are to be omitted from the schedules.

[14] Mr *Wragge* submitted that TNPA was entitled to know whether the entities listed in the discovery affidavits from whom the documents were obtained are the alter ego of the Owners, and he submitted that Mr Edwards could not simply refer to documents emerging from the hull and machinery underwriters. He submitted that the problem which arose was that if improper discovery is made, and this emerges at the trial, it would be difficult to identify the person who was responsible for not discovering a document. He submitted that in particular, the hull and machinery insurance documents were vital because of the initial investigations which would have been conducted after the

loss of the ship, and any claims of privilege which may be made with regard to those documents.

[15] Mr *Wragge* pointed out that when the first supplementary discovery affidavit was produced, after complaints were made by TNPA regarding the first discovery affidavit, the documents comprising the first schedule, were simply replaced. No reference is made in the first supplementary discovery affidavit to define the status of the documents, and the first supplementary affidavit simply recorded that:

‘The Plaintiff substitutes the Second Part of the First Schedule as previously delivered, and objects to producing the documents set forth in the Second Part of the First Schedule hereto.’

[16] The further complaint by TNPA is that the first part of the first schedule in the first supplementary discovery affidavit contained new documents not previously discovered. The first supplementary discovery affidavit did not deal with those documents and identify their origin. Mr *Wragge* also submitted that the prescription set out in Uniform rule 35(2) was not followed.

[17] Mr *Wragge* submitted that in the second supplementary discovery affidavit, Mr Edwards set out in paragraph 3 thereof the detail which he should have set out in the first supplementary discovery affidavit. TNPA was left in the position that it could not tell who had sent the documents to Mr Edwards and whether or not they were authentic. Mr Edwards purports to deal with this by stating that if he were not to depose to the affidavit, then the representative of



the North of England would have to do so, in precisely the same terms which he had done. In both cases the items listed are documents of which Mr Edwards, and Mr Durr, would not have had personal knowledge. Mr *Wragge* submitted that this raises the question of whether all the documents had been provided, which the various plaintiffs were obliged to discover. This was not something about which Mr Edwards would have been in a position to certify in his affidavit. Mr *Wragge* submitted that the aspects of relevance and authenticity had not been dealt with by Mr Edwards.

[18] In addition, Mr *Wragge* raised the following complaints about the first supplementary discovery affidavit deposed to by Mr Edwards:

- (a) In paragraph 6 of part two of the second schedule there are no dates or parties identified relating to correspondence reflected therein.
- (b) Similarly, this creates a problem in paragraphs 7, 9 and 10 which refer to documents without identifying each specific document and when it was sent. Mr *Wragge* submitted that some of the correspondence referred to, may not in fact be privileged.
- (c) With regard to paragraph 11 in the first supplementary discovery affidavit, reference is made to correspondence arising in the London arbitration proceedings. Mr *Wragge* submitted that it was impossible to tell from Mr Edwards' description of those documents what they purport to be. Mr *Wragge* submitted that this a pattern which runs through all the supplementary affidavits deposed to by Mr Edwards.

[19] Mr *Mullins SC* who appeared for the Owners together with Mr *Wallis*, dealt with the aspect raised by Mr *Wragge* with regard to the identity of Alpha Marine by describing it as a one ship owning company which no longer has a ship. Mr *Mullins* pointed out that in circumstances such as the present action, it is necessary for one of the plaintiffs to take the lead. The two insurers would inevitably have a limited number of documents to be discovered regarding the incident. Mr *Mullins* pointed out that Mr Durr records in his affidavit in the first discovery affidavit that he has been duly authorised on behalf of all the parties jointly who are cited as plaintiffs in the action. Mr Edwards' affidavits pointed out that he is also authorised on behalf of all the parties cited as plaintiffs to represent them in the discovery procedure.

[20] Mr *Mullins* submitted that in the first supplementary discovery affidavit deposed to by Mr Edwards, certain identified documents which had not previously been discovered, had then been added to the list of documents provided. He submitted that the obligation of the Owners is to discover and Mr Durr discovered all that was known at that stage. More documents emerged as time passed, and Mr Edwards discovered them. Mr *Mullins* referred to the second supplementary discovery affidavit where Mr Edwards had corrected the previous omission and set out why the previous discovery affidavits had been deposed to in the manner in which they had been. The second supplementary discovery affidavit had been deposed to after the letter complaining of discovery had been received from TNPA. In his answering affidavit in the application Mr Edwards sets out in full the process which was followed by him in compiling the supplementary discovery affidavits, which 'took literally hundreds of hours'. Mr *Mullins* submitted that the real complaint of TNPA is that Mr Durr does not identify the other three plaintiffs. Mr *Mullins* submitted that it is clear, however, from the papers and the correspondence that the North

of England has effectively taken control of the proceedings and is what may be described as ‘the driving force’ behind the discovery affidavits.

