THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: AC 54 / 2004

In the matter between:

TRANSNET LIMITED t/a NATIONAL PORTS AUTHORITY Plaintiff

versus

THE MV *CLEOPATRA DREAM* 1st Defendant

The cargo laden on board the MV *CLEOPATRA DREAM* 2nd Defendant

JUDGMENT : 22 JANUARY 2010

BOZALEK J:

[1] The issue raised in this matter is whether a public authority is entitled to claim a reward for salvaging a vessel in distress. It is a vexed issue because a key element of a claim for such a reward is that the salvor's services must be voluntary and since public authorities involved in salvage actions often render their services under a common law or statutory duty, the voluntary nature of the services is negated and no award may be claimed.

[2] Transnet Limited, trading as the National Ports Authority, is the plaintiff in this action *in rem* in which the first defendant is the MV "Cleopatra Dream" (also referred to as "the vessel"), and the second defendant is The cargo laden on board the vessel. Plaintiff claims a salvage award arising out of services rendered to the vessel and the cargo on 2 April 2004 in the port of Saldanha.

[3] The parties agreed that liability would be determined through the stating of two questions of law and fact. They agreed further that the determination would be made on the basis of those averments not in issue on the pleadings, the documents referred to therein and the facts set out in a statement of agreed facts. That statement reads as follows:

1. *The plaintiff, Transnet Limited trading as the National Ports Authority, is a company vested with legal standing by virtue of section 3 of the Legal Succession to the South African Transport Services Act 9 of 1989 ("the SATS Act") and administers the port of Saldanha.*

2. *The plaintiff is a public authority as contemplated by article 5 of the International Convention on Salvage of 1989.*
3. *The first defendant is the MV "CLEOPATRA DREAM" ("the vessel") a bulk carrier of 75801,00 GRT having a length overall of 269 meters.*

4. *The second defendant is a cargo of 146 670 MT of iron ore product that was loaded on board the vessel at the port of Saldanha during the period 31 March to 2 April 2004.*

5. *The area in respect of which the plaintiff has jurisdiction in the port of Saldanha is described in the preamble to the Harbour Regulations published on 18 April 1982 ("the Harbour Regulations") which continue to be in force and are deemed to have been promulgated in terms of the SATS Act by reason of section 21 of that Act. A chart depicting the plaintiff's area of jurisdiction as regards the port of Saldanha Bay will be placed before the court at the hearing of this matter.*

6. *The plaintiff is the entity that exercises control over the port of Saldanha and earns revenue from the services provided by it pursuant to the charges set out in the Tariff Book.*

7. *Section 4.3 of the Tariff Book, which was in force at the relevant time, especially provided that: "CRAFT INVOLVED IN SALVAGE: Special conditions apply when services rendered constitute salvage. Transnet reserves the right to claim a reward for salvage if the services rendered to a ship in distress constitute salvage.*"

8. *The port of Saldanha is a compulsory pilotage harbour as described in section 10(1) of Schedule 1 to the SATS Act with the result that every ship entering, leaving or moving in the harbour is required to be navigated by a pilot who is an employee of the plaintiff, with the exception of ships that are exempt by statute or regulation.*

9. *The vessel is not exempt from the requirements of section 10 of the Schedule.*

10. *The plaintiff is the sole public authority lawfully operating tugs within the port of Saldanha.*

11. *Regulation 22 of the Harbour Regulations states: "The Transport Services will, on application or when considered necessary, and subject to the discretion of the port captain and to any conditions which he may impose in the interest of safe, orderly and efficient harbour working, undertake work and provide all towage, tug or other floating craft services at harbours under the Transport Services' jurisdiction where such craft are maintained and are available".*

12. *The vessel arrived in the port of Saldanha on 31 March 2004 and was berthed and loaded the cargo at the Saldanha side bulk ore loading terminal situated within the port.*

13. *The vessel completed loading the cargo at approximately 02h50 on the morning of 2 April 2004.*

14. *A sailing pilot was requested for 04h00.*

15. *At approximately 03h54 pilot De Kock, an employee acting in the course and scope of his employment by the plaintiff, boarded the vessel while she was alongside.*

16. *In accordance with section 10 of the Schedule:*

    16.1. It was the function of the pilot to navigate the vessel in the harbour, to direct its movements and to determine and control the movements of the tugs assisting the vessel whilst under pilotage.

    16.2. It was the responsibility of the pilot to determine the number of tugs required for pilotage in consultation with the port

captain.

17. *At approximately 04h00 the vessel commenced casting off the last of her mooring lines and at approximately 04h14 all lines were clear and on board.*

18. *Shortly after 04h00 the plaintiff's tug "Jutten" made fast to the starboard bow of the vessel and, at approximately 04h20, cast off from the vessel before she had reached the navigation channels for departing ships.*

19. *At 04h40, and within the limits of the port of Saldanha, the vessel experienced a power failure which resulted in the stoppage of her main engines.*

20. *On the occurence of the vessel's main engine stoppage the pilot requested that the plaintiff provide tug assistance to the vessel.*

21. The vessel drifted without power in the south-westerly direction towards shallow water and Jutten Island.

22.Thereafter, and at approximately 06h18 to 06h28, the plaintiff's tug "Jutten" came alongside and commenced pushing the vessel's port bow.

23. At approximately 06h48 the second pilot, Captain Ahmed, boarded the vessel.

24. At approximately 07h05 - 07h20 the second tug operated by the plaintiff, the "Meeuw", came alongside and was made fast to the vessel.

