REPUBLIC OF SOUTH AFRICA

Case No 442/96 In

the matter between:

DRYBULK SA Appellant

and

M V "YU LONG SHAN" Respondent

CORAM: Smalberger, Eksteen, Nienaber, Marais JJA et Van Coller AJA

HEARD: 25 August 1997 DELIVERED: 29 September 1997

J U D G M E N T

MARAIS JA/

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Statutory accretions to the Admiralty jurisdiction of South African courts inevitably give rise to conundrums. In 1983 parliament altered the law to permit the bringing of an action in rem against a ship other than the ship in respect of which the particular maritime claim sought to be asserted arose, provided that the former ship was an "associated ship" as defined in the relevant legislation (sec 3 (7) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act)). The question which then arose was whether the newly created remedy was available to a claimant whose claim had arisen before the enactment of that remedy. This Court's answer was that it was not and that it could be invoked only in respect of maritime claims arising after the remedy was enacted. See Euromarine International of Mauren v The Ship Berg and Others 1986 (2) SA 700 (A).

So too, when the definition of an associated ship was broadened in 1992 in the Admiralty Jurisdiction Regulation Amendment Act 87 of 1992 (the amending Act), this Court held in

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National Iranian Tanker Co v MV Pericles GC 1995 (1) SA 475

(A) that the extra breadth so created could not be taken advantage of by a claimant whose claim had arisen before the amendment took effect.

The present question is yet another arising from the amending Act. Pared to their essentials, the facts are these. (I shall refer to the parties as they were referred to in the Court a quo.) A company referred to as Groupco owned the vessel Fei Xia Shan at all relevant times. It chartered the vessel out to a company referred to as Zhen Hua which in turn chartered the vessel out to plaintiff in May 1991 by way of a time charter. Delivery of the vessel was to have

taken place between 1 August and 20 September 1991 but plaintiff refused to accept delivery because the vessel's speed, fuel consumption, cargo handling gear and certain hold ladders did not conform to the provisions of the charterparty. Plaintiff claimed damages from Zhen Hua. The charterparty made provision for arbitration in such an event and the outcome of the arbitration in London was that a final award to plaintiff of certain sums of money which had to be paid by Zhen Hua was made on 10 June 1994.

Zhen Hua failed to pay and plaintiff instituted an action in rem for those sums in the Court a quo against another vessel, the Yu Long Shan (defendant). The claim thus made was squarely based upon the arbitration award and the Yu Long Shan was alleged to be an associated ship of the Fei Xia Shan for reasons which I need not recite.

Exception was taken to the particulars of claim. The point taken was this. When the claim for damages which resulted in the award arose in 1991 only a demise charterer was liable in terms of sec 3 (6) and (7)(c) of the Act to have an associated ship arrested at the instance of a plaintiff. A time charterer such as Zhen Hua was not so liable. Plaintiff had failed to allege, and could not allege, that it was pursuant to a demise charter that it had chartered the Fei Xia Shan and it was therefore not entitled to proceed against the Yu Long Shan as an associated ship.

Plaintiffs answer was that while that was so prior to the amendment of sec 3 (7)(c) of the Act in 1992, it was no longer so after the amendment because it extended the right to proceed against an associated ship irrespective of the nature of the particular charterparty. The subsection had read:

> "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 subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner."

After amendment in 1992 it read:

> "If at any time a ship was the subject of a charter-party the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the subcharterer, and not the owner, is alleged to be liable."

The premises upon which plaintiffs answer rested were that the award

was made in 1994 after the amendment of the Act in 1992; that by

1994 a time charterer such as Zhen Hua was statutorily deemed to be

the owner of the chartered ship (the Fei Xia Shan) in the application

of the associated ship provisions in sec 3 (6) and 3 (7)(c) of the Act;

that the claim made in these proceedings for the amount of the award

is a maritime claim in its own right by virtue of para (aa) of the definition of maritime claim in sec 1 (1) of the Act; that the award is an English award governed by English law; that in English law the cause of action for the enforcement of an arbitral award arises on or shortly after the award and is based on an undertaking to honour the award; that defendant (the Yu Long Shan) was an associated ship of the Fei Xia Shan of which the charterer (Zhen Hua) was deemed to be the owner; and that plaintiff was therefore entitled, when asserting the claim to which the award gave rise, to invoke the remedy (given by sec 3 (6) of the Act) of proceeding against defendant (the Yu Long Shan) as an associated ship.