[21] With regard to the complaints of privilege, Mr *Mullins* submitted that a court should accept an attorney’s say so when he states that he had been through each and every document in order to determine whether privilege could validly be claimed. Mr *Mullins* submitted that in this case litigation was envisaged very early on in the proceedings. Indeed, given the weather conditions on the day, the mere sinking of the ship indicated immediately and certainly that litigation would follow from the very outset. Accordingly almost all the documents thereafter were privileged.

[22] Mr *Mullins* submitted that TNPA was not entitled to further details regarding the discovered documents. To disclose the contents of a confidential communication in respect of which privilege could be claimed, would defeat the very aim of the privilege. Mr *Mullins* pointed to the many dates referred to in the discovery affidavits and submitted that TNPA has no basis for complaint. He conceded that in the other affidavits parties are identified, and the only missing aspects would be the dates. What is important is that the classes of document are identified. Mr *Mullins* submitted that complaining about the identity of the deponents to the affidavits in this case was tantamount to ‘nit-picking’. He submitted that what TNPA apparently seeks is to have a third person to say what happened to various underwriting documents. In this regard he submitted that there has not been a single complaint that any particular document should have been discovered, but was not discovered.

[23] In reply Mr *Wragge* submitted that it was not sufficient for Mr Edwards to say that he had been through all the documents carefully and was able to identify those in respect of which privilege was claimed. He submitted that it was incumbent upon the Owners to have made proper discovery. He submitted that it is the insured person and not the insurer who has the duty to discover.

[24] In my view the following aspects are relevant in order to decide whether the discovery made by the Owners is inadequate:

- (a) In the original discovery affidavit deposed to by Mr Durr on behalf of the North of England, he sets out at paragraph 3 the parties from whom he obtained documents. These include various persons who are named and whose positions are respectively, the commercial managers of the ship, the technical managers of the ship, the Owners' English solicitors as well as their South African attorneys.
- (b) It is common cause that discovery was initially insufficient, and the further discovery which was made was contained in affidavits deposed to by Mr Edwards. It is usually the case that discovery affidavits are deposed to by the parties themselves. However, the authorities suggest that there are circumstances in which it may be proper for a party's attorney to depose to a discovery affidavit. In this regard I was referred to *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 558C-G where van Heerden J stated:

'It has long been held that failure to comply with the requirement that the discovery affidavits have to be made by the parties themselves and not by their attorneys should only be condoned for cogent reasons and in very special circumstances and only if the attorney was in a position of his own

knowledge to make a comprehensive affidavit. . . .There could be circumstances, as was indeed recognised in *Union Business and Estate Agency v Weiss*, which would justify an affidavit of discovery being made by the attorney or somebody other than the actual party to the suit but the circumstances ought then to be disclosed in the affidavit to indicate to the other party the reason at least why the Rule was not being strictly complied with.’

- (c) In this matter the reasons emerge from the discovery affidavit of Mr Durr. It is clear from that affidavit that there are many other entities involved in the gathering of documents relating to discovery, and it made complete sense in the first instance for those documents to be recovered by Mr Durr as the person controlling the litigation on behalf of the Owners.
- (d) In addition the second supplementary affidavit of Mr Edwards sets out the reasons why he deposed to the first supplementary discovery affidavit. His explanation was clearly provided because of the correspondence which had been exchanged between the parties and the complaints of TNPA in that regard.
- (e) Given the volume of documents and the fact that Mr Edwards has confirmed that he went through the documents himself in order to ascertain whether or not privilege could be claimed by the Owners, should be sufficient, in my view, to satisfy TNPA that he has gone to the lengths expected of an officer of the court to ensure that none of the documents in respect of which privilege is claimed, were not in fact privileged. In *Rellams*, van Heerden J continued at 560F-H:

‘It is, generally speaking, no doubt true that, whilst the Court should not and would not go behind a party’s affidavit that the contents of a document are not relevant, such affidavit is nevertheless as far as the Court is concerned not conclusive. After an examination and consideration of the recognised

sources as well as the pleadings and the nature of the case the Court may come to the conclusion that the party making discovery in all probability has other relevant and disclosable documents in his possession or power and may order further and better discovery or production in conflict with the claim in the affidavit.’