25. At approximately 07h36 - 07h42 pilot De Kock left the vessel.

26. The vessel was towed to a place of safety within the port of Saldanha.

27. All of the events described above giving rise to the plaintiff's claims against the defendants occurred within the limits of the port of Saldanha as described in the Harbour Regulations.

[4] The following further facts admitted by the defendants on the pleadings are relevant:

1. The "CLEOPATRA DREAM" is a ship as described in section 1 of the Wreck and Salvage Act 94 of 1996 ("the Wreck and Salvage Act") and in Article 1(b) of the International Convention on Salvage, 1989 ("the Convention") which is a Schedule to the Act.

2. The cargo laden on board the "CLEOPATRA DREAM" is "property" as described in Article 1(c) of the Convention.

3. In so far as the defendants are concerned, the services rendered by the plaintiff constituted a "salvage operation" as described in Article 1(a) of the Convention.

4. Until the tug "Jutten" made fast at 06h32, the "Cleopatra Dream" was in danger of grounding.

5. When the "Cleopatra Dream" suffered engine failure its crew was unable to provide or restore power to the vessel and until 10h20 she was unable to drop either of her anchors.

6. The "Cleopatra Dream" was towed to an anchorage position within the area of the port of Saldanha and the tugs "Jutten" and "Meeuw" stood by until the vessel let go of her starboard anchor at approximately 11h25.

[5] Notwithstanding the various admissions by the defendants, including that the services rendered by the plaintiff constituted a "salvage operation", they denied that the services gave rise to a salvage award in terms of the Wreck and Salvage Act, 94 of 1996 ("the Wreck and Salvage Act") and the 1989 International Convention on Salvage ("the Convention"), a Schedule to that Act, since, it was contended, they were rendered in the performance of a statutory and common law duty and were not voluntary. This in turn is denied by the plaintiff. The two questions of law and fact to be decided prior to and separately from the other matters in issue are the following:

[1] Whether the salvage operation carried out by the plaintiff in connection with the defendants was rendered voluntarily and not in the performance of a statutory and/or common law duty to perform the salvage operation in question.

[2] In the event of it being found the salvage operation was

carried out in the performance of a statutory and/orcommon law duty, and accordingly not voluntarily (as pleaded by the defendants), whether the plaintiff is nonetheless entitled to a salvage reward by virtue of the provisions of the Salvage Convention and clause 4.3 of the Tariff Book.

THE APPLICABLE LAW

[6] Subject to any relevant local statute, English law as it existed on 1 November 1983 applies to salvage claims. This is so because immediately before the commencement of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the AJRA") the South African court of admiralty would have had jurisdiction to entertain a claim for salvage. The incorporation of English law is subject, however, in terms of section 6(2) of the AJRA, to the provisions of a local statute, namely, the Wreck and Salvage Act and/or the Convention. In the event of there being a conflict between English law on the one hand and the Wreck and Salvage Act and the Convention on the other, the latter must prevail.

WAS THE SALVAGE OPERATION VOLUNTARY OR PURSUANT TO A STATUTORY OR COMMON LAW DUTY?

[7] It is an essential element of the salvor's right to claim salvage that the service rendered must be voluntary.[1] Salvage is defined by Kennedy[2] as "a

1 MVMbashl TransnetLtdvMVMbashlandOthers 2002 (3) SA 217 (D & CLD) at 224 B-C. MVMbashl TransnetLtdvMVMbashlandOthers 2002 (3) SA 217 (D & CLD) at 224 B-C.

2 FD Rose Kennedy and Rose, the Law of Salvage 6th Edition (2002) at para 16. FD Rose Kennedy and Rose, the Law of Salvage 6th Edition (2002) at para 16.

service which confers a benefit by saving or helping to save a recognised subject of salvage when in danger from which it cannot be extricated unaided, if and so far as the rendering of such service is voluntary in the sense of being attributable neither to a pre-existing obligation nor solely for the interests of the salvor".

[8] Having regard to the definition of salvage given by Kennedy—and the defendants' formal admissions in this regard, it is clear that, aside from the issue of voluntariness, all the requirements for a successful salvage claim were met in the present case.

[9] Kennedy states further that the general test for whether a public authority is entitled to a claim for a service provided is essentially the same as the Admiralty law test for voluntariness: "whether the service provided is outside the scope of the normal performance of its public duties". Thus, it is stated, " ... *a harbour authoritytaking action for the safety of shipping is likely to be unable to claim salvage while acting within its harbour area but may be able to do so if acting elsewhere*".

[10] In assessing whether the operation in respect of the *Cleopatra Dream* fell within the plaintiff's duties, defendants' counsel relied in their plea on the duty of a harbour authority to users to make it reasonably safe for navigation, the duty owed by it in terms of Regulation 22 of the Harbour Regulations to provide tug assistance within the confines of the harbour and its duty to users to ensure that tugs are available in the event of an

emergency occurring within the harbour area.

