Bib.

4/86

349/84

N v H

EUROMARINE INTERNATIONAL OF MAUREN

v THE SHIP "BERG" & OTHERS

MILLER, JA :-

349/84

N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

EUROMARINE INTERNATIONAL OF MAUREN	Appellant
and	
THE SHIP "BERG"	First Respondent
SOUTHERN GAS SHIPPING S A OF PANAMA	Second Respondent
UNICORN LINES (PROPRIETARY) LIMITED	Third Respondent

CORAM: CORBETT, MILLER, HOEXTER, GROSSKOPF, JJA, et GALGUT, AJA

HEARD: 11 NOVEMBER 1985

DELIVERED: 27 February 1986

J U D G M E N T

MILLER, JA :-

What is at issue in this appeal is whether certain provisions of the Admiralty Jurisdiction Regulation

Act / .....

Act, no 105 of 1983 (the Act) operate with retrospective effect in the sense of being applicable in respect of maritime claims which came into being prior to the commencement of the Act. The question arose for decision when the appellant, a foreign company carrying on business and having its Head Office in Lichtenstein, moved the Durban and Coast Local Division of the Supreme Court of South Africa, in the exercise of its admiralty jurisdiction, for an order that a vessel called "the Berg" (the first respondent), owned by a Durban company (the third respondent) be arrested and thereafter be held as security for a claim by the appellant against the second respondent, a Panamanian company.

The / .....

The appellant had on 16 August 1978 entered into a time charterparty with the second respondent in respect of a ship named "Pericles", owned by the second respondent. It was alleged that as a result of the negligence of the second respondent the ship, the Pericles, became unseaworthy and by reason thereof came to grief in the Durban harbour when it suffered an explosion on 24 December, 1978, during the subsistence of the charterparty. As a consequence of this disaster the appellant suffered considerable damage and loss in respect of which it commenced arbitration proceedings in London, which were still pending at the time of the launching of the application for the arrest of the Berg. The damages suffered by the appellant as a result of the explosion on board the Pericles represented the claim for the security of which the appellant sought to have the Berg arrested.

Neither the third respondent nor its vessel, the Berg, was in any way responsible for or the cause of the explosion which damaged the Pericles, or the loss sustained by the appellant. It appeared, however, that at the time the claim arose, which was the 24th December, 1978, the shares in the second respondent were owned or controlled by the third respondent and that the shares in the third respondent are controlled by the persons who controlled the shares in the second respondent at the time of the coming into existence of the claim which was by definition in sec 1 of the Act a "maritime claim", in that it related to a "charter party" such as is referred to in sec 1(l)(i). In these circumstances it was alleged by the appellant that the Berg was an "associated ship" with regard to the Pericles in terms of sec 3(7) of the Act, which defines an associated

ship against which, in terms of sec 3(6), an action in rem may be brought by the arrest of such associated ship instead of the ship in respect of which the maritime claim arose.

I reproduce the terms of ss 3(6) and (7):

> "3(6) Subject to the provisions of subsection (9) an action in rem, other than such an action in respect of a maritime claim contemplated in paragraph (a)(b) or (c) of the definition of 'maritime claim', may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.
>
> (7) (a) For the purposes of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose -
>
> (i) owned by the person who was the owner of the ship concerned at the time when the maritime claim arose; or
>
> (ii) owned by a company in which the shares, when the maritime claim arose were controlled or owned by a person who then controlled or owned the shares in the company which owned the ship concerned.

(b) For / .....

(b) For the purposes of paragraph (a) -

(i) ships shall be deemed to be owned by the same persons if all the shares in the ships are owned by the same persons;

(ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company.

(c) If a charterer or subcharterer of a ship by demise, and not the owner thereof, is alleged to be liable in respect of a maritime claim, the charterer or sub= charterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner."

Sec 5(3) of the Act contains the provision by which, so the appellant alleged, the Court was empowered to order the arrest of the Berg at the instance of the appellant because it had a maritime claim enforceable by an action in rem,

or which would be so enforceable, but for a pending artibration, against the associated ship (the Berg) instead of the "guilty" ship (the Pericles).

Sec 5 (3)(a) and (b) are in these terms:

"5(3)(a) A court may in the exercise of its admiralty juristiction order the arrest of any property if -

(i) the person seeking the arrest has a claim enforceable by an action in rem against the property concerned or which would be so enforceable but for an arbitration or proceedings contemplated in subparagraph (ii);

(ii) the claim is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding either in the Republic or elsewhere and whether or not it is subject to the law of the Republic.

(b) Unless the court orders otherwise any property so arrest shall be deemed to be property arrested in an action in terms of this Act."