In this case there is no suggestion whatsoever by TNPA that Mr Edwards has failed in his duty in certifying that certain documents were privileged.

- (f) Section 6 (3) of the Act specifically provides for the admission of hearsay evidence, and in this regard it seems to me that it would have been an enormous and unnecessary task for each person who had created documents or received them to depose to an affidavit with regard thereto. It is true that the practice in admiralty is somewhat different to that adopted in normal litigation. This is because of the nature of the litigation, involving as it does, foreign parties who may hail from various areas of the world. The most practical and efficient method of producing the record of documents is what has been done in this case. In saying this I am not suggesting that this is a practice which should always be adopted in admiralty matters or which would necessarily be acceptable in normal matters. In the circumstances of this matter, the actions of Mr Edwards are justifiable and reasonable.
- (g) There are two further reasons why I would regard the attack on the discovery affidavits as being unreasonable:
  - (i) The fact that the application was launched some 15 months after Mr Durr’s discovery affidavit, and after six of the supplementary discovery affidavits had been delivered. If TNPA had serious ejections to the process adopted by Mr Durr and Mr Edwards, it should have been alert to have

raised its objections in a proper application brought timeously, and not waited for so long.

(ii) There is no suggestion by TNPA that there are any documents which have not been discovered, and no objection to specific documents which have been discovered, save for the complaints raised in argument relating to the dating of some documents and the identity of the authors of others.

(h) In my view there has been sufficient compliance with the requirements of discovery taking into account the facts set out above and the unusual problems which arise in the exercise of admiralty jurisdiction. In addition, it would appear that the discovery process by the Owners has been completed. There would be little value in now insisting that the Owners are required strictly to comply with the provisions of Uniform rule 35(2) when it would have little, if any utility.

[25] In all the circumstances the application to compel what is referred to as ‘proper discovery’ must fail.

[26] Mr *Wragge* also referred to submissions in his heads of argument in which TNPA seek to strike out certain allegations made by the Owners in their founding affidavit regarding inordinate delays in bringing the action between the parties to finality. There are indeed complaints in all the applications levied by each of the parties against the other. Those relating to delays in the action are relevant insofar as they demonstrate the Owners’ view of what they regard as dilatory conduct on the part of TNPA. Given the history of the conduct of

TNPA throughout the action, I do not see any merit in making a separate order striking out parts of the Owners' affidavits. It is an unfortunate aspect of the litigation between the parties in this action that a great deal of unnecessary animosity has been revealed between the legal practitioners. In my view, to make any order for striking out would simply add fuel to this fire.

[27] The costs should follow the result, and I accordingly make the following order:

‘The application to compel proper discovery from Owners as claimed in the Notice of Motion dated the 31<sup>st</sup> May 2019, together with the application to strike-out are dismissed with costs, such costs to include those consequent upon the employment of two counsel.’

The Owners application to compel further and better discovery:

[28] The Owners sought to compel further discovery in respect of five categories of documents:

- (a) Messages originating from TNPA staff regarding the closure of Richards Bay for any reason for the period, the 1<sup>st</sup> January 2002 up to and including the 31<sup>st</sup> December 2011.
- (b) Copies of any written guidance criteria or procedures regarding port closure enforced at the ports of Durban, East London, Ngqura, Port Elizabeth, Cape Town and Saldana Bay for the period 2002-2018 inclusive.
- (c) Copies of documents including but not limited to all reports, manuals and notes on the introduction, development, operation and improvement of DMAX at the port of Saldana Bay for the period 2002-2018 inclusive.



- (d) Copies of any written guidance, criteria and/or procedures regarding the embarkation and disembarkation of pilots at the ports of Durban, East London, Ngquru, Port Elizabeth, Cape Town and Saldana Bay for the period 2002-2018 inclusive.
- (e) Internal memoranda and/or any other documents setting out circumstances in which pilots were permitted to disembark before reaching the extent of the compulsory piloted area at the ports of Durban, East London, Ngqura, Port Elizabeth, Cape Town and Saldana Bay for the period 2002-2018 inclusive.

