Case No 265/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NATIONAL IRANIAN OIL COMPANY Appellant

and

BANQUE PARIBAS (SUISSE) SA 1st Respondent

THE FUND, CREATED BY THE PROCEEDS
OF THE SALE OF THE S/T "BOS ENERGY"
HER OWNERS AND ANY PARTIES INTERESTED
IN HER 2nd Respondent

CORAM: HOEXTER, E M GROSSKOPF, VIVIER, F H GROSSKOPF, JJA

et HARMS, AJA

HEARD: 6 May 1993

DELIVERED:

J U D G M E N T

E M GROSSKOPF, JA

This appeal concerns the priority of claims under section 11 of the Admiralty Jurisdiction Regulation Act, no. 105 of 1983 ("the Act") arising from the following facts.

The MV Bos Energy ("the vessel") was arrested in Cape Town on 19 December 1990, and again subsequently, at the instance of her creditors. At the time of the various arrests she was chartered to the Golden Ivy Offshore Corporation ("Golden Ivy"), a company incorporated in Panama, which had in turn sub-chartered her to the National Iranian Tanker Company ("Iranian Tanker"). The latter company had taken on a cargo of 1 601 461 barrels of Iranian heavy crude oil valued at approximately US $32 million. The owner and consignor of the cargo was the appellant, the National Iranian Oil Company. The vessel was still laden with this cargo when she was arrested.

As a result of the arrests several applications were made for the sale of the vessel in terms of section 9 of the Act. Negotiations between the various creditors followed. It is not necessary to consider these events in any detail. The outcome was that eventually only one application for the sale of the vessel came before the Cape Provincial Division. This was brought by the Bangue Paribas (Suisse) SA, the respondent in this appeal. The respondent had claims falling into three categories against the vessel. I give the amounts in round figures. The first category consisted of claims for US $15 million in respect of moneys lent and advanced, US $1,6 million in respect of monies expended for goods supplied and rendered to the vessel, US $31000 in respect of legal fees incurred by the respondent, and claims for interest in respect of the above amounts. In respect of this first category of claims the respondent had obtained default judgment against the vessel, her owners and any parties interested in her. These claims were secured by

Maltese statutory ship mortgages over the vessel. The second category of claims arose out of a guarantee given by the owners of the vessel to the respondent in respect of moneys advanced to associated companies. The amount claimed in this regard was US $ 15,4 million with interest. This claim also was secured by a Maltese statutory ship mortgage. The third category consisted of claims obtained by cession from Acomarit Services Maritimes SA ("Acomarit"). These claims arose from management services provided by Acomarit in respect of four vessels which were associated ships of the vessel within the meaning of sec 3(6) and 3(7) of the Act. The claims totalled US $285 906.

The respondent's application was heard ex parte on 22 February 1991. A rule nisi was issued returnable on 11 March 1991, calling on interested parties to show cause why an order should not be made authorising the sale of the vessel in accordance with the provisions laid down in the order. Attached to the rule nisi were the conditions of

sale. They included the following.

> "7. The vessel is sold in terms of South African Law by virtue of the Judicial Order for the sale free of all liens, encumbrances, preferences or charges, and all arrests and attachments effected before any such sale shall be discharged on delivery of the vessel to the purchaser.
>
> 27. Prospective purchasers' attention is drawn to the fact that there is currently on board the vessel a quantity of approximately 219650 metric tons of bulk crude oil.
>
> 28. The Registrar, the claimant, the auctioneer or any of their representatives accepts no responsibility for any delay caused to the vessel during either the carriage or discharge of the cargo or negotiations with the purchaser or the cargo owners with regard to any of the terms of these Conditions of Sale or the Order of Court."

On 6 March 1991 the appellant gave notice that, as the owner of the cargo of oil on the vessel, it intended objecting on the return day to the grant of an order in terms of the rule nisi. I need not set out the contents of the affidavit filed in support of the objection in any detail.