[11] It is appropriate to have regard firstly to the statutory and regulatory framework under which the plaintiff administers and operates the port of Saldanha. It does so pursuant to the provisions of the Legal Succession to the South African Transport Services Act 9 of 1989 ("the SATS Act") in which the "operating provisions" and "operating powers" applicable to the plaintiff are set out in articles 10 and 11 of Schedule 1 to the Act. In so far as it is relevant article 10 provides:

> "*1. The harbours of the Company are compulsory pilotage harbours with the result that every ship entering, leaving or moving in such a harbour shall be navigated by a pilot who is an employee of the Company, with the exception of ships that are exempt by statute or regulation.*
> *2. It shall be the pilot's function to navigate a ship in the harbour, to direct its movements and to determine and control the movement of tugs assisting the ship under pilotage.*
> *3. The pilot shall determine the number of tugs required for pilotage in consultation with the Port Captain, whose decision shall be final.*
> *4. The master shall at all times remain in command of his ship and neither he nor any person under his command may, while the ship is under pilotage, in any way interfere with the navigation or movement of the ship or prevent the pilot from carrying out his duties except in the case of an emergency, where the master may intervene to preserve the safety of his ship, cargo or crew and take whatever action he deems necessary to avert the danger.*"

[12] Also in force at the relevant time were the Harbour Regulations promulgated in terms of section 73(1) of the South African Transport Services Act 65 of 1981. Regulation 22 is relevant and bears repeating:

> "*The Transport Services will, on application or when*

> *considered necessary, and subject to the discretion of the port captain and to any conditions which he may impose in the interests of safe, orderly and efficient harbour working, undertake work and provide all towage, tug or other floating craft services at harbours under the Transport Services' jurisdiction where such craft are maintained and are available".*

[13] On behalf of the defendants, Mr. Wragge contended that, regard being had to this legislative and regulatory framework, the plaintiff, through its employees, the Port Captain and the pilot, had a statutory duty to provide tug services to the vessel whilst it was under pilotage so as to safely direct its movementswithin the port. However, Mr. Fitzgerald, who appeared for the plaintiff together with Mr. Cooke, took a different view of Regulation 22, contending that it was a general empowering provision which contemplated not salvage operations but the ordinary work of a port tug. In so far as it bestows a discretion on the Port Captain to provide towage or tug services, he submitted, this discretionary power could not simultaneously be deemed an obligation.

[14] In *The Mars and other Barges* the Court was faced with the same argument in a similar situation. The plaintiffs were the crew of the London port authority's launch which rescued a number of barges adrift on the River Thames. In response to a claim for salvage the defendant alleged that the plaintiffs were doing no more than performing their ordinary duties as servants of the port authority which, significantly, did not itself claim salvage. The first line of defence adopted was that in no circumstances should a salvage award be payable to the servants of a public authority in such circumstances for doing that which was the

authority's duty to do in any event.

[15] In rejecting this defence, Mr Justice Willmer held that the relevant statute gave the port authority the power to remove any obstruction that impeded navigation in the River Thames. He held that this section granted a permissive power rather than imposing a statutory duty. He doubted, however, that this was a point of significance because it was well-established that if an authority armed with such a power receives tolls and dues from shipping using the port then at common law, there arises a duty towards vessels paying such tolls and dues to exercise reasonable care "to *see that the channel is safe, and so forth*". In the circumstances he had no doubt that the port authority had a duty to exercise the power conferred upon it by the relevant Act. I find this reasoning persuasive and directly applicable to the interpretation of Regulation 22 of the Harbour Regulations.

[16] Whilst the language used in Regulation 22 is obviously important in construing its meaning, the context in which the regulation is framed must not be overlooked. In this regard the statutory provisions making Saldanha a compulsory pilotage harbour are in my view significant. Going hand in hand with this provision is the plaintiff's entitlement to levy charges for such pilotage and related services calculated in accordance with the detailed provisions set out in its Tariff Book. This effectively accords to the plaintiff a monopoly over the provision of such services and, as such, lends support to an interpretation of Regulation 22 as imposing a duty

upon the plaintiff, provided, of course, that the necessary craft are available. Such an interpretation is moreover borne out by the language used. The operative phrase ""*Transport Services will ••• undertake work and provide all towage, tug or other floating craft services.*" although qualified by reference *inter alia* to the Port Captain's discretion, is peremptory. The factors which must inform the exercise of his discretion are of limited scope, either the availability of resources or considerations of efficiency and safety.

[17] Mr. Fitzgerald submitted further that Regulation 22 imposed no obligation upon the plaintiff inasmuch as it is not specifically concerned with the salving of vessels in distress. To give it such an interpretation, it was said, would compel the plaintiff to engage in perilous salvage operations, regardless of the circumstances. I do not regard Regulation 22 as creating an absolute obligation on the part of the plaintiff to mount a salvage operation within the area of its jurisdiction in all circumstances. The Port Captain retains a discretion as to the circumstances in which he will deploy the vessels at his disposal. The discretion would have to be exercised rationally and is subject to certain restraints such as the availability of an appropriate vessel. Other constraints can be readily imagined. The envisaged salvage exercise might be extremely perilous and have limited prospects of success. In such circumstances it would be difficult to contend that the port authority was burdened with an absolute obligation to provide the services necessary to salvage a vessel.

[18] In my view, bearing in mind that Saldanha is a compulsory pilotage harbour, it would be anomalous to construe Regulation 22 as affording the plaintiff, acting through the Port Captain, an unfettered discretion to decide whether or not it would provide towage, tug or other floating craft services to a vessel particularly where it is both under pilotage and in need of such services. Although dependent upon the precise circumstances obtaining, I consider that, viewed in its overall context, Regulation 22 imposes a general obligation upon the plaintiff to provide the services envisaged therein.

[19] The fact that the plaintiff's towage or tug services were needed by the defendants when the *Cleopatra Dream* found herself in distress or an emergency situation does not, in my view, establish or point towards a separate duty, founded in statute or in common law, on the part of the plaintiff to provide these services in such a situation. Nor was any authority cited by defendant's counsel for the existence of a separate common law duty to this effect. Rather, any such duty would appear to be an incident of the plaintiff's statutory duty based primarily on the provisions of Regulation 22, read together with those statutory provisions establishing the port of Saldanha as a compulsory pilotage harbour and the plaintiff as the public authority administering the harbour.