According to the judgment a quo it was "common cause in argument that this subsection must be read as if the word 'and' appeared between subpara (a)(i) and subpara (a) (ii)".

The appellant's / .....

The appellant's application for an order arresting the Berg was referred for decision to the Full Court of the Natal Provincial Division. Before that Court (MILNE, JP, LEON and VAN HEERDEN, JJ) the third respondent raised two main defences to the appellant's claims. (Other possible defences of a technical nature were not relied on by the respondent in the Court below nor in this Court and they may be ignored.)

The first of the two defences was unanimously rejected by the Full Court; the second was upheld by the majority of the Court (MILNE, JP, with whom VAN HEERDEN, J, concurred). LEON, J, dissented. In the result the applica= tion was refused. The case is reported under the name Euromarine International of Mauren v The Ship Berg and Others

at 1984(4) SA 647. Leave to appeal was granted by the Court a quo.

The respondent's summary of the first of the defences is quoted by MILNE, JP, at p 651 G - I.

That passage in the judgment reads as follows:

> "On behalf of the respondents it is submitted that 'what the Act has achieved is to permit the institution of the action in rem against the Pericles by the arrest of the Berg. The right to bring such proceedings by way of the arrest of the Berg as an associated ship is not in itself an action in rem, it is merely an available alternative to the arrest of the Pericles in cir= cumstances where arrest is required in terms of the Act in order to enable the action to be instituted'

The learned Judge President then proceeded:

> "The point is summarised as follows:
>
> 'In other words, in order to commence proceeding an applicant may arrest an associated ship, but the maritime claim and the action in rem in terms of which it is sought to be enforced is still against the ship (and therefore the

owners of it) against or in respect of which the maritime claims arose'".

(That is, against the guilty ship, the Pericles.)

The second defence was that even if the relevant provisions of the Act were not to be construed restrictively in the sense thus contended for by the respondents, and if it were to be found that the appellant had brought itself "within the provisions of sec 5(3) of the Act", the applica= tion should fail because the provisions of sec 5(3) were not applicable to any claim which arose before 1 November, 1983, that being the date of commencement of the Act, and the claim in this case having arisen, as we have seen, on 24 December, 1978.

When considering the first defence the learned Judge President had occasion to examine the nature of an action in rem and to compare it with an action in personam for

enforcement / .....

enforcement of a maritime claim and with the existence of a maritime lien over the property to be arrested. As an aid to the proper construction of the relevant provisions in the Act, "the historical origins" of actions for enforcement of maritime claims in British law were considered and an instruc= tive passage from para 305 of Vol 1 of the 4th Edition of Halsbury's Laws of England was quoted in order to show, inter alia, how the Admiralty Court of Britain established "a right to arrest property which was the subject matter of a dispute, and to enforce its judgments against the property so arrested ....." (See Judgment pp 652 - 4 and also sec 6 of the Act.)

On appeal Mr Gordon, for the third respondent, in effect abandoned the first of the two defences I have described. His heads of argument contain the statement that

"notwithstanding /.....

"notwithstanding its contentions in the Court below, which were to the effect that the appellant did not have an action in rem against the Berg, the third Respondent concedes on appeal that the appellant had a claim which would have been enforceable by an action in rem against the Berg, but for the arbitration proceedings in London". It is therefore un= necessary for this Court to give further consideration to the arguments apparently advanced in the Court a quo in support of the first defence. Such references as I have made to the judgment of the Court a quo relative to the first defence have been made because in some respects considerations relative to the first defence overlap considerations proper to the resolu= tion of the problem of retrospectivity, which is the subject of the second defence. The considerations which I have in min are those which concern the nature and extent of the diffe=

rences between the rights and obligations stemming from maritime claims before and after the coming into force of the Act.

I turn to consider the second defence.

The general principles which should guide the Court when considering whether a statutory provision is to apply not only to future matters but also to those which existed prior to its coming into operation, have been fre= quently discussed by our Courts, but perhaps nowhere more fully than in Curtis v Johannesburg Municipality 1906 T S 308, when each of the members of the Court discussed the principles involved. "The general rule", said INNES, CJ, was that

> "in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should, if possible, be so / .....

be so interpreted as not to take away rights actually vested at the time of their promulgation."