The rejoinder to this which found favour with the Court a quo (Niles-Duner AJ) was that "the arbitration award itself cannot be regarded as an entirely separate and independent cause of action"

and that "the charterparty and the original breach thereof are part of the cause of action based on the arbitration award". The learned judge thought it followed that plaintiffs claim arose prior to the amendment of the Act and that plaintiff, as a party to a time charter and not a charter by demise, had no right to proceed against the Yu Long Shan as an associated ship. The exception was thus upheld but leave to appeal to this Court was granted. The judgment of the Court a quo is reported as M V Yu Long Shan : Drybulk SA v M V Yu Long Shan 1997 (3) SA 629 (D & CLD).

I think there is a fallacy in the latter part of that reasoning. The claim asserted was founded upon the award. Section 1 (l)(aa) of the Act in both its amended and unamended form conferred the status of a maritime claim upon a claim so founded. It had read (and was then sec 1 (1)(x)):

" 'maritime claim' means -

any claim for the enforcement of, or arising out of, any judgment or arbitration award relating to a maritime claim, whether given or made in the Republic or elsewhere."

After amendment (and renumbering as sec 1 (l)(aa)) it read:

"maritime claim' means any claim for, arising out of or relating to - (aa) any judgment or arbitration award relating to a maritime claim, whether given or made in the Republic or elsewhere."

It is therefore difficult to appreciate how the claim sought to be

enforced could be said to have arisen before the amendment of the

Act, for the award had not been made before the amendment of the

Act. If, however, what the learned judge meant when she said "I

accordingly hold that the plaintiffs claim arose prior to the

amendment", was that the antecedent claim for damages which was the

subject of the arbitration arose prior to the amendment, she would

have failed to take account of the fact that plaintiffs claim was for the

enforcement of an award, and not for an adjudication of the claim for damages. That was the antecedent claim which had already been determined by the award. It would also mean that there had been a failure to take account of the fact that a claim for the enforcement of the award was a maritime claim in its own right by virtue of sec 1 (l)(aa) of the Act. However, it does not necessarily follow that the conclusion ultimately reached by the Court a quo was wrong.

Counsel for defendant submitted that there was a clear indication in sec 1 (l)(aa) that, in the case of a time charterer deemed to be an owner by virtue of the 1992 amendment of sec 3 (7)(c) of the Act, only a judgment or award against it which related to an antecedent maritime claim which had come into existence after the amendment could be enforced as a maritime claim against an associated ship. That indication, so he suggested, is to be found in the

words "relating to a maritime claim" which qualify the words "any judgment or arbitration award" in sec 1 (l)(aa). I see no merit in the point. Some qualification of the words "any judgment or arbitration award" was obviously necessary in order to preclude judgment creditors, or those in whose favour an arbitral award had been made, in matters which had nothing to do with maritime claims, from contending that they had become maritime claims by virtue of the definition. Nothing more than that can be deduced from the qualifying words upon which counsel for defendant relied. In fact those qualifying words were present in the definition when it was enacted in 1983. There is nothing in those words which provides any positive indication that the antecedent maritime claim which gave rise to the judgment or award must also have arisen after the 1992 amendment before the remedy provided may be invoked against a time charterer.

At best for defendant the qualifying words are neutral and take the particular matter under consideration no further in either direction.

In my view, counsel for defendant and the Court a quo were on firmer ground when he submitted, and it accepted, that, if the effect of interpreting the amendments in the manner contended for by plaintiff would be to render parties or ships retroactively liable in respect of an event for the consequences of which they were not liable when it occurred, one should not adopt that interpretation, unless such an intention appears quite plainly and unmistakably from the language used by parliament. It is hardly necessary to cite yet again the large body of authority to that effect. It suffices to say that the decisions of this Court in the cases of Berg and Pericles cited earlier provide illustrations of those principles at work.