The appellant's grounds of objection were succinctly

summarised as follows:

"8.1 that the Order makes no provision for the transshipment of the cargo prior to the sale of the vessel or indeed at all;

29. that the Order makes no provision for the costs of such transshipment being accepted as a necessary expense to procure the sale of the vessel and;

30. that the Order in similar vein makes no provision that the freight payable for the onward carriage of the cargo (Cape Town to Europe) being accepted as a necessary cost of selling the vessel given, inter alia that the cargo cannot be disposed of in South Africa due to trade restrictions between Iran and South Africa."

The appellant accordingly asked for the following

order:

"(a) that the Respondent vessel may only be sold by public auction in terms of S 9 of Act 105/1983 once the cargo comprising some 220175 m/tons of Iranian Heavy Crude Oil has been removed from the vessel;

(b) that the Owners of the abovementioned cargo be and are hereby required to remove their cargo from the vessel within 40 days of the date of service upon them of the Order or within such extended period as the Court may on good cause

allow;

(c) that the cost and expense of removing the cargo from Respondent vessel and of on-carrying it to its original destination (Rotterdam) shall be regarded as costs and expenses incurred to procure the sale of Respondent vessel and in respect of the distribution of the proceeds of the sale, such costs and expenses shall enjoy the ranking afforded by S 11 (l)(a) of Act 105/1983."

I shall have to refer again later to the papers filed in support of and in opposition to the objection.

On 8 March 1991 Golden Ivy also filed a notice of objection. Its interest in the matter arose from the sub-charter of the vessel to Iranian Tanker. The vessel's failure to complete its voyage to Rotterdam would give rise to a claim for damages by the owners of the cargo (the appellant) against Iranian Tanker with which the appellant had contracted under a bill of lading. Iranian Tanker would in turn be entitled to claim against Golden Ivy for breach of its charter-party. It was accordingly in the interest of Golden Ivy to reduce the damages suffered by the appellant as

far as possible. It accordingly supported the appellant's objection, and asked for the same relief.

On the return day the matter came before van den Heever J. After hearing argument, she ruled that the cost of discharging the cargo was for the account of the owner of the cargo. Moreover she decided that "the rule should be confirmed with a suitable amendment to insert an order upon the owners of the cargo to remove that cargo from the vessel within 30 days" and that clauses 27 and 28 of the conditions of sale should be amended accordingly. These changes were reflected in the order as follows. New paragraphs were added reading:

> "1,8.1 That the owner of the cargo of crude oil presently on board the vessel, the National Iranian Oil Company, is hereby ordered to remove from the vessel on or before 11th April 1991 at its own cost the whole of the said cargo of crude oil;
>
> 1.8.2 Should the owner of the cargo fail so to remove the said cargo of crude oil the Sheriff is hereby authorised to remove such cargo and to recover the cost of doing so from the National Iranian Oil

Company. Should payment of such expenses not be made by the National Iranian Oil Company within seven (7) days of written demand for payment delivered to the National Iranian Oil Company's Cape Town attorneys, Messrs Field & Sims, the Sheriff shall be entitled to cause the cargo to be sold and to recover his costs, including the costs of such sale, from the proceeds of the sale as a first charge against such proceeds. The balance of the proceeds of the sale is to be paid to Messrs Field & Sims."

Clauses 27 and 28 of the conditions of sale were amended to read:

"27. Prospective puchasers' attention is drawn to the fact that there is currently on board the vessel a quantity of approximately 220 175 metric tons of bulk crude oil and that the owner of the said cargo has been ordered by the Court to remove such cargo from the vessel at its own cost on or before 11th April 1991.

28. The Registrar, the claimant, the auctioneer or any of their representatives accept no responsibility for any delay caused to the vessel by the discharge from the vessel of the cargo presently on board."

The objectors were ordered to pay the respondent's costs occasioned by the objections.

With the leave of the court a quo the appellant now appeals against the above order. Its grounds of appeal may be summarised as follows: (a) The court should have held that the cost of transshipment of the cargo and the freight payable for the onward carriage of the cargo from Cape Town to Rotterdam fell within the category of costs and expenses incurred to procure the sale of the vehicle within the meaning of sec 11(1)(a) of the Act.

31. The court should have held that the costs referred to in (a) above are part: of the expenses of justice which arise when a vessel is in custodia legis.