[29] Mr *Mullins* submitted that records relating to the closure of the port of Richards Bay have not been provided, and, according to TNPA, do not exist. He points out that TNPA is willing to produce guidance criteria and procedures regarding port closures at Richards Bay harbour. There was accordingly no use in the Owners persisting in obtaining the documents in sub-paragraph (a) above.

[30] I queried with Mr *Mullins* why the Owners requested documents extending back to 2002. After some debate Mr *Mullins* was content to have such records from 2010 to December 2018. He submitted that such documents would indicate how TNPA approached the closure of ports, and he submitted that in this regard it was important for the Owners to be able to determine the approach of TNPA with regard to the closure of other ports. Similarly, with regard to the other documents sought, Mr *Mullins* conceded that documents from January 2010 to December 2018 would suffice. Mr *Mullins* indicated that the Owners were not seeking private emails, but that the Owners should not have to guess as to the approach of TNPA. Even if the relevant documents did not exist for Richards Bay, the Owners were entitled to know, and it was

important that they understand, the approach of TNPA with regard to other harbours. Mr *Mullins* submitted that the further discovery sought was important for the purpose of understanding the concept of institutional negligence as it may apply to TNPA.

[31] Mr *MacKenzie*, who dealt with this application, submitted that the Owners bear an onus as the party seeking discovery to justify why documents not already discovered, should be discovered. Mr *MacKenzie* submitted that what is referred to in the correspondence between the parties as ‘e-discovery’ would have to be carried out with regard to the emails. This is because of the huge volume of documents which would be included. He submitted that this task would take an inordinate length of time and involve enormous costs to TNPA.

[32] With regard to the other documents required, it would not help the Owners to obtain documents from the six ports requested, other than Richards Bay. In this regard he referred to the concept of relevance and submitted that different considerations would apply to the different ports. No two ports are the same, they all have different characteristics which would apply to each different port such as the type of ships accommodated by the port, the nature of the entrance to the port, the exposure of the port to particular weather conditions, etc.

[33] Mr *MacKenzie* submitted that TNPA had discovered all items for the operation of the DMAX system at Richards Bay. He pointed out that there is no suggestion that any relevant document regarding the operation of DMAX at

Richards Bay had not been disclosed. He submitted that it was unclear why the Owners wanted to obtain similar documents with regard to Saldana Bay, and submitted that relevance had not been demonstrated as it should have been by the Owners. He also pointed out that during the application in terms of the Promotion of Access to Information Act, 2000 many documents relating to the operation of the DMAX system at Richards Bay were delivered to the Owners.

[34] Mr *MacKenzie* submitted that in the event that limited relief was granted to the Owners, then TNPA was entitled to have opposed the application and was entitled to its costs. He also submitted that any order granted should stipulate that no e-discovery was necessary.

[35] In reply Mr *Mullins* pointed out that the Owners accepted that no e-discovery was necessary or desirable with regard to compliance with the copies of email messages relating to the Richards Bay harbour. Mr *Mullins* submitted that guidance reports from the other ports were important because they may lead to the conclusion that, with regard to the condition under which pilots operate, TNPA recognises the need for controls which were neither applicable nor implemented at Richards Bay. He accepted the argument that ports may differ in their makeup and usage but maintained that the issues in contention are not irrelevant. He reiterated that the Owners had identified precise items required and did not want e-discovery to take place. He submitted that it was a simple case of TNPA asking the port captains or harbour masters at the ports concerned whether they had the guidelines or criteria and/or procedure referred to.

[36] Mr *Mullins* finally submitted that the costs should follow the results and that the concession made regarding the 2002-2010 period would have no implication for costs.

[37] It is clear from the particulars of claim, and the contents of the application papers that the Owners contend that TNPA acted negligently in allowing the ship to sail, and in the manner in which it did so. This included the role of the pilots and there are suggestions that they disembarked when they should not have done so. This, of course, is all denied by TNPA, but that is the very reason why the further and better discovery is sought. It is clear that the Owners do not envisage that TNPA engage in what they have described as a ‘massively extensive and expensive electronic discovery process which has been conducted by Cyanre’ (Cyanre presumably refers to a service provider). As the parties have agreed that e-discovery will not be required, the process seems to me to be relatively straight forward and simple. There is no reason why TNPA cannot make the relevant enquiries at the ports concerned and gather those documents available, and it should be neither an extensive nor expensive exercise. The importance of the documents appear to me to be that, in the ordinary course, TNPA has procedures and criteria for the closure of ports and the embarkation and disembarkation of pilots. In the event that criteria or guidelines were laid down at the other ports, it may well raise an issue if they were not in place at Richards Bay or were not adhered to at Richards Bay.