[20] The central question remains whether, under the circumstances prevailing, the plaintiff acted outside or within its existing duty in providing the services it did to the vessel and the cargo. It is now

necessary to consider the common law duty upon which the defendants rely in contending that the services it enjoyed were not rendered voluntarily.

COMMON LAW DUTY

[21] Counsels' arguments in relation to a common law duty focussed on the harbour authority's duty to make the port of Saldanha reasonably safe for navigation. This principle was established in our law in *In re SS Winton: Avenue Shipping Company Ltd (in liquidation) and Others v South African Railways and Harbours and Another* 1938 CPD 247 at 264 where Centlivres J stated as follows:

> "It *was not disputed that it is the duty of the Administration to make that Harbour reasonably safe for navigation. If the Administration introduces or is a party to the introduction of a source of danger in a harbour under its control it seems to me that a duty arises on its part to take steps to see that no one is injured by that danger*".

The principle was extended in *Colonial Steamship Co Ltd v SA Railways and Harbours* 1949 (3) SA 1187 (D & CLD), De Wet J stating at 1194 as follows:

> " *The defendant Administration earns revenue through charges which it makes for the use of its harbours and equipment. It owes a duty to make the harbour reasonably safe for navigation...*".

[22] It was contended on behalf of the plaintiff that this duty, which it undoubtedly bore, should not be equated with an obligation to make ships safe to navigate the port. Furthermore, the argument proceeded, the *Cleopatra Dream* never presented a danger to other ships in the port and thus the salvage operation was a case of making that vessel safe to

navigate rather than an instance of the plaintiff discharging its duty of keeping the port safe for navigation. The first difficulty with this argument is that there was no mention in the stated or common cause facts regarding the effect, if any, of the "Cleopatra Dream's" plight upon other shipping.

[23] The general argument was moreover rejected in the case of The Citos[3] a ship which found itself at risk of running aground on a stormy night and was abandoned by her crew. The master of the Pole Star, which was owned by the Commissioners of the Northern Lighthouses, was instructed to endeavour to secure the Citos and remove it from the track of shipping. The crew of the Pole Star boarded the Citos, connected a tow and duly towed the Citos to a place of safety. The master and crew of the Pole Star claimed a salvage award which was defended by the owner of the Citos on the ground that the services were rendered in the discharge of a statutory duty and were therefore not rendered voluntarily.

[24] Amongst the arguments raised by the Commissioners were that even if their services in removing the stricken vessel from the fairway were in the execution of a public duty such a plea in effect was not available to the owners of the *Citos* in that the services were a duty owed only to owners of other ships. The judgment of Lord Blackburn of the Scottish Court of Sessions on this point is recorded as follows:

> ""*This denial amounted to an admission that the removal of an abandoned vessel from the fairway was a duty laid upon*

3 The Citos (1925) 22 Lloyd's Rep 275. *The Citos (1925) 22 Lloyd's Rep 275.,*

> *them, coupled with an averment that the removal of the vessel was not a duty to the owners of the vessel itself but only a duty to the owners of other shipping. In his Lordship's opinion the defendant's contention was not well founded. The principal object of the powers might be to protect other shipping from the risks of collision with the abandoned vessel: but it was undoubtedly an advantage to the owners of an abandoned vessel to have their vessel removed from the danger of such collision; and, accordingly, it could not be said that they had no interest in the performance of a statutory duty laid upon the Commissioners.*"

Lord Blackburn found, however, that a salvage award might be earned for services rendered in excess of a duty owed by the salvors to the salved vessel. He concluded that only certain services rendered during the latter part of the towage and certain repairs rendered to the steering gear of the *Citos* fell outside the public duty.

[25] Notwithstanding the fact that neither the stated facts nor those which were common cause on the pleadings make any reference to the question of what danger, if any, the vessel posed to other shipping, *prima facie* it would not be unreasonable to conclude that the steps taken by the plaintiff to tow the *Cleopatra Dream* to a place of safety within the harbour were taken in the execution of a public duty to make it safe for navigation, being a duty owed both to other shipping using the harbour and to the vessel itself. At first sight, a fully laden bulk carrier, drifting without power within the harbour, apart from being itself in distress and in danger of grounding, would constitute a danger to other users of the port, either existing or prospective. Inasmuch as the plaintiff bears the onus of proving that it acted voluntarily, the lack of any evidence regarding the danger to

other shipping impacts negatively upon its claim.

[26] A survey of the case law confirms the governing principle to be that, as a general rule, a public authority which renders salvage services falling within an existing statutory duty or common law duty to exercise reasonable care to ensure that a port is safe for navigation, will not be entitled to claim salvage. Where the services rendered go outside the scope of the statutory or common law duty which the public authority is required to perform, it may claim salvage. This core principle was pithily expressed by Brandon J in the matter of *The Gregerso*[4] after considering and approving the judgments in *The Citos* and *The Mars* as follows:

> "*The way in which the principle has been applied is by denying to such persons salvage in respect of acts within their existing duty, but allowing salvage in respect of acts going outside such duty.*"

[27] In *The Gregerso* a vessel, the *Kungso,* ran aground in the River Witham which leads to the port of Boston and a tug which was owned by the port authority was hastily manned and taken to the sea. Eventually, the next morning, the tug managed to free the *Kungso.* The port of Boston, its harbour master and the master and crew of the tug, all claimed salvage from the owners of the *Kungso.* Brandon J found that it was the duty of the Boston port authority to exercise the powers of removal conferred upon it byvarious statutes and that this duty was owed by it to