32. The court should have made an order of costs in the appellant's favour.

The first question then is whether the cost of transshipment of the cargo and the freight payable for its onward carriage fall within the terms of section 11(1)(a) of the Act. In this regard it should be noted that a new sec 11 of the Act was substituted by Act no 87 of 1992. However, the

old section was in force when the matter was heard in the court a quo, and it is common cause that no material changes were effected for present purposes by the new section. Save where I indicate otherwise I shall consequently deal with the section as it was prior to its substitution. Sec 11(1) then read as follows:

> "(1) Claims with regard to a fund in a court in terms of this Act or security given in respect of property in connection with a maritime claim or the proceeds of property sold pursuant to an order or in the execution of a judgment of a court in terms of this Act shall be paid in the following order:
>
> 33. claims in respect of costs and expenses incurred to preserve the property or to procure its sale, and in respect of the distribution of the proceeds of the sale;
>
> 34. claims to a preference based on possession, whether by way of a right of retention or otherwise;
>
> 35. claims which arose within one year before the commencement of the proceedings, in respect of -
>
> (i) wages and other sums due to or payable in respect of the master, officers and other members of the ship's complement, in connection with their employment on the ship; (ii) port, canal and other waterways dues and pilotage dues; (iii) loss of life or personal

injury, whether occurring on land or on water, directly connected with the employment of the ship;

(iv) loss of or damage to property, whether occurring on land or on water, resulting from delict and not capable of being based on contract, directly connected with the operation of the ship; (v) the repair of a ship or the supply of goods or the rendering of services to a ship for the employment or maintenance thereof;

(vi) salvage, removal of wreck and contribution in respect of a general average act or sacrifice;

36. claims in respect of mortgages, hypothecations, rights of retention of, and other charges on, the ship, effected in accordance with the law of the flag of the ship;

37. claims in respect of any maritime lien not falling under any category mentioned in any of the preceding paragraphs;

38. all other claims."

Some further refinement of the order of priority is provided in sec 11 (2) but nothing turns on it

at present. The practical effect of the dispute between the

parties arises from the order of priority laid down by sec 11(1). If the appellant is correct in its contentions that the costs of transshipment and onward carriage are costs and expenses incurred to procure the vessel's sale pursuant to sub-sec (l)(a) its claim would enjoy the very highest priority, even above those, for instance, of a lien holder, a necessaries man or a mortgagee. On the other hand, if it did not fall under sub-sec (l)(a) it could not rank any higher than as a part of the damages claimable by the appellant or Golden Ivy for breach of contract. Such a claim would fall under sub-sec (l)(f) and effectively be at the end of the queue.

The question then is whether the costs of transshipment and onward carriage of the cargo constitute "costs and expenses incurred to ... procure [the vessel's] sale". At the outset Mr. van Schalkwyk, who appeared for the appellant, conceded (rightly, in my view) that the costs of the onward carriage of the cargo to Rotterdam would not have

been incurred to procure the vessel's sale. He accordingly limited his argument to the discharge costs of the cargo.

The expression "to procure the sale" and its Afrikaans equivalents ("ten einde ... dit te verkoop" in the unamended section and "om die verkoop daarvan te bewerkstellig" in sec 11 (4) (a) as substituted in 1992) are not terms of art. They are ordinary expressions dealing with a practical matter. The sale of a vessel or other property in terms of the Act necessarily requires the expenditure of money. Because such expenditure is incurred (usually by an officer of the court) to realize the asset so that claimants may be paid, it is the policy of the law that it should be a first charge against the proceeds. If there is a dispute whether a particular expense is included the court will have to decide whether, as a fact, the expense in question was incurred, or would be incurred, to procure the sale of the property. The question in every case is whether there is a sufficient connection between the expense in issue and the

sale of the property.