[38] The concession made by Mr *Mullins* with regard to the documents relating to years 2002-2010 does not materially affect the outcome of the application. It would have been necessary for the Owners to persist with the application in any event because it was not suggested that TNPA had tendered

the information only for the years 2010 - 2018, and that tender had been unreasonably refused by the Owners. The documents requested are, in my view, clearly relevant. In this regard it is important to note that it is information *which may*, and not *which must*, either directly or indirectly enable the party requiring the discovery affidavit to advance his own case or damage the case of his adversary.

See: *Rellams* at 564A-B

[39] In so far as the exercise of a discretion, as set out in Uniform rule 35(7), is concerned, I have little doubt that the documents are relevant and should be provided. Although a court will not usually go behind suggestions of irrelevance, in this case the views of either party are set out fully in the papers and in my view TNPA's view is incorrect.

[40] In the circumstances the Owners are entitled to an order in terms of the notice of motion dated the 22<sup>nd</sup> July 2019. Prayer one (a) falls away because a positive denial has been made that the documents do not exist. In addition the time period for the documents reflected in sub-paragraphs (b), (c), (d) and (e) should only be provided for the period 2010 - 2018. I accordingly make the following order:

- ‘(a) I grant an order in terms of prayer 1 (b), (c), (d) and (e) of the notice of motion dated the 22<sup>nd</sup> July 2019.
- (b) The dates in prayers 1 (b) - (e) shall be from January 2010 to December 2018.
- (c) No part of the discovery process set out above shall include the need for The National Ports Authority to conduct what is referred to as ‘e-discovery’.
- (d) The costs of the application to compel discovery, including the costs of two counsel are to be paid by The National Ports Authority.’

Section 5 (5) application:

[41] The Owners seek an order in terms of s 5 (5) of the Act allowing it to have access to the DMAX system ('the system') which is in the possession of the second respondent, the CSIR. Although cited as the second respondent in this application, the CSIR is not involved because it has not objected to the relief sought by the Owners and was not represented before me in the application. In effect they have elected to abide, although I am not aware of a notice to abide which has been delivered.

[42] It is necessary to set out some of the history leading to this application:

- (a) As I set out above, the ship ran aground and broke up shortly after attempting to leave Richards Bay harbour.
- (b) The system which was in operation at the port of Richards Bay was designed to take into account inputs from various items of equipment regarding wind, wave and rain measurements, apparently based on algorithms that incorporate the limits of the port's capability, weather data and ship characteristics.
- (c) The system is apparently designed to indicate whether it is safe for a particular ship to leave the harbour under particular conditions.
- (d) The system was developed by the CSIR and it has a version of the system at its facilities in Stellenbosch.
- (e) The Owners wish to have access to the system for the purpose of determining what was likely to have been recorded in respect of the ship when she departed Richards Bay harbour, and to enable an assessment of the safe design parameters of the port based on the historical calculations made by the CSIR.

- (f) The Owners approached the CSIR who agreed to allow an examination of the system on terms prescribed by the CSIR. This was after the Owners had issued a subpoena against the CSIR in 2018, and the Owners instituted an application in this court seeking to compel the CSIR to comply with the subpoena.
- (g) The application was opposed and the CSIR and the Owners eventually agreed to parameters in which disclosure of the system could be made, whilst protecting the intellectual property interests of the CSIR.
- (h) The agreement made the continuation of the application to compel the CSIR to comply with the subpoena unnecessary.
- (i) The Owners nominated Dr Jasionwski to conduct the investigations on their behalf.
- (j) The arrangements between the Owners and the CSIR were then interrupted by the fact that TNPA brought an application in the Western Cape High Court, seeking an interdict preventing the CSIR from demonstrating the system to the Owners. The three bases upon which TNPA sought to object to the examination of the system were:
  - (i) Confidentiality in the system.
  - (ii) Originally, that the application was partly for the benefit of the Owners in the London arbitration proceedings. It appears that the London arbitration proceedings are now complete and this is no longer an issue.
  - (iii) That TNPA should have been invited to be present at the examination of the system.