4 The Gregerso [1971] 1 Lloyd's Rep 220. *The Gregerso [1971] 1 Lloyd's Rep 220.,*

all users of the port, including the *Kungso.* He found thus that the work done by the port authority's employees was within their ordinary work and, in the circumstances, that the freeing of the *Kungso* was not voluntary as the term is understood in salvage law and that neither the port authority nor its employees were entitled to recover salvage for the operation. Brandon J explained his reasoning in part as follows:

> " *The result at which I have arrived may appear unjust in that it means, in effect, that the defendants get the benefit of having their vessels salved by the port authority, without having to pay for such benefit . This result is, however, justified by the need to ensure that those who have existing public duties to perform at ordinary rates of remuneration should not be permitted to say that they will only discharge such duties if they are paid salvage for doing* so."

[28] In *The Mars and other Barges* (supra), the second line of defence raised, was that if in such circumstances there could be a claim by a public authority for a salvage award, it could only arise in exceptional cases where the work done went substantially outside the ordinary work which would be expected of the authority's servants when carrying out the authority's duties.

[29] Willmer J held that in a proper case salvage may be payable to the servants of a public authority notwithstanding that they wereengaged in work which was part of the duty of the public authority to carry out and quoted with approval the following passage from Mclachlan's Law of Merchant Shipping:

> "*In all cases, indeed, where duty springing from office or arising out of contract would have legally bound the claimants to do services of the same nature as they actually rendered, the Court is vigilant to protect the owners from*

improper claims, without neglecting what is required for the ends of justice and the encouragement of enterprise on such occasions."

[30] Lord Willmer held that each case must be considered on its own facts and merits. However, salvage may only be claimed by servants of a public authority in very exceptional cases where the services rendered go far outside those which the statutory or common law duty of the public authority required it to perform. Significantly, he held that the onus rests upon the claimants to satisfy the court that they did, in the circumstances, render services which went quite outside their ordinary duties. The claim for salvage was nonetheless allowed because:

" •*by boarding the drifting barges, by overhauling and renewing their ropes, and by attempting to take them in tow, (they) were doing something which was outside and substantially outside, their ordinary duties as servants of the Port of London Authority.*"

[31] In *Master, Officers, etc of S.T. "J.W. Sauer" v Owners of S.S.* "*Sellasia*" 1926 CPD 437, the Court held that, where Railways and Harbour Administration had in good faith and with full knowledge of the circumstances entered into a fair contract of towage for remuneration, the officers and crew of a harbour tug were bound to carry out the contract and were not entitled to claim salvage even though the services might otherwise be regarded as salvage. It was further held that the Court should incline towards supporting contracts for towage or salvage made by the Administration and the

onus would thus be placed on the officers or crew of the towing tug to show that any such contract was manifestly unfair and such that they were entitled to a salvage award.

[32] In MV Mbashi - Transnet Limited v MV Mbashi and Others the defendant vessel, in seeking to defeat a salvage claim, unsuccessfully raised the defence that the plaintiff, under whose jurisdiction the harbour authority fell, had not acted voluntarily in rendering its services to the vessel when in distress. The salvage operation arose when a fire broke out in the engine room of the first defendant's container vessel, as a result of which it lost all power and was left a "dead ship". At this stage it was 3.5 miles from Durban harbour where it had berthed prior to its departure for Port Elizabeth. In response to a radio message from the Master, the Durban port authority despatched two tugs and a pilot to assist the vessel. When they reached the vessel it was 0.9 miles from the beach and drifting towards it. Lines from the tugs were eventually made fast and it was towed out to the open sea and brought into the harbour the following day.

[33] The first defendant submitted that, since the plaintiff as port authority had been under a statutory duty to perform the services it had rendered to the vessel, an essential ingredient of a salvor's right to claim salvage, namely, that the services rendered be voluntary, had been absent. In rejecting this defence, however, Levinsohn J noted that the voluntary nature of the services rendered in a salvage operation was an entrenched principle in the common law of salvage both in England and in South Africa. The plaintiff's claim for salvage was upheld, however,

principally on the basis that when the emergency arose, the vessel had reached a point in the open sea beyond the area of the harbour or the extended harbour and, furthermore, that the tugs had responded to a distress signal from the first defendant in going to its assistance. The Court held that it was incorrect to characterise the actions of the tugs as designed to remove an obstruction or potential obstruction in the area of the harbour.

APPLICATION OF THE LAW TO THE FACTS

[34] Against this background I turn to the question of whether the plaintiff acted pursuant to, and within, a common law and/or statutory duty in rendering its services to the *Cleopatra Dream* when it suffered engine failure. Of central importance is that the services were rendered within the limits of the port of Saldanha and whilst the vessel was under pilotage. It is also material that the power failure which incapacitated the vessel occurred at 04h40, merely 20 minutes after the plaintiff's tug had cast off from the vessel and before she had reached the navigation channels for departing ships. Furthermore, it was the pilot's request that the plaintiff provide tug assistance, in accordance with his function and responsibility in terms of article 10 of Schedule 1 to the SATS Act, which resulted in the *Jutten* coming to the vessel's assistance at 06h18. Thereafter a second pilot boarded the vessel and from 07h05 onwards a second tug operated by the plaintiff, the *Meeuw,* came alongside the vessel, made fast to it and assisted in towing it to a place of safety.