(At p 311.) Side by side with that "rule" was the recog= nition that any law regulating legal procedure must, where applicable, govern the procedure "in every suit which comes to trial after the date of its promulgation"; (p 312) SMITH, J, (at p 319) was disposed to say that it did "not follow of necessity" that because a statute dealt with procedure it was to be treated as retrospective in its operation. The learned Judge reminded those who might read what he had to say that in the case of "every statute, whether dealing with procedure or not, the intention of the legislature had to be ascertained and no general rule applicable to all statutes" could be laid down. MASON, J, (at p 325) observed that the manner in which an action was to be brought was governed by "the law for the

time / .....

time being in force" and was "not a vested right attached to the contract or obligation at the time of its creation". But, added the learned Judge, the "rule" (i.e. regarding procedural matters) "can only be justified as a general maxim upon the understanding that the parties concerned are able to adopt and to apply to their vested rights the existing procedure ....." Of course, some of the observations made in the judgments in the Curtis case were prompted or moulded by a consideration of the nature of the particular enactment with which the case was concerned - it was a statute of limita tion of actions which required actions to be brought within si months of the time when the causes of such actions arose. But what is clear from the several judgments is that primarily in every case, the inquiry must be into the language of the enactment and purpose and intent of the legislature

which emerges therefrom. This was also the approach of Lord Brightman in Yew Bon Tew v Kenderaan Bas Mara (1982) 3 ALL E R 833 P C at p 836:

> "Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any parti= cular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.
>
> But these expressions 'retrospective' and 'proce= dural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (e.g. because it applies to a

pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (e.g. because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.

Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute."

(See also per JANSEN, J (as he then was) in Van Wyk v Rondalia 1967(1) SA 373 (T) at p 375 D - H) and per CORBETT, J, (as he then was) in Cape Town Municipality v F Robb and Co Ltd 1966(4) SA 345 (C) at pp 350 F - 351 H.)

Although / .....

Although, as the majority of the Court a quo found, there are provisions in the Act which might indicate that certain matters which arose prior to the commencement of the Act could possibly be affected by its coming into operation (e.g., sec 6(1)(a) which regulates the law to be applied in certain circumstances, sec 6(3) which deals with reception of evidence, and sec 11 which makes provision for the ranking of claims when payment is to be made out of funds held by the Court in connection with a maritime claim or out of the proceeds of property sold pursuant to an order or in the execution of a judgment of a Court) it does not follow that the intention was that "the whole of the Act must be construed as if it were intended to be retrospective." (See p 658 of the judgment of MILNE, JP.) It was contended that sec 16(2) was strongly indicative of an intent that the Act was to operate with retrospective effect. This

contention /....

contention was dealt with by MILNE, JP, at p 657 I - p 658 C. I agree with what he said in that regard. Short of these and possibly other indications limited to specific incidents, there are no express provisions in the Act to the effect that the sections relating to maritime claims and their enforcement are to be operative in respect of claims which arose prior to its commencement, nor can it reasonably be said that there is any clear implication to that effect.

In Katagum Wholesale Commodities v The M V Paz 1984 (3) SA 261 (N) at p 263, FRIEDMAN, J, described the Act as one which contained "novel, unusual and at times far-reaching provisions". And LEON, J, in his dissenting judgment in this case at p 666, with reference to the Act, said that it was the intention of the legislature"to intro= duce a remedial measure designed to provide what is nowadays

referred to as 'a new dispensation' in respect of maritime claims and their enforcement in South Africa". I agree that it is proper to approach the Act as one that is "new", not only because of the recency of its commencement but mainly because there are in it bold departures from the old, the possible impact of which needs to be carefully assessed. The departures with which we are now concerned are in the provisions of sec 3 and 5, set out above.

It is true that prior to the passing of the Act the English Admiralty Court had requested and been granted enhanced jurisdiction which empowered it to arrest a ship and to order that the arrested property be retained as security for claims which were the subject of arbitration or legal proceedings. In the light thereof the provisions

of sec 5(3) of the Act may be said not to be entirely strange to South Africa, where the admiralty jurisdiction of the Courts was governed by Admiralty Jurisdiction of the English High Court as it existed in 1890. Indeed, it has been suggested that sec 5(3) of the Act was to some extent modelled on sec 26 of the English Civil Jurisdiction and Judgments Act of 1982. (See the M V Paz, case, supra, at p 267.) But the enhanced jurisdiction of the English Admiralty Court did not go the full length of sec 5(3) of the Act, read with the provisions of sec 3(6) and (7). It is the advent of the "associated ship" as defined in sec 3(7) that broadens the impact of the legislation and constitutes the true novelty.

I did / .....

I did not understand Mr Shaw, who appeared for the appellant, to contend that the provisions to which I have just referred did not constitute a new development which could expose the owners of ships to a greater risk of liability for injuries suffered by others than had existed before the commencement of the Act. He acknowledged that the concept of an associated ship was a development of the notion of "sister-ship liability" which was introduced in England during 1956 - a sister-ship being a vessel fully owned by the owner of the "guilty" ship, i.e., the ship responsible for the damages claimed. As Mr Shaw explained, the purpose of the Act was to make the loss fall where it belonged by reason of ownership, and in the case of a company, ownership or control of shares.