[43] It is suggested in the correspondence and in the answering affidavits in this application that TNPA claims ownership of the DMAX system and accordingly the CSIR was required to regard the system as confidential. It was to this end that the interdict was sought in the Western Cape High Court. It is suggested in this regard that if the question of ownership is not decided, that is something which should be decided by the Western Cape High Court.

[44] Mr *Mullins* submitted that the system is the most important part of the evidence which will be adduced at the trial in order to determine whether the port should have been closed by TNPA prior to the ship attempting to leave Richards Bay harbour. In this regard Mr *Mullins* submitted that there was evidence that the system may not have been working entirely correctly, at the very least because of an error relating to the designation of magnetic north.

[45] Mr *Mullins* submitted that what the Owners seek to achieve is to ascertain what the system would have done if the ship's details and other data had correctly been entered into it. Eventually after all the disputes between the Owners and the CSIR were resolved, the CSIR agreed to run a simulation exercise at the Stellenbosch office for one day.

[46] Mr *Mullins* submitted that there was no basis upon which TNPA could prevent the Owners from finding out about the operation of the system. Mr *Mullins* pointed out that the Owners have no knowledge of the actual ownership of the system, but that ownership is not a defence if TNPA is in fact the owner of the system.



[47] With regard to the TNPA's concerns of disclosure, Mr *Mullins* pointed out that the CSIR would not divulge the source or object codes of the system but would only allow a demonstration. Without such demonstration, it would be impossible for the Owners to ascertain details of the system prior to commencing the trial proceedings. They are now in a position where they require, and are entitled, to know and understand the workings of the system.

[48] Mr *Wragge* submitted that there were two aspects to be considered:

- (a) An extra-curial leg regarding the agreement between the CSIR and the Owners. This has nothing to do with rules of court and is governed by the interdict which is sought in the Western Cape High Court. The Owners could as easily have subpoenaed the CSIR in order to ascertain the aspects they needed to know.
- (b) The problem exists that there could be split decisions between this court and the Western Cape High Court. This is because the Owners have sought to use s 5(5) in the face of the application which was brought in the Western Cape High Court.

[49] Mr *Wragge* further submitted that it was possible to have an inspection-in-loco during the trial, when all parties could view the working of the system. He submitted that the orders sought by the Owners obliged the CSIR to run tests, and the Owners would be able to ask questions of the CSIR staff. This would create problems because there would be no guarantee as to whether the answers were correct. He submitted that the provisions of s 5(5) were there to preserve evidence which may be lost, which was not the case in the present circumstances. He submitted that if TNPA lost the interdict in the Western

Cape High Court, it would be unnecessary to make any order in terms of s 5 (5). It was not the purpose of s 5(5) to implement an agreement between the CSIR and the Owners.

[50] In reply Mr *Mullins* submitted that it may well be that it is necessary to call the CSIR representatives as witnesses at the trial. It would be wholly impractical to stop the trial, hold an inspection-in-loco in Stellenbosch and then carry on with the trial in circumstances where witnesses will thereafter have to be called depending upon the findings which were made at the inspection-in-loco.

[51] Mr *Mullins* submitted that the obvious purpose of the Western Cape High Court interdict was to prevent the Owners from having access to the computer codes compiled for the system. He submitted that the right to access evidence by a party cannot be defeated by a secrecy order. In this case the CSIR and the Owners had already agreed that the Owners could ask questions. The fact that the Owners could speak to the CSIR cannot be prevented by a confidentiality agreement between the CSIR and TNPA. Mr *Mullins* submitted that there was absolutely no evidence produced by TNPA which suggested that ownership of the system, or particular propriety rights in the system, vested in TNPA.

[52] It is relevant in this context for me to consider why, when three actions were instituted in this Division, TNPA chose to approach the Western Cape High Court for an interdict. When asked about this, Mr *Wragge* submitted that

TNPA had approach the Western Cape High Court because the offices of the CSIR were in Stellenbosch. When it was pointed out to him that there would have been no bar whatsoever to this court having jurisdiction over the matter, Mr *Wragge* submitted that that was the course of action which, after careful consideration, had been taken by TNPA.