[35] Both parties accepted that the plaintiff had a common law duty to

make the port of Saldanha reasonably safe for navigation. It was common cause, moreover, that until the tug *Jutten* made fast at 06h32, the *Cleopatra Dream* was, as dawn was breaking, drifting without power in a south-westerly direction towards shallow water and Jutten Island with all the potential dangers this held for its safety and that of its crew. Furthermore, in my view a fully laden bulk carrier drifting without power within the confines of a harbour would, in the ordinary course, by its very nature, constitute a danger to other users of the harbour with the result that the plaintiff would owe a common law duty to come to the vessel's aid in order to make the port safe for navigation, both for other shipping and for the owners of the *Cleopatra Dream* and her cargo. In this latter regard I refer to the remarks of Lord Blackburn in the *The Citos* quoted above.

[36] From a statutory perspective, in determining whether the plaintiff acted outside its legal duty to the *Cleopatra Dream,* and thus the question of whether it rendered the services in question to the vessel voluntarily or not, it is clearly material that Saldanha was a compulsory pilotage harbour, that the plaintiff's services were at all times rendered within the area in which it exercised its jurisdiction as the port authority and that it was under a duty, in terms of Regulation 22, to "provide all towing, tug or other floating craft services..." at the port. The vessel was under pilotage when it fell into distress and it was the pilot who requested that the plaintiff provide tug assistance to the vessel at a time when it was drifting without power towards shallow water and Jutten Island. In terms of article

10 of the first Schedule to the SATS Act it remained "the *pilot's function to navigate a ship in the harbour, to direct its movements and to determine and control the movement of tugs assisting the ship under pilotage*".

[37] One can envisage circumstances where tug services rendered by the plaintiff might well fall outside of its ordinary duties, for example, where a vessel was in imminent danger of sinking or grounding in the harbour and was not under pilotage or where the provision of such services would have entailed considerable danger to the plaintiff's vessels or personnel. This was not such a case, however. The *Cleopatra Dream* was still under pilotage within the port precincts when it suffered engine failure and even the somewhat leisurely pace of assistance provided by the plaintiff was sufficient to secure the vessel which appeared never to have been in any imminent danger of grounding. Bearing in mind the onus resting on the plaintiff, there is furthermore, in my view, nothing in the stated or admitted facts in the way of action taken by the plaintiff which suggests that the services rendered by the plaintiff went substantially beyond the scope of the duties which it bore.

[38] Taking all these factors into account as well as the operative legal framework, I conclude that the plaintiff rendered therelevant services to the *Cleopatra Dream* pursuant to, and within, both a statutory and common law duty and thus not voluntarily as that term is understood in the law of salvage.

CONVERSION OF A CONTRACT OF PILOTAGE TO SALVAGE

[39] The plaintiff's claim may also be approached from the perspective that it became entitled to a salvage reward upon conversion of a contract of pilotage into one of salvage. The circumstances in which a pilot is entitled to recover salvage are governed by principles which are the same as or very similar to those applying when a tug towing a ship under a towage contract may recover salvage. In *The Aldora* Brandon J held:

> "*The general principle governing claims for salvage by a pilot engaged to pilot a ship, or by tugs engaged to render towage services to her, is that they are only entitled to claim salvage if, first, the ship is in danger by reason of circumstances which could not reasonably have been contemplated by the parties when the engagement to pilot or tow was made, and, secondly, risks are run, or responsibilities undertaken, or duties performed, which could not reasonably be regarded as being within the scope of such engagements.*"

[40] The same point is made in the following passage in Kennedy (supra) at page 592:

> "The *courts have long been reluctant to recognise in cases before them that pilots have performed salvage services. Thus, Sir Boyd Merriman P, said in* The Luigi Accame*: ' regard it as of the utmost importance to the seafaring community in general that there should be no temptation to pilots to convert their ordinary pilotage duties, or the normal hazards which may arise in the course of performing their ordinary pilotage duties, into salvage services...*'" .

[41] I do not consider that the plaintiff's case is much strengthened by its reliance on the ruling in *The Manchester*. In that case the court allowed the conversion of services from towage to salvage in the light of the wording of the port authority's contract and the provisions of the Merchant Shipping Act, 57 of 1957 which entitled a person rendering assistance to a ship "in distress" to a salvage award. The court's finding that the *Manchester* was in distress and that her saviours were thus salvors has been called into question on the basis that the port authority's towage obligation probably encompassed its actions in saving the vessel. The decision in *The Manchester* is difficult to reconcile with that in *The J.W. Sauer* where, at page 443 - 444, the following dictum of English law was approved by Gardiner JP:

> "*In accordance with this just principle of rewarding only volunteers as salvors, neither the crew nor the pilotnavigating the ship nor the owner or the crew of the tug towing it under a contract of towage ... are ordinarily held entitled to obtain salvage reward in respect of the services rendered by them in the preservation of the ship herself or of the lives or the cargo which she carries; for all of these persons are under a pre-existing obligation to work in their respective ways for the benefit of the life and property at risk; and the like disability rests upon government officials, however valuable their assistance may be, so long as they are acting only within the lines of their official duty*" ..." *I do not think that claims are to be encouraged where the services merely consist in using the vessels in which the claimants are engaged, without any personal risk and without the necessity for displaying any special skill or the rendering of any great or courageous service - where, in other words, the work done in connection with the salvage services by the officers and crews of these ships is no harder and involves no more risk than the work in which they would ordinarily be engaged.*"

[42] The remarks of Dr. Lushington in *The Rosehaugh* (1854) 1 Spinks

267, 268 are apposite:

> "*(T)here is a striking difference between a person possessed of such monopoly (of pilotage), and entitled to charge a given sum (which is fixed on the ground of its being a monopoly), and a person voluntarily performing a duty, whether a pilotage or a salvage service, because the latter has a right to exercise his own judgment as to whether he will go out on the service or not, and may then demand a fair remuneration for whatever he does. It might happen that mere pilotage pay would be no reward at all to a person who goes out under these circumstances...*".