The contention on behalf of the appellant was, however, that the new provision enabling a claimant to bring an action in rem by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose should be taken to have retrospective effect, because it is in essence a provision relating to procedure rather than to substantive or vested rights. Such provision, it was said, in effect provided the legal machinery by which a claim could be enforced. It is true that sec 3(6) read with sec 5(3) describes a method for recovery of money due to one who has suffered injury or loss for which he has a maritime claim, but it does much more than that; it gives to the claimant a right which he never had before, namely, to recover what is due to him from a party who was not

responsible for the damage suffered by him. It provides the claimant not only with a method for recovery but with an additional or alternative defendant. And by that token it is creative of new liabilities or obligations in owners of ships, or the potential thereof, of which such owners, if the claims arose prior to the commencement of the Act would have been wholly unaware and unsuspecting.

It was suggested by Mr Shaw, and Mr Gordon was disposed to accept, that the hypothetical case described by MILNE, JP, at p 662 G - I did not in fact demonstrate the "interference with vested rights" which it was said by the learned Judge President could flow from the circum= stances postulated if the provisions of the Act had retrospective effect. The relevant passage in the judgment

of MILNE, JP, is not entirely clear because of the repeated references therein to "an associated company". The Act nowhere defines or has regard to "associated companies". If by the phraseology used in the passage in question there was intended to describe not the ship of an "associated company" but an associated ship as defined in the Act, which belonged to a company other than the one owning the guilty ship, the example given by MILNE, JP, might indeed demonstrate manifest interference with vested rights. On that basis the factual situation posed by the hypothetical case is this:- A ship (let us call it the "Pericles") is owned by company A, the shares in which are owned or controlled by Mr "X". On 1 November 1978 (five years before the Act came into operation) the

Pericles while in Valparaiso caused damage which gave rise to a maritime claim. On that date "X" also owned or controlled the shares in company B which owned a ship which we shall call the "Berg", then lying in Hong Kong. On 2 November Mr X sold his shares in company B to the Z company which was in no way connected with either company A or company B and which acquired the shares in good faith, without knowledge of the claim against the Pericles. Six years later there is an application for the arrest of the Berg. If the combination of circumstances thus described brings the Berg within the scope of the statutory definition of an associated ship,(for which there is indeed much to be said) the Berg, which but for the provisions of the Act would at no time have been liable for the damage or subject

to arrest, would, if the Act operates with retrospective effect, become liable to arrest upon the coming into operation of the Act with all the prejudicial consequences to its erstwhile rights and to the interest of the Z company. The example given by MILNE, JP, would, therefore, if the postulated facts and circumstances brought the Berg within the definition of an associated ship, represent powerful support for the contention that it was not intended that these provisions of the Act should operate with retrospective effect.

The question whether upon the facts postulated by MILNE, JP, the hypothetical ship, Berg, would fall within the definition of "associated ship" was not specifically argued before us. Although it appears to us, as at present advised,

that it would fall within the definition, without having heard full argument on that point it is not desirable to express a final or firm opinion thereon, nor is it necessary for present purpose to do so because even if the specific example given by MILNE, JP, is disregarded, I am in full agreement with his general observations concerning the possibilities of prejudice to owners of ships who would have had no knowledge

of / .....

of their potential liability if the provisions in question were to be applicable to causes of action which arose prior to the passing of the Act.

The applicability of the Act to claims which arose prior to its commencement would not only result in the owners of ships being deprived of the opportunity of taking precautionary measures to avoid, if possible, the arrest of an associated ship, but the sudden, unsuspected confrontation with the fact of arrest of such a ship would carry its own potential of prejudice.

Looking at the Act in its entirety, as one must do, I cannot find justification for a conclusion that for the fulfilment of its purpose the new enactment required

that the innovative provisions therein were to apply in respect of claims which arose before its commencement, or that that was what the legislature intended. The argument that the provisions of ss 3(6) and (7) and 5(3) are procedural and ought therefore to be applied with retrospective effect cannot avail the appellant, for even if, to the limited extent that those provisions describe the method by which maritime claims may be enforced, they might be regarded as procedural, they can by no means be regarded as "purely procedural" measures (see the judgment of LORD BRIGHTMAN, quoted above) nor as being predominantly or substantially procedural, for their design was, clearly, to create substantive rights and obligations in regard to security for and payment of maritime claims.

The appeal is dismissed with costs.

S MILLER

JUDGE OF APPEAL

CORBETT, JA)
HOEXTER, JA) CONCUR
GROSSKOPF,JA)
GALGUT, AJA)