[53] The conduct of TNPA in proceeding for an interdict in the Western Cape High Court is, to my mind, inexplicable. All matters of convenience pointed to the CSIR simply being joined in an application in this action (s 21(2) of the Superior Courts Act, 2013). It is most unfortunate that TNPA adopted the procedure which it did, and one can only question its motives for doing so in the circumstances. The obvious inference is that TNPA sought to evade the jurisdiction of this court in seeking the interdict in the Western Cape High Court. However, I can reach no final conclusion in that regard because I am not privy to what decision was made and by whom.

[54] Section 5(5) of the Act provides:

- (a) A court may in the exercise of its admiralty jurisdiction at any time on the application of any interested person or of its own motion -
  - (i) if it appears to the court to be necessary or desirable for the purpose of determining any maritime claim, or any defence to any such claim, which has been or may be brought before a court, arbitrator or referee in the Republic, make an order for the examination, testing or inspection by any person of any ship cargo, documents or any other thing and for the taking of the evidence of any person;
  - (ii) in making an order in terms of subparagraph (i), make an order that any person who applied for such first-mentioned order shall be liable and give security for any costs or expenses, including those arising

- from any delay, occasioned by the application and the carrying into effect of any such order;
- (iii) grant leave to any such person to apply for an order that any such costs or expenses be considered as part of the costs of the proceedings;
  - (iv) in exceptional circumstances, make such an order as is contemplated in subparagraph (i) with regard to a maritime claim which has been or may be brought before any court, arbitrator, referee or tribunal elsewhere than in the Republic, in which case subparagraphs (ii) and (iii) shall *mutatis mutandis* apply.
- (b) The provisions of this Act shall not affect any privilege relating to any document in the possession of, or any communication to or the giving of any evidence by, any person.

[55] In *The Hazel Intergran BV v MV Hazel* (SCOSA), E57(D), Galgut J granted an order that a plaintiff was entitled, in terms of s 5(5)(a)(i) to take photographs of those parts of a ship and cargo to which reference was made in the order. This was allowed despite the fact that there was no provision in the section for the taking of photographs. Mr *Wragge* submitted that that judgment was authority for the proposition that the section was to be strictly interpreted. Presumably that was a reference to Galgut J referring to s 5(2)(c) of the Act which provides that orders can be made subject to such conditions as to the court appears just. Galgut J did not consider the taking of photographs to be exceeding a limitation of the powers conferred by s 5(5)(a)(i) (which section was, in any event, somewhat differently worded in 1990 when the *Hazel* was heard).

[56] In *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd & others* 1999 (3) SA 500 (C) the court dealt with what it

perceived as the real purpose of s 5(5) as being to provide a litigant with relief akin to an Anton Piller order for the preservation of existing evidence which may be come relevant. In this regard, Thring J stated at 508D-E:

‘it is undoubtedly correct, at Mr *MacWilliam* who appears for the respondents pointed out, that the discretion conferred on this Court by s 5(5)(a)(i) of the Act is a wide one, especially when it is read in conjunction with Admiralty Rule 25.’

Rule 25 of the Admiralty Proceedings Rules deals with the discretion of a court to give directions which it considers proper for the disposal of any matter before it, together with the power to deviate from or supplement the provisions of the Admiralty Proceedings Rules or the Uniform Rules or of any other rules relating to the division in question. With due deference to Thring J, I am of the view that the provisions of s5(5) are not limited to the preservation of evidence, but would include an investigation such as is envisaged in this matter. This seems to be quite strongly indicated in s 5(5)(a)(i) where the section refers to making ‘an order for the examination, testing or inspection by any person of any ship cargo, documents or any other thing...’. In this regard I refer to the judgments of Froneman J in *The C. Tashin* Koch Oil Marketing SA v Owner of The *C. Tashin* (SCOSA) E129(E) at E130I-E131B, and that of Cleaver J in *The Ioannis NK* The Owner of the cargo lately laden on board The *Ioannis NK* v The Master and Crew of The *MV Ioannis NK* (SCOSA) E184(C) at E186I-188B.

[57] The following matters are relevant:

- (a) There is no doubt that an investigation into the workings of the system and the implementation of it by TNPA is central to the Owner’s cause of action.
- (b) The Owners would be entitled to subpoena expert witnesses to speak to the workings of the system. But how would that expedite

the conduct of the trial unless the experts were able to tell the court how the operation of the system impacted upon the Owner's case? The answer, almost certainly, is that the trial would have to be delayed whilst tests were conducted. That process cannot be in the interests of either the litigants or the court.