[43] In the present matter by the time the pilot called for tug assistance the very reason for him doing so could only have been that the *Cleopatra Dream* was without power and was drifting. Accepting that the vessel was in danger when it lostpower and further that the pilot could not reasonably have anticipated that the vessel would lose all power, I nonetheless do not consider that the action taken by the pilot in summonsing tug assistance and remaining with the vessel until it was towed to a safe place of anchorage and until power was restored, were risks run, responsibilities undertaken or duties performed which could not reasonably be regarded as being within the scope of his duties as a pilot.—There is thus no room for any finding that in the circumstances of this matter a contract of towage was converted to one of salvage.

IS THE PLAINTIFF ENTITLED TO A SALVAGE REWARD BY REASON OF THE PROVISIONS OF THE SALVAGE CONVENTION AND CLAUSE 4.3 OF THE TARIFF BOOK?

[44] Clause 4.3 of the Tariff Book, which was in force at the relevant time, provided under the heading: "Craft Involved In Salvage" as follows:

""*Special conditions apply when services rendered constitute salvage. Transnet reserves the right to claim a reward for salvage if the services rendered to a ship in distress constitutes salvage.*"

[45] Relying on the decision in *The Manchester* it was contended on behalf of the plaintiff that even if it should be found that the salvage services rendered to the *Cleopatra Dream* were not voluntary, the relevant clause of the tariff book constituted an agreement between the parties to the effect that the plaintiff would be entitled to a salvage reward if it rendered salvage services to a ship in distress. However, quite apart from the difficulty of elevating a regulation in a tariff book to a substantive contract, upholding this contention would amount to the tail wagging the dog. The regulation providing that the plaintiff may claim a salvage reward if the services rendered constitute salvage takes its claim no further since the regulation itself does no more than restate the existing legal position. Standing alone it cannot negate an essential element of a successful salvage claim, namely the voluntary nature of the services rendered.

[46] Inasmuch as it was argued that a contract of salvage arose, I have already indicated why, on the facts there can, in my view, be no question of a contract of pilotage having been converted into one of salvage. In any event the onus of proving the existence of such a contract lay with the plaintiff. Bearing in mind that the call for tug assistance came from the pilot and the absence of any evidence of any communication between the ship's master and the port authorities regarding the terms upon which the

assistance would be rendered, there is no basis for a finding that a contract of salvage was concluded.

[47] In terms of section 2(1) of the Wreck and Salvage Act, the Salvage Convention has the force of law and applies in South Africa. Article 5 of the Convention provides as follows:

> ""*Salvage Operations Controlled by Public Authorities*
>
> *1. This Convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.*
>
> *2. Nevertheless salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.*
>
> *3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.*"

[48] Article 12 provides that salvage operations which have had a useful result give right to a reward, whilst article 13 stipulates the criteria to be considered in fixing the salvage reward. Finally, article 17 provides that:

> ""*Services Rendered Under Existing Contracts No payment is due under the provisions of this Convention unless the services*

rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose."

[49] The plaintiff's case is that, upon a proper interpretation of articles 5, 12, 13 and 17 of the Convention, the right of a public authority to salvage reward is not dependent upon whether a salvage operation was carried out voluntarily or in the performance of a statutory or common law duty; in terms of article 12 in order to qualify for a reward one need only show that there was a salvage operation as defined in the Convention which had a useful result. On behalf of the plaintiff, Mr. Fitzgerald submitted further that inasmuch as there is no express reference to the principle of voluntariness in article 12, to the extent that voluntariness remains an essential element of a salvage operation, article 17 restricts it to circumstances where a salvage operation is performed under the terms of an existing contract. Since there was no suggestion by the defendants that the salvage operation was performed by the plaintiff pursuant to an existing contract, the non-voluntary nature of the plaintiff's services do not deprive it of a salvage reward.

[50] I should firstly observe that the Convention must be read as a whole and all the articles given their due weight. It is unhelpful, therefore, to disregard those articles of the Convention dealing directly with an issue and to focus on other articles not directly addressing that issue for indirect support for a particular interpretation.

[51] Central to the plaintiff's argument is the far-reaching proposition that the requirement of voluntariness as an element of a successful salvage claim has been completely or largely removed by the terms of the Convention. However, the provisions of article 5(1) and 5(3) in themselves are clear and strongly suggest no substantive change to the existing law of salvage where the salvage operations are conducted by or under the control of a public authority. Article 5(1) provides that the Convention does not affect any provision of a national law or any international convention relating thereto. There is no other convention relating to salvage operations which is applicable and accordingly in order to determine whether a public authority carrying out salvage operations is entitled to a salvage reward, regard must be had to the South African law, which is English law as of 1 November 1983 unless in conflict with the Wreck and Salvage Act or the Convention. Article 5(3) more pointedly focuses upon the extent to which a public authority "under a duty" to perform salvage operations may avail itself of the rights and remedies provided in the Convention. It stipulates that this question is to be determined by the law of the state where such authority is situated. These two sub-articles are thus powerful indications that the Convention does not purport to change existing national law in these respects.