In the present case we are dealing with the discharge costs of a cargo of oil. The cargo was not subject to the arrest, and the appellant was entitled to remove it at any time. If this was not done before the sale, the vessel could, both from a legal and a practical point of view, be sold with the cargo on board. The cargo would, of course, remain the property of the appellant, and the appellant would have to make arrangements with the purchaser for its discharge or further carriage. These are, however, practical problems between the purchaser and the cargo owner, and do not stand in the way of the sale of the vessel. The discharge of the cargo consequently does not appear prima facie to have been necessary to procure the sale of the vessel.

What then is the basis of the appellant's case? The affidavit filed in support of the notice of objection is completely uninformative on this issue. Its main burden is that the appellant's position as cargo owner would be

seriously prejudiced if the cargo were not discharged prior to the sale and conveyed further to Rotterdam, and that the order does not fully set out the relevant facts for the benefit of potential purchasers. No reason is given why the discharge of the cargo would be necessary, or even desirable, to procure a sale of the vessel.

In argument before us Mr. van Schalkwyk contended that the vessel laden with the cargo was likely to fetch a lower price that she would if free of the cargo. The discharge of the cargo would consequently lead to a higher price, and the costs of discharging the cargo must therefore be regarded as costs incurred to procure the sale of the vessel.

I accept that there is no clear distinction between expenditure incurred to procure a sale and expenditure designed to secure a higher price. One thinks, for instance, of matters such as advertising. A minimum of advertising might be sufficient to attract one or two persons who may be

interested in buying a vessel, but wider advertising may be necessary to ensure that a reasonable price is obtained, whether by auction or private treaty. In the present case, however, the appellant is faced with the problem that there is no evidence at all that the discharge of the cargo is likely to lead to a higher price. I assume that this would usually be so, but it is not inconceivable that a purchaser in the present case would prefer to buy the vessel with the cargo on board, since he would then be in a strong position to conclude an advantageous freight contract with the owner of the cargo.

But what is in my view even more important is that the appellant has made no attempt to compare the probable cost of discharging the cargo with the probable increase in price which could be achieved thereby. The appellant has emphasized in its affidavit that the task of discharging the oil would be difficult and expensive. I cannot assume that it would nevertheless be worth while in order to obtain a higher

price for the vessel. This would depend on a comparison between the costs of discharge and the higher price which the vessel was likely to realize as a result of the discharge. I accept that there may conceivably be cases where expenses to remove a cargo could be regarded as having been reasonably incurred to procure the sale of the vessel. This would, however, be exceptional. In the present case the facts show clearly that the discharge of the cargo would provide a substantial benefit for the cargo owner, but there is nothing to indicate that it would result in a nett increase of the fund created by the sale of the vessel. In these circumstances it could clearly not be said that, as a fact, the costs of discharging the cargo would amount to expenditure incurred to procure the sale of the vessel.

For the reasons I have given, I accordingly conclude that in the present case the costs of discharging the cargo from the vessel do not fall under sec 11(1)(a) of the Act. I have reached this conclusion simply on an

application of the terms of the section to the facts of this case, but it is fortified if regard is had to English authorities.

In terms of section 6(1) of the Act a court exercising its admiralty jurisdiction is to apply English law ("the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied" at the commencement of the Act) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom had jurisdiction immediately before the commencement of the Act (i e, 1 November 1983). See Transol Bunker BV v MV Andrico Unity and Others 1989 (4) SA 325 (A) at pp 334H to 335B and 339B to 340C. The application of English law is of course subject to South African statute law on the subject. See sec 6(2) of the Act. In the present case the matter in issue is regulated by sec 11 of the Act, and to the extent of its application it

would supersede the English maritime law. However, the ranking of maritime claims against a ship, and in particular, what expenses are to be included in the costs of procuring the judicial sale of a vessel, were clearly matters in respect of which an admiralty court had jurisdiction under the Colonial Courts of Admiralty Act. See, in the latter regard, rules 144, 145 and 146 of the Rules of the Vice-Admiralty Courts, which governed the procedure of Colonial Courts of Admiralty in South Africa pursuant to sec. 16(3) of the Colonial Courts of Admiralty Act. If a common law context were required for the interpretation of sec 11(1) this would accordingly have to be found in the English law.

The approach of English admiralty law to priorities is set out as follows in Thomas, Maritime Liens, pp 234 to 235:

> "There has to date been no attempt by the legislature, beyond giving a statutory priority to the maritime lien of the life salvor to lay down a precise scheme of priorities. Nor has the judiciary been attracted by such an approach. On the contrary, the Admiralty and Appellate Courts have adopted a broad discretionary approach with

> rival claims ranked by reference to considerations of equity, public policy and commercial expediency, with the ultimate aim of doing that which is just in the circumstances of each case. This is not however to suggest that the law is capricious, erratic or unpredictable. Arising from the 'value' framework within which the Courts operate there have emerged various principles which are capable of providing reliable signposts to the likely attitude of the Courts. Such indeed, on occasions, is the degree of predictability that many commentators have been tempted to represent the operative principles as firm 'rules of ranking'. Whilst this approach is understandable it would appear not to be strictly accurate, for such 'rules of ranking' are no more than visible manifestations of an underlying equity, policy or other consideration. Upon the underlying equity, policy or other consideration being displaced, either for want of substantiation or from the competitiveness of a greater equity or policy,so also the 'rule' becomes inoperative or inapplicable. In the realm of priorities there would appear to be no immutable rules of law, but only a number of guiding principles."

See also the Transol Bunker case, supra, at p 344B-E.

At first blush the approach of the English law differs so much from ours that it would not appear to afford any guidance. However, in practice there is considerable

common ground. Thus, although there is no statutory system of priorities in English admiralty law, there is "an incontrovertible rule of practice" that the fees and expenses incurred by the Marshal arising from the arrest, detention, appraisement and sale of the res and from the preservation and good management thereof are a first charge on the fund in the hands of the court (Thomas, op cit, p 259). This rule of practice has accordingly achieved much the same result as sec 11(1) (a) of the Act. And in that context the English courts have had to decide how to deal with the situation where an arrested vessel has a cargo on board which is not subject to an arrest.

Although this question arose in earlier cases there has been no reasoned judgment on it until quite recently. The first case to be considered is The "Myrto"(l978) 1 Lloyd's Rep 11 (CA). In that case the ship (the Myrto) had been arrested by various creditors. There were a number of disputes between the interested parties. On application to

court Brandon J ordered that many of these matters should go for trial. Pending trial he made an order for the sale of the ship. Then the question arose how the sale was to be effected since the ship had 6000 tons of cargo on board. On further application to Brandon J he ordered that the Admiralty Marshal make arrangements for discharging the cargo, storing it and putting it at the disposal of those persons having title to possession thereof. There were also a number of ancillary orders. Of particular importance for present purposes was a paragraph in the order reading:

> "That all expenses incurred by the Admiralty Marshal in acting under this order shall form part of his expenses in executing the Commission for Appraisement and Sale."

This paragraph was challenged on appeal. The Court of Appeal found it unnecessary to decide on its correctness, but held in effect that the question should be left open until the rights of the parties had been ascertained.

The next case was The Joqoo [1981] 3 All ER 634 (QB). In that case the ship was mortgaged. The mortgagees

claimed the principal sum due under the mortgage and later arrested the ship in port. The court ordered the Admiralty Marshal to permit the cargo owners to discharge their cargo on their undertaking to pay the costs of discharge. The cargo was discharged and the costs of the discharge borne by the cargo owners. Later the mortgagees obtained judgment against the shipowners and in order to have the judgment satisfied, the court ordered that the vessel be sold. The sale realized less than the amount of the mortgagees' judgment against the shipowners. The cargo owners applied for a declaration that the costs of discharging the cargo which they had borne should rank equally with the Marshal's charges and expenses in executing the commission of appraisement and sale, and should therefore, like the marshal's charges and expenses, be a first charge on the proceeds of the sale of the ship and take priority over the mortgagees' judgment against the shipowners.

The court pointed out that the cargo owners had the

cargo discharged primarily for their own benefit. It assumed that one result of the discharge of the cargo was that when the ship was subsequently sold by order of court, the price paid was higher than it would have been if the cargo had still been on board. Even on that assumption the cargo owners had no claim against the mortgagees, because there is no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit from it. Of course, in The Jogoo it was not contended that the cargo owners would have a direct claim against the mortgagees, but the effect of acceding to their application would be that the expense of discharging the cargo would come out of the pockets of the mortgagees. In sum the court held (at p 640e):

> "Such few cases as have been reported show that in England the Admiralty Court has consistently taken the view that the cargo owners must pay for removal of their own cargo in the event of the contract of carriage not being completed by the shipowners, and then make a claim against the shipowners for the damage which they have suffered. It seems to me that this is correct in principle. For these reasons this motion by the cargo owners must

fail."

This question again came before the court in The "Myrto" (No 2) [1984] 2 Lloyd's Rep 341 (QB). This case was a sequel to The "Myrto" (supra). I need not go into details about the history of the case subsequent to the hearing in the Court of Appeal to which I referred earlier. In The "Myrto" (No 2) the court had to decide the question left open by the Court of Appeal. It formulated the question as follows (at p 348):

> "When the Court has ordered that a ship laden with cargo is to be appraised and sold, is the expense involved in discharging the cargo to be regarded as part of the expenses of the Admiralty Marshal in selling the ship or should that expense be borne by the owners of the cargo which has been discharged?"

In discussing this issue, Sheen J first discussed the policy considerations which were applicable in the circumstances of the case before him. He also considered various American decisions, to which I shall return later. His conclusion was (at p 351):

> "I have already pointed out that on the special

> facts of this case the cost of discharging the cargo has conferred a benefit upon the owners of cargo and no benefit upon the mortgagees. For that reason alone the equities are all one way, and if it were merely a matter of exercising a broad discretion I would unhesitatingly order that the costs of discharging cargo be borne rateably by the owners of that cargo."

However, Sheen J went further to deal with the general principle involved because, he said, "it is highly desirable that there should be a well-recognized rule of practice as to who is liable for the cost of discharging cargo from a ship under arrest." His final conclusion was (at p 352):,

> "The more I have thought about this problem the more convinced I am that it is desirable to maintain a uniform practice that when a shipowner is unable to perform a contract of carriage the owner of cargo laden in his ship is entitled to take his cargo out of that ship at his own expense or abandon the cargo. If it is necessary for the Admiralty Marshal to supervise the discharge of the cargo he is, in my judgment, entitled to recover the cost of discharging the cargo from the owners of that cargo in proportion to their interests. If the cargo-owners abandon their cargo the Admiralty Marshal may sell it and recover his expenses from the proceeds of sale."

Now the decisions in The Jogoo (supra) and The "Myrto" (No 2) (supra) were both judgments of Sheen J sitting as a single judge in the Queen's Bench Division (Admiralty Court). As such they are not decisions of the highest authority (cf the Transol Bunker case (supra) at p 339 B -E). However, they were decided in accordance with previous authorities and reflect the long-standing practice of the English admiralty courts. See The Jogoo (supra) at p 639g to 640a and the authorities quoted in the Hong Kong case of Dharamdas & Co (Nigeria) Ltd and Another v The Owners of the Ship or Vessel "Minqren Development" [1979] Hong Kong LR 159 at p 161 to 163. In my view we can accept the principle laid down in these cases as representing the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied to the facts of this case at the commencement of the Act.

On behalf of the appellant we were referred to certain American cases, and in particular to The Emilia

[1963] AMC 1447. In that case a United States District Court held (at p 1449) that the presence of cargo aboard a ship had an adverse effect on the sale to the detriment of all parties who had an interest in the vessel. The cargo was lawfully on board the vessel. The owner of the vessel did not have the right to order the removal of the cargo at the expense of the cargo owner. The sale of the owner's interest in the vessel could not serve to vest a greater right than the owner had, nor could it impose an additional liability on the cargo owner. Where the cargo is discharged at the instance of the court, it is a service furnished on authority of the court and should be paid out of the proceeds of the sale as an "expense of justice" i e, as an administrative expense. The United States Court of Appeals, Second Circuit, held (at p 1448) that service rendered to a ship after arrest in aid of the discharge of the cargo necessarily enured to the benefit of a lienor since it contributed to the creation of the fund available to him, and that the District Court had

jurisdiction to make the order which it did.

It is clear, therefore, that the American courts take a different view of the matter than the English courts do. We were urged to follow the American rather than the English approach. Now, first of all, we must apply sec 11 of the Act, and that by itself provides an answer adverse to the appellant's case. The appellant's counsel contended (albeit not with great conviction) that we should not read sec 11 as containing an immutable list of priorities. This court still had a residual power, he said, to determine matters of priority on a broad discretionary basis like the English courts of admiralty. There seem to me to be two answers to this contention. First, the terms of sec 11 do not appear to allow any exceptions. Sec 11(1) provides that claims "shall be paid in the following order". The Afrikaans version, which is the authoritative one, reads "Eise ... moet in die volgende volgorde betaal word...". The same peremptory language is retained in the English version of the

substituted sec 11. Although the Afrikaans version is changed, it remains equally peremptory: "Indien ... goed 'n fonds uitmaak...word die relevante eise... betaal in die volgorde voorgeskryf...". This language leaves no room for the exercise of any discretion to depart from the order of priorities laid down in the section. This court has held that sections 96 to 102 of the Insolvency Act, no 24 of 1936, lay down a closed system of priorities (Cooper NO en Andere v Die Meester en 'n Ander 1992 (3) SA 60 (A) at p 82 G-I). Although the language of the Act is not quite as emphatic as that of the Insolvency Act, I consider that it is clear enough to lead to the same result. And in this regard it is pertinent to note that in certain cases the Act incorporates the provisions of the Insolvency Act (see Sec 11(2)(f) of the Act prior to its substitution in 1992 and the substituted sec ll(5)(f)). The legislature could hardly have intended that the powers of the court would differ depending on whether it applied the priorities laid down by the Act or those grafted

onto the Act from the Insolvency Act, i e, that the court be allowed a discretion in the former case which by clear language is denied it in the latter.

I consider therefore that the language of sec 11 excludes any discretionary power on the part of the court. But, in any event, if the court were to have retained a discretionary power of the kind enjoyed by the English admiralty courts, it would have had to exercise it in the manner employed by the English courts. The American authorities to which we were referred, were considered by the English courts in the cases quoted above (see The "Myrto", supra (1978), at p 16 (Roskill LJ), The Jogoo, supra, at p 638 d - j, and The "Myrto" (No 2), supra, at p 350 to 351. See also the Minqren Development case, supra, at p 163.) The consensus of these cases was that the American view was inconsonant with the law of England. With this conclusion I agree.

From what I have said it follows that the costs of

discharging the cargo in the present case would not have constituted costs or expenses incurred to procure the sale of the vessel for the purposes of sec 11(1)(a) of the Act, and that the American cases on this topic should not be applied. This conclusion disposes of the appellant's arguments a) and b) set out above. What remains is its argument c) relating to costs in the court a quo.

The appellant's counsel argued that, on the papers, there was a dispute whether the appellant was entitled to remove the cargo of oil before the sale. The appellant wished to do so, but the respondent would not permit this. This dispute was resolved in the appellant's favour, so it is contended, and the appellant's success in this regard should have been reflected in the court's order as to costs. In my view there are several answers to this contention. In the first place, I do not agree that the appellant's right to remove the oil was questioned on the papers by the respondent. The respondent's affidavit, properly read, says

no more than that the costs of discharging the oil was the appellant's problem, and should not be ordered to rank as costs of procuring the sale of the vessel. In this respect the respondent was completely successful in the court a quo. But, in any event, even if there was a dispute on the papers concerning the appellant's right to remove the oil prior to the sale, it was an entirely subordinate one. The main issue between the parties related to the ranking of the costs of discharging the cargo and forwarding it to Rotterdam. There is nothing on the papers to suggest that the respondent would have objected to the appellant removing the cargo if it proposed doing so at its own expense. On the main issue the respondent was successful and was, in my view, correctly awarded the costs occasioned by the objection to the confirmation of the rule nisi.

In the result the appeal is dismissed with costs, including the costs of two counsel.

E M GROSSKOPF, JA