- (c) In those circumstances it would be manifestly unfair and disadvantageous to the Owners were they not to be allowed to examine, at the very least, the operation of the system and have their questions answered by the CSIR.
- (d) I can see no objection to the Owners requesting the CSIR (who are apparently in agreement with this approach) to input information relating to the ship into the system and have that information processed by the system together with other variations such as weather, wind, wave direction, etc, as are appropriate.
- (e) As was pointed out by Schutz JA in *Powernet Services (1988) (Pty) Ltd v Government of the Republic of South Africa* 1998 (2) SA 8 (SCA) at 19A-B:

‘Also, it needs to be emphasised again that cases concerned with technical subjects are tried by lay tribunals and go on appeal to a lay appeal Court. Technical matter is not always easy to make clear. But it *must* be done.

- (f) In circumstances where TNPA does not own, or have protectable interests in the system in the possession of the CSIR (and none is established in this application), I cannot conceive on what basis it can seek to prevent the Owners from examining and having questions answered by persons who will have to testify as expert witnesses concerning the workings of the system. Even if TNPA does have proprietary rights in and to the system, on what legal principle should it be allowed to prevent the Owners from investigating the operations of the system when those operations

may well be decisive in the action? I can conceive of none, save to protect the copying or exploitation of the system. With very little effort and co-operation, that hurdle is easily overcome, and should not stand in the way of achieving a result in the trial which is just and fair to all parties.

- (g) The suggestion has been raised that the Owners bear the onus to prove the negligence of TNPA, and it should not be compelled to assist the Owners in establishing their case. But TNPA admits that the system was operable on the day in question and designed to prevent seafarers from harm. If it was not functioning correctly, or did not receive the correct inputs to enable it to do so, that is precisely what the court is to decide.
- (h) The provisions of Uniform rule 36(6) and (7), which are applicable in admiralty, provide for the relief sought by the Owners, once account is taken of my discretion in regulating those proceedings and of making orders for the just and equitable disposal of procedural matters. The provisions of Uniform rule 36(8) are applicable in that regard.
- (i) In my view the representatives of TNPA have no legal right to be present when CSIR and the Owner's representatives meet. Once they have received the Owner's expert notices, they will be entitled to carry out their own testing within their own experts.

[58] As in the first application before me there is an application to strike-out paragraphs 28 to 62 of the Owners' founding affidavit on the basis that information contained in those paragraphs is scandalous, vexatious and irrelevant. Rule 20 of the Admiralty Proceedings Rules provides that a court may strike out any proceedings which are vexatious or an abuse of the process

of the court. As pointed out by Griesel J in *Golden International Navigation SA v Zeba Maritime Co Ltd Zeba Maritime Co Ltd v MV Visvliet* 2008 (3) SA 10 (C) para 8, there is no doubt that that rule contemplates that the common law principles should be applied whenever the rule is invoked by a litigant. *Golden International*, however, as well as *Bisset & others v Boland Bank Ltd & others* 1991 (4) SA 603 (D) referred to the striking out of actions, and not of allegations in affidavits. The provisions of Uniform rule 6(15) remain applicable in admiralty and refer to the striking out from affidavits of matter which is scandalous, vexatious or irrelevant. In my view none of those things apply in the present circumstances.

[59] With regard to the question of costs, I have been urged by Mr *Mullins* to make a punitive order of costs for the reason that the bringing of this application was entirely unnecessary and forced upon the Owners by the unreasonable conduct of TNPA.

[60] Whilst I view the opposition of TNPA in this application as unnecessary and unsubstantiated, without the ability finally to resolve the issue of the Western Cape High Court proceedings, I do not believe it would be appropriate for me to make a punitive order of costs. In all the circumstances I make the following order:

- ‘(a) An order is granted in terms of prayers 1 (restricted to DMAX), 2, 3 and 4 of the Notice of Motion dated the 19<sup>th</sup> July 2019.
- (b) The application to strike-out is refused.



- (c) The costs of the application, including any costs relating to the striking-out application, are to be paid by The National Ports Authority, such costs to include the costs of two counsel where so employed.'

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Lopes J

Date of hearing: 7<sup>th</sup> February 2020.

Date of Judgment: 10<sup>th</sup> March 2020.

Counsel for the Plaintiff: S R Mullins SC, with P J Wallis (instructed by Shepstone & Wylie Attorneys).

Counsel for the Defendant: M Wragge SC, with J D MacKenzie (instructed by Webber Wentzel).