It is unquestionably so, and counsel for plaintiff did not

contend otherwise, that the 1992 amendments broadened the categories of persons who might incur liability arising from a maritime claim, and also made ships amenable to arrest which had not previously been liable to arrest. It is common cause that prior to the amendment defendant (the Yu Long Shan) could not have been arrested by plaintiff to enforce its claim for damages (or to obtain security) under the charterparty, or to obtain security for payment of any consequential arbitration award once given. The reason is that the provisions relating to associated ships did not apply then to the case of a time charterer. Indeed, it is also common cause that even after the amendment it would not have been possible for plaintiff to do either of those things. The reason why a claim under the charterparty for damages (or security) could not have been brought against the Yu Long Shan is because such a claim had arisen prior to the amendment

at a time when she was not liable to be arrested as an associated ship at the instance of a party to a time charter and, consistently with the approach taken by this Court in the cases of Berg and Pericles, it was not open to plaintiff to seek to arrest her by virtue of the subsequently enacted amendments.

The reason why security in respect of any contemplated arbitration award could not have been obtained by arresting the Yu Long Shan is because sec 5 (3)(a) of the Act requires the person seeking to obtain an arrest for security to have a claim enforceable by an action in personam against the owner of the Yu Long Shan or an action in rem against either the Fei Xia Shan or the Yu Long Shan. Prior to the making of the award plaintiff had neither. Groupco owned the Yu Long Shan but it was not liable in personam to plaintiff. For reasons already given plaintiff had no action in rem against either of

the vessels.

It is therefore implicit in the interpretation for which plaintiff contends that, although the Yu Long Shan was not amenable to arrest at the time when plaintiffs claim for damages for breach of the charterparty arose (a maritime claim in terms of the definition set forth in sec 1 (1)(j) of the Act), she became liable to arrest thereafter because, after the 1992 amendments had come into operation, the claim was upheld by an arbitrator making an award in plaintiffs favour and that provided plaintiff with a new and different maritime claim which rendered her liable to arrest. It is equally implicit in the contention that if the award had been made prior to the amendments, it could not have been enforced against the Yu Long Shan. There is thus no escape from the conclusion that, on plaintiffs submission, a vessel which was not liable to arrest at the instance of plaintiff when

the breach of the charterparty occurred and plaintiff sustained the damages which it did, became so liable ex post facto solely by reason of the subsequent amendment of the Act and the making thereafter of an arbitral award in plaintiffs favour.

The question is whether or not parliament must be taken to have so intended. I can find nothing expressly said in the amending : Act which can be said to lend support to such an interpretation. Counsel for plaintiff pointed to the words "If at any time a ship was the subject of a charter-party" in sec 3 (7)(c) and emphasised the words "at any time", suggesting that they showed that the legislature intended that no distinction should be drawn between causes of action arising before or after the amendment in the application of the deeming provision in the subsection. I do not think that inference is justified. Those words are there, so it seems to me, simply to rebut

any suggestion that the deeming provision is to apply only in cases where the charterparty has been entered into after the amendment. Non constat that they were also meant to convey that the deeming provision was to be applicable even if the cause of action arising from a charterparty had arisen prior to the amendment. The mere existence of a charterparty gives no cause of action; it is a failure to perform the obligations under it or other unlawful conduct relating to it which gives rise to a cause of action. At best for plaintiff the words relied upon are equivocal in that particular regard and therefore provide no sure guide to an intention to impose by legislative decree liability ex (post)facto for the consequences of certain conduct or events where no liability existed at the time when they occurred.

Nor can I And anything in the amending Act which can be said to lead to a necessary implication to that effect. It is true, as

counsel for plaintiff contended, that the cases of Berg and Pericles are distinguishable in certain respects, but their central thrust is plain: one does not readily impute to the legislature an intention to impose liability for past conduct or events where no liability existed at the time, or to set at nought an immunity which existed at the time. In my view, the learned judge in the Court a quo was correct in thinking that the upholding of plaintiffs contention would not be consistent with the judgment in the case of Berg.

I appreciate that it is said that this is not a case in which it is sought to hold a ship liable with retroactive effect by virtue of a cause of action which would not have been maintainable against it at the time when the cause of action arose and that it is, on the contrary, simply a case of a plaintiff enforcing against the ship a new and different cause of action which in fact only arose after the enactment

of the amendment, and which the amendment entitled the plaintiff to enforce against the ship. On this view of the matter the event which is important and which triggers the right to proceed in rem against the Yu Long Shan is not the breach of the charterparty and the ensuing loss to plaintiff, but the making of the award. Since the making of the award occurred after the enactment of the amendment, no question of retroactivity arises.

The submission has the merit of simplicity and apparent logicality but, in my view, it ignores the unique and special character of the cause of action based upon an arbitral award or the judgment of a court. In both instances they are entirely derivative causes of action in the sense that they owe their own existence to the prior existence of some or other antecedent cause of action found to be good in fact and law after being subjected to adjudication. Whatever

the substantive effect in law of the giving of a judgment or the making of an award upon the cause of action adjudicated upon may be, it can not alter the fact that the judgment or award purports to be, and must be regarded as, a binding pronouncement of liability arising from the cause of action ventilated in the judicial or arbitral proceedings. If the cause of action so ventilated would not have given the successful claimant rights against particular ships or persons when the cause of action arose, it must be questioned whether the legislature intended to confer upon the claimant any such rights merely by reason of the fact that his claim happened to be upheld by an arbitrator or a court after the enactment of the amendment. It would certainly amount in substance, if not in form, to saddling ships and persons with retroactive liability in respect of breaches of contract and the commission of delicts for which they were not liable at the time when

they occurred. For the reasons I have already given, I remain unpersuaded that such was the intention of the legislature. Much plainer language than that which the legislature has employed would be required before such an interpretation could be justified.

I may say that if the only consequence of giving retroactive effect to the 1992 amendments would be that assets of a wrongdoer which were previously immune from arrest, would lose their immunity irrespective of when the cause of action in respect of which it is sought to arrest them arose, I would have hesitated to reach the conclusion which I have reached. However, the amendments wrought by the amending Act in 1992 are more far reaching than that. As I have said, it is common cause, at least in so far as claims arising from events or conduct occurring after the amendment are concerned, that the effect of the amendment is also to render liable persons who

would not have been liable in similar circumstances, if those circumstances had come into existence prior to the amendment. There is no indication in the amending legislation that any distinction is to be drawn between assets and persons in so far as retroactivity of operation of the amendments is concerned and I balk at the notion that even persons who were not liable at the time when a breach of a charterparty causing damage occurred, are intended to be made liable ex post facto solely by the amendments.

Counsel for plaintiff sought to meet this by recalling dicta to be found in the cases to the effect that arbitrary and seemingly irrational lines have sometimes to be drawn when enacting statutes and amendments to them, and that it is simply unfortunate if the consequence is that two similarly positioned persons are treated differently merely by reason of the respective dates upon which their

respective positions crystallised. That is of course so but different considerations apply when one is dealing with suggested ex post facto impositions of liability or ex post facto losses of immunity from claims.

There was some reference in the heads of argument and in oral argument to the law of novation. Counsel for defendant sought to rely upon cases such as Swadif (Pty) Ltd v Dyke N.O. 1978 (1) SA 928 (A); Trust Bank of Africa Ltd v Dhooma 1970 (3) SA 304 (N); and Zygos Corporation v Salen Rederierna AB 1984 (4) SA 444 (C) for the proposition that a judgment or arbitral award does not necessarily result in a novation of the debt upon which the claim was based, and that it could therefore not be said that the award in this case extinguished the antecedent cause of action and gave rise to an entirely new and independent cause of action which could be pursued

irrespective of when the antecedent cause of action on the charterparty arose. Counsel for plaintiff did not argue that the cases of Swadif, Dhooma, and Zygos Corporation were wrongly decided and whatever doubt I, speaking solely for myself and with respect, may have about the correctness of some of the propositions enunciated in those cases, this case falls to be decided on the assumption that they are correct. If it is so that the award sued upon in this case did not supersede the antecedent cause of action and create a new debt, but merely "strengthened" or "reinforced" the right to be paid the antecedent debt, and if it is so that "the enforceable right remains the same", as was held to be the position in the cases referred to, then that is all the more reason for declining to give retroactive operation to the 1992 amendments in the manner contended for by plaintiff, if the result would be to render liable to arrest a vessel which was not liable for

the antecedent debt which was the subject of the award or judgment. In my view, the exception was rightly upheld. The appeal is dismissed with costs. The costs of two counsel are allowed.

R M MARAIS
JUDGE OF APPEAL

Smalberger JA)
Eksteen JA)
Nienaber JA) (Concur
Van Coller AJA)