[52] It is article 5(2), an apparent qualification of article 5(1), which throws up problems of interpretation. On its face it seems to contradict article 5(1) when it states that salvors carrying out salvage operations shall be entitled to the rights and remedies

provided in the Convention, notwithstanding that article 5(1) states that the Convention does not disturb any provisions of national law or any other international convention. Commenting generally on the Convention the authors of Brice state as follows at page 14 para 1 - 39:

> " *It may be that lawyers, tribunals and others will at times be perplexed when seeking to find the true intent of the London Salvage Convention 1989 and by an apparent lack of clarity in some respects. This obscurity arises from the circumstances in which the Convention was discussed and constantly re-drafted.*"

[53] Kennedy[5] states that the effect of the Salvage Convention on the Admiralty rule is unclear by reason of the inconsistency of the language of article 5. One way the authors offer to reconcile these provisions is to construe the combined effects of the different parts of article 5 as laying down a general rule limiting the impact of the Convention on the general law relating to salvage operations by or under the control of public authorities, subject however to a *prima facie* right by persons conducting salvage operations to recover salvage. That right is displaced if there is an existing or pre-Convention rule denying such recovery to public authorities with the duty to perform salvage operations. The authors state that this interpretation "has the attraction of familiarity and is '*perhaps the one most likely to be adopted by an English tribunal*'".

[54] On behalf of the defendants, Mr. Wragge relied on Brice's[6] view that article 5 was enacted to prevent intervention by public authorities

5 Kennedy et al supra at para 553. Kennedy et al supra at para 553.
6 Brice supra at para 1-213. Brice supra at para 1-213.

being used as an argument for depriving private salvors of their right to salvage. Seen from this perspective article 5(2) is in harmony with article 5(1) which leaves the right of a public authority to a salvage reward to be determined by the relevant national law. In support of this view Mr. Wragge referred to a report prepared by the *Comite Maritime International,* the drafters of the Convention, which report was submitted to the International Maritime Organisation together with the draft Convention preceding its eventual adoption by that body.

[55] By virtue of the provisions of section 2(5) of the Wreck and Salvage Act, in interpreting the Convention a South African court or tribunal is given the liberty to "consider the preparatory texts to the Convention, decisions of foreign courts and any publication". I consider the CMI report to be a valuable guide to the interpretation to the Convention and falling within the class of material which a court may consider. In that report the purpose of Article 5(2) is described as follows:

> "In *this provision it is now made clear that the fact that a salvor has performed salvage operations under the control of a public authority shall not prevent him from exercising any right or remedy provided for by the Convention against the private interests to which salvage services are being rendered by him. Whether the salvor is entitled to recovery from such private interests depends upon whether, according to the facts, the conditions for recovery set out in the provision of the Convention have been met.*"

The following further comments in the report regarding Articles

5(1) and 5(2), respec tively, are relevant:

> ""*The draft convention does not deal directly with questions related to salvage operations by or under the control of public authorities, nor does it deal with the rights of salvors to payment in such cases from the authority concerned.*"

and:

> "The *present law varies from State to State as to whether for instance the coast guard or the fire service may recover in salvage. It is intended that this position should be preserved.*"

[56] Furthermore, in the CMI report the purpose of article 17, which prescribes that no salvage reward is payable for services rendered in terms of those reasonably envisaged in a contract, is described as follows:

> "*This is a general restatement of the principle in the 1910 Convention, Art 4. As mentioned above, the rule forms part of the important principle under which a salvage service must be voluntary to give right to the remedies of the Convention.*"

[57] In support of his contention that the Convention had in effect reversed the pre-Convention position regarding the entitlement of public authorities engaged in salvage operations to reward, plaintiff's counsel cited the view expressed in Hare that the Convention " *would allow the non voluntary salvor who performs the salvage operation, and complies with the other requirements of the Convention, to claim salvage notwithstanding the existence of a pre-existing duty*". Hare's view, however, is not supported by any other authority or writer and, inasmuch as it is called into service in

respect of salvage operations carried out by public authorities, is contrary to the provisions of articles 5(1) and (3) of the Convention and South African national law. Mr.

Wragge submitted, correctly in my view, that had the drafters of the Convention intended to do away with the requirement of voluntariness in regard to salvage services rendered by public authorities, it would have done so in express terms.

[58] In *The Mbashi* the Court held that the Convention does not detract from the existing law relating to salvage services rendered by a public authority. Referring to the principle that an essential ingredient of the salvor's right to claim salvage is that the service he renders must be a voluntary one, Levinsohn J concluded that:

> "On *a proper interpretation of the Convention, nothing that is stated therein derogates from the aforesaid requirement*".

[59] In my view article 5 of the Convention does not recognise the entitlement of a public authority to a salvage award irrespective of the existence of any duty, whether statutory or otherwise, pursuant to which the services were rendered but rather stipulates that, in considering whether a public authority is entitled to a salvage award, regard must be had to the existing national law. As I have indicated, in my judgment, applying that law to the facts of this matter the plaintiff has no entitlement to a salvage reward.

[60] For these reasons I consider that the second stated question, namely, whether, assuming that the salvage operation was carried out in the performance of a statutory and/or common law duty, the plaintiff is nonetheless entitled to a reward by virtue of the provisions of the salvage Convention and clause 4.3 of the Tariff Book, must be answered in the negative.

[61] Both stated questions having been answered in favour of the defendants, the customary costs order must follow. In the result the plaintiff's claim-is dismissed with costs.

L J BOZALEK, J

JUDGE OF THE HIGH COURT