THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 163/10

In the matter between:

TRANSNET LIMITED t/a
NATIONAL PORTS AUTHORITY **Appellant**

and

THE MV CLEOPATRA DREAM **First Respondent**
THE CARGO LADEN ON BOARD **Second**
Respondent

Neutral citation: *Transnet v The MV Cleopatra Dream* (163/10) [2011] ZASCA 12 (11 March 2011)

Coram: BRAND, LEWIS, HEHER, MALAN and SERITI JJA

Heard: 22 February 2011

Delivered: 11 March 2011

Updated:

Summary: Merchant Shipping – maritime law – salvage – by public authority within limits of its own port – whether acting under statutory and common law duties – claim for reward under Salvage Convention – interpretation of arts 5 and 17 of Convention.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Bozalek J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

HEHER JA (BRAND, LEWIS, MALAN AND SERITI JJA concurring):

[1] This is an appeal against the whole of the judgment and order delivered by Bozalek J in the Western Cape High Court, Cape Town in the exercise of its admiralty jurisdiction. The learned judge answered two stated questions in favour of the present respondents and dismissed the appellant's claim with costs.[1]

[2] The appellant instituted an action in which it claimed a salvage reward from the first respondent (the vessel) and the second respondent (the cargo), arising from a salvage operation carried out by tugs belonging to the appellant on 2 April 2004 in the port of Saldanha Bay in which it is the statutory authority. The claim was defended.

[3] Pursuant to an agreed order in terms of Rule 33(4), the following questions of law and fact were to be decided prior to and separately from the other matters in issue in the action:

1 Whether the salvage operation carried out by the appellant in connection with the respondents was rendered voluntarily and not in the performance of a statutory and/or common law duty.

2 In the event of it being found that the salvage operation was carried out in performance of a statutory and/or common law duty, and accordingly, not voluntarily, as averred by the respondents in sub-paragraph 18.2.6 of the plea, whether the appellant

1 The judgment is reported as *Transnet Ltd t/a National Ports Authority v MV Cleopatra Dream* [2010] 3 All SA 110 (WCC).

was nonetheless entitled to a salvage reward by reason of the provisions of the Salvage Convention[2] and item 4.3 of the Tariff Book.[3]

[4] As regards the first issue, Bozalek J held that:

'the [appellant] rendered the relevant services to the vessel 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.'

[5] With respect to the second issue, the learned judge held that:

'[A]rticle 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 (and) applying that law to the facts of the matter the [appellant] has no entitlement to a salvage award.'

[6] In stating the question for decision the parties agreed that the issues would be determined by reference only to the facts set out in a Statement of Agreed Facts, the documents referred to in it and to those facts not in issue in the pleadings. It is from these sources that I derive the summary which follows in paras 7 to 19.

[7] The appellant, a company with legal standing by virtue of s 3 of the Legal Succession to the South African Transport Services Act 9 of 1989, administers the port of Saldanha. The appellant is a public authority as contemplated by art 5 of the Convention.

[8] The vessel is the MV *Cleopatra Dream*, a bulk carrier of 75801 GRT having an overall length of 269 metres. The cargo consisted of 146 670 MT of iron ore that was loaded on board the vessel in the port during the period 31 March to 2 April 2004.

[9] All of the events described below giving rise to the appellant's claims against the

2 The International Convention on Salvage, 1989 which is contained in the Schedule to the Wreck and Salvage Act 94 of 1996 and has, subject to the provisions of the Act, force of law and application in the Republic (s 2(1) of the Act).
3 National Ports Authority of South Africa: Port Tariffs, 4ed, 1 April 2004.

respondents occurred within the limits of the port. The area in which the appellant has jurisdiction in the port is described in the preamble to the Harbour Regulations published

on 18 April 1982 and which continue to be in force. A chart depicting the appellant's area of jurisdiction in the port was placed before the court at the hearing and a copy was made available to us. It shows *inter alia* the limits of the appellant's jurisdiction, the layout of the harbour, the approach channel and the position of sandbanks and islands, the largest of which, to the south of the channel and inside the harbour entry line (stretching from North Head to South Head) is Jutten Island.

[10] The appellant exercises control over the port and earns revenue from the services provided by it pursuant to the charges set out in the Tariff Book. Among the charges listed in Section 4 'Marine Services' are charges 'payable for tugs/craft assisting and/or attending ships, within the confines of the port' (item 2), 'miscellaneous tug/craft services' (item 3) and 'berthing services' (item 4). Included in the 'miscellaneous services' is this sub-item:

'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.'

[11] The appellant is the sole public authority that lawfully operates tugs within the port. Moreover the port of Saldanha is a compulsory pilotage harbour as described in s 10(1) of Schedule 1 to the Legal Succession Act,[4] with the result that every ship entering, leaving or moving in the harbour is required to be navigated by a pilot who is

4 Section 10 provides as follows:
'(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 movements of the 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) A 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.
(5) Where a master intervenes, he shall immediately inform the pilot thereof and, after having restored the situation, he shall permit the pilot to proceed with the execution of his duties.
(6) The master shall ensure that the officers and crew are at their posts, that a proper look-out is kept and that the pilot is given every assistance in the execution of his duties.
(7) The Company and the pilot shall be exempt from liability for loss or damage caused by a negligent act or omission on the part of the pilot.
(8) For the purpose of this item, 'pilot' shall mean any person duly licensed by the Company to act as a pilot at a particular harbour.'

an employee of the appellant, with the exception of ships that are exempt by statute or regulation. (The vessel was not so exempt.)

[12] Regulation 22 of the Harbour Regulations[5] provides:

'The Transport Services will, on application or when 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, tugs or other floating craft services at harbours under the Transport Services' jurisdiction where such craft are maintained and are available.'

[13] The vessel arrived in the port on 31 March 2004 and was berthed and loaded at the Saldanha side bulk ore loading terminal.

[14] The vessel completed loading the cargo at about 02h50 on 2 April 2004 and a sailing pilot was requested for 04h00. At approximately 03h54 pilot De Kock, an employee of the appellant acting in the course and scope of his employment, boarded the vessel.

[15] In accordance with s 10 of Schedule 1:

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 while it was under pilotage.

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

[16] At about 4h00 the vessel commenced casting off the last of her mooring lines. The appellant's tug *Jutten* made fast to the starboard bow of the vessel. At about 4h20 the tug cast off from the vessel before she had reached the channel for departing ships.

[17] At 4h40, within the limits of the port, the vessel experienced a catastrophic power failure which resulted in the stoppage of her main engines and prevented her from dropping anchor. When that happened the pilot requested tug assistance from the

5 Promulgated or in force in terms of s 21 of the Legal Succession Act.

port authority.

[18] The vessel drifted without power in a south-westerly direction towards shallow water and Jutten Island.

[19] At about 6h18 the tug *Jutten* again came alongside and commenced pushing the vessel's port bow. Twenty minutes later a second pilot, Captain Ahmed, boarded the vessel. Within the next half hour a second tug operated by the appellant, the *Meeuw*, also came alongside and was made fast to the vessel, which was then towed to a place of safety within the port.

[20] On the same day the appellant caused the *Cleopatra Dream* and her cargo to be arrested in terms of the provisions of the Admiralty Jurisdiction Regulation Act 105 of 1983, thereby instituting an action *in rem* for payment of a total of R10 million. The claim was in respect of salvage services rendered to ship and cargo in the port of Saldanha.

[21] Security was furnished for the appellant's claims and the vessel and her cargo were released from arrest. The arrests were, however, deemed to continue in terms of s 3(10)(a)(i) of the last-mentioned Act.

[22] The appellant duly delivered its particulars of claim and the respondents pleaded. They admitted that the services rendered by the appellant constituted a 'salvage operation' as described in art 1(a) to the Convention and that the vessel and cargo were in distress and in danger of grounding at the time the services were rendered. They denied that the appellant was entitled to a salvage reward because the services performed by the appellant were rendered in the performance of a statutory or common law duty and were not voluntary.

[23] In its replication the appellant, having denied that its services were rendered in the performance of a duty and, therefore, not voluntary, averred that, should the court hold otherwise, it was nevertheless entitled to a salvage reward by virtue of the

provisions of the Convention, and, in particular, articles 5[6] and 17[7] thereof.

[24] In addition, the appellant replicated that, as the entity that exercised control over the port of Saldanha, it earned revenue for the services provided by it according to the charges set out in its Tariff Book. It referred specifically to the terms of item 4.3.[8]

The law to be applied

[25] Immediately before the commencement of the Admiralty Jurisdiction Regulation Act

on 1 November 1983 the South African courts of admiralty had jurisdiction to entertain a claim for salvage. In terms of s 6(1) of that Act the applicable law in the action brought by the appellant was the English law of admiralty at that date 'in so far as that law can be applied'. That provision does not however derogate from the provisions of any law of the Republic applicable to a claim for salvage (s 6(2)). The Wreck and Salvage Act together with the Convention is such a law. In the event of a conflict between English law and the Act or Convention, the latter must prevail.[9]

[26] In interpreting the Convention the court may consider the preparatory texts to the Convention, decisions of foreign courts and any publication.[10]

[27] The Convention came into force on 14 July 1996. Its essential purpose was to bring the traditional rules of salvage which had been codified in the Convention for Unification of Certain Rules of Law relating to Salvage and Sea, adopted in Brussels in 1910, up to

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6 Art 5 *Salvage operations controlled by public authorities*, provides:
'(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.'

7 Art 17, *Services rendered under existing contracts*, provides:
'No payment is due under the provisions of this Convention unless the services rendered exceed what can reasonably considered as due performance of a contract entered into before the danger arose.'

8Item 4.3 is quoted in para 10 above.

9*MV Roxana Bank: Swire Pacific Offshore Services (Pty) Ltd v MV Roxana Bank* 2005 (2) SA 65 (SCA) para 8.

10 Section 2(5) of the Wreck and Salvage Act.

date with modern practice and jurisdictional principles, and to take account of mounting international concerns relating to the protection of the marine environment.[11]

[28] To achieve that object the Inter-governmental Maritime Consultative Organisation (now the International Maritime Organisation or IMO) invited the CMI to prepare a draft Convention to replace the 1910 Convention. The 1989 Convention was introduced in draft form in Montreal in 1981 and settled in final form at a diplomatic conference in London in April 1989. The convention came into force on 14 January 1996 when the requisite number of States consented to be bound.[12]

[29] It has been suggested that five categories of preparatory text for the Convention may be identified in the following, descending, order of importance:

1 The proceedings of the 1989 diplomatic conference at which the text was finalised.

2 The proceedings of the Legal Committee of the IMO during the period 1983-88 discussing the draft Convention formulated in 1981.

3 The proceedings of the CMI leading up to the 1981 draft.

4 The Brussels Salvage Convention of 1910.

5 The *travaux preparatoires* of the Brussels Convention, 1910.[13]

Voluntariness as a requirement for a salvage reward.

[30] As Bozalek J held, subject to the effect of Art 5 of the Convention, it is an essential element of a salvor's right to recover salvage that the services to the property in peril are rendered voluntarily, without any pre-existing contractual or other legal duty. The duty is a legally recognised duty towards the salved property or its owners and not a mere sense of moral obligation. A right to salvage only arises when the contribution is voluntary.[14]

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11 *The Travaux Preparatoires of the Convention on Salvage*, 1989 (2003), publication of the Comite Maritime International, (the CMI): foreword.

12 Ibid p ix.

13 F D Rose *Kennedy & Rose Law of Salvage* 7 ed (2010) at para 1.097. See also R Shaw *The 1989 Salvage Convention and English Law* 1996 Lloyd's Maritime and Commercial Law Quarterly 202.

14 See for example Brice*, Maritime Law of Salvage* 3 ed 1-01, 1-206; *Kennedy & Rose* 8.001; The *MV Mbashi; Transnet Ltd v MV Mbashi* 2002 (3) SA 217 (D) 224B-C; J Reeder, *Brice on Maritime Law of Salvage* 4 ed (2003) 1-184; Halsbury's *Laws of England*, Vol 94, 5 ed (2008) para 932 fn 2; W A Joubert (ed) *Law of South Africa*, Vol 25 (2) (2006) first re-issue, para 45.

[31] The rationale for not allowing a salvage reward to a salvor acting under a pre-existing duty to render assistance, whether the duty arises from a contract or otherwise, is that such a person should not be encouraged to neglect his duty and, by doing so, cause or contribute to the danger necessitating salvage. Nor should the (prospective) salvor be tempted to refuse to render services falling within his duty in order to obtain a salvage reward.[15]

[32] If a service is rendered under a pre-existing obligation to work for the benefit of property and life at risk, then it is prima facie not a salvage service. Even in the absence of a duty, where the services performed are ordinarily to be expected of the claimant in the capacity in which he performs them he will usually be barred from recovering salvage.[16]

[33] The principle of voluntariness has been applied to various classes of persons who are or may be under an existing duty to the owner of the vessel assisted by them, including port authorities, and salvage has been allowed only in respect of services going beyond their duties.[17] In *The Gregerso*,[18] Brandon J said:

'It is, in my view, significant that there is, so far as I know, no reported case where a port authority has claimed salvage for removing a vessel which was an obstruction in its port. This is not, of course, decisive against the validity of such a claim; but it does to my mind suggest that no port authority has in the past felt optimistic about the chances of putting such a claim forward successfully.'

My researches have failed to uncover such a success in the past forty years.[19] The question which must now be considered is whether the appellant has shown that this is such a case.

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15 *Kennedy & Rose* 8.009.

16 For example, the master and members of the crew from the owner of the cargo: *The Sava Star* [1995] 2 Lloyd's Rep 134 (QB) (AdmCt) at 142, or a passenger, ibid at 143, or the cargo owner himself, ibid at 143; *Kennedy & Rose* 8.006; Reeder 1.206.

17 See particularly *Bostonian (Owners, Master and Crew) and Patterson v The Gregerso (Owners)* [1971] 1 Lloyd's Rep 220 at 225-7 and the references therein to *The Citos* (1925) 22 Lloyd's Rep 275 and *The Mars and Other Barges* (1948) 81 Lloyd's Rep 452.

18 At 227.

19 In *The Mbashi* supra the Durban port authorities assisted a ship in distress some three miles beyond the harbour limits and were rewarded.

Services rendered voluntarily or under a duty?

[34] The respondents relied on three alleged duties in support of their contention that the services rendered by the port authority at Saldanha were not voluntary but rendered in performance of a duty. These were:

1 Duties flowing from reg 22 of the Harbour Regulations.[20]

2 A duty to users of the port (including the respondents) to make the port reasonably safe for navigation.

3 A duty to users of the port (including the respondents) to ensure that tugs are available in the event of an emergency occurring within the confines of the port.

[35] In interpreting reg 22 the intention behind the provision should be sought having regard to its context, object and purpose.[21] The context is the proper and orderly management of South African harbours in so far as the carrying out of work and the provision of floating craft services is concerned and, with that aim in mind, the role of the port authority. The purpose of reg 22 is equally clear: it ensures that, within the ports operated by it, the appellant shall be the first resort for all work required in the harbour and the provision of such services. To this end the regulation stipulates that work or services will only be undertaken (i) if application is made, or (ii) if the appellant, *mero motu*, considers such to be necessary. In either case, the port captain is given an overriding discretion (which he must of course exercise with due consideration of all the relevant circumstances) to refuse to undertake the work or provide the services. Absent an exercise of the discretion the clear intention is that the appellant will (and is therefore obliged to[22]) undertake the work or carry out the services (albeit subject to conditions which the port captain may impose in the interests of the safe, orderly and efficient working of his harbour).

[36] In the present instance the port captain did not, on the agreed facts, exercise a discretion against providing the services of the appellant's tugs and their crews. As no application was made to him and the only communication emanated from the pilot who

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20 Quoted in para 12 above.

21 *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) paras 16 to 19.

22 *Sutter v Scheepers* 1932 AD 165 at 173-4; *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd* 2004 (1) SA 308 (SCA) para 32.

called for the assistance of the tugs, it must be inferred that the appellant (through its employees such as the pilot and the, undisclosed, persons to whom the call was transmitted) considered the provision of assistance to be necessary.

[37] The peremptory nature of the provision is borne out by the language and the following considerations:

1 Reg 22 relates to *all* floating craft services at the harbour. Such services are not limited to routine or everyday occurrences but embrace exigencies which may be regarded as unusual or extraordinary within the harbour. Just as it is applicable to all users of South African ports, so it applies to users who experience mishap or require assistance.

2 If there were no duty do provide emergency services (including salvage) users of the ports would be subjected to uncertainty and confusion and the hazard of emergencies would be increased by delay and the availability of suitable alternative services, especially in smaller ports. It was common cause that at ports under its jurisdiction the appellant exercises the sole public authority and that Saldanha (as indeed all such ports) are compulsory pilotage harbours with the consequence that every ship entering, leaving or moving in the harbour is required to be navigated by a pilot with the functions and powers that have been identified earlier in this judgment.[23] The appellant has an effective monopoly over the provision of tug services and its implied duties must be determined with that as a starting point.

[38] Argument was addressed to us on the nature and breadth of the discretion conferred on the port captain in reg 22. But that is of no relevance once the port captain does not exercise the discretion. The peremptory terms of the regulation remain unaffected (because not made subject to its exercise).

[39] Appellant's counsel submitted that a salvage operation is inherently dangerous not only to the ship, its crew and its cargo but also to the property and personnel of the salvor. Therefore the regulations should not be interpreted so as to compel the appellant to face the hazard. That may frequently be so, but the port captain is empowered to refuse to undertake services or to impose conditions appropriate to the

23Section 10(1), (2) and (3) to the Schedule, quoted in para 12 above.

circumstances in so doing. The degree of danger and the complexity of the task and the extent of resources available to him are no doubt factors which he may properly consider in the exercise of his discretion or the imposition of conditions. The extent of deviation from the normal duties of the port authority in the harbour area may also be regarded as an influence on his decision. In addition, to the extent that the dangers and complications facing the salvor exceed the call of duty, the possibility of salvage reward is not wholly excluded as I have pointed out. In so far as they do not the appellant may claim the compensation provided for in its Tariff Book.

[40] I conclude therefore that the trial judge correctly found that Harbour Regulation 22, read within its context, imposed a general statutory obligation to furnish tug and towage services to users of the port within its confines.

[41] A further consideration which supports the conclusion that a statutory duty prevailed throughout the course of the salvage in this case flows from the facts: At the time that the ship's engines failed the appellant's pilot, De Kock, was carrying out his duties as pilot on it. Although, strictly-speaking, once the ship began to drift it became incapable of further pilotage, the pilot immediately called for assistance from the tugs. That was done and responded to in the context of s 10(2) of the Schedule: the tugs were under a duty to answer the pilot's summons. There is no agreed fact which supports an inference that their arrival was voluntary in any respect. The same can be said of their subsequent actions. The salvage operation effectively commenced when the tug *Jutten* came alongside. What she did then was designed to move the ship from a position of potential danger in the harbour to safe anchorage and can only have taken place in accordance with the pilot's instructions. He was exercising his statutory obligation (s 10(1) of the Schedule) to navigate a ship moving in the harbour and, to that end, 'to direct its movements and to determine and control the movements of the tugs assisting the ship under pilotage' (s 10(2)), and persisted in so doing until the vessel was drawn into a safe anchorage. So construed the whole substance of the salvage operation was carried out pursuant to the statutory duties of a pilot navigating a ship under compulsory pilotage.

A common law duty

[42] The parties agreed that the appellant has a common law duty to make the port of Saldanha reasonably safe for navigation.[24] Counsel for the appellant submitted that that duty extended only to the physical aspects of the port such as the positioning of lights and the provision of safe berths. Further, he said, a distinction should be drawn between making the port safe and making ships safe to navigate: the appellant's common law obligation does not extend to assisting ships to be safe.

[43] I agree with counsel for the respondents that both distinctions are artificial. If it is necessary to take a ship without power under tow in order to prevent it from drifting within the port limits or from becoming stranded in the port or from constituting a danger or obstruction to other users of the port, then, in my view, such an action will constitute performance of the appellant's duty to make the port reasonably safe for navigation. A sandbank or a ship drifting out of control are equally inimical to the safe working of the port and both are within the means and competence of a port authority to deal with.

[44] But, so appellant's counsel contended, the duty owed to users of the port, to make it safe for navigation, is not a duty owed to the owners of the salved ship or cargo. It seems to me, however, that this is to take too narrow a view. A fully laden bulk carrier drifting in a harbour in the early hours of the morning presents a danger to itself, its crew and its cargo as well as to shipping generally using the harbour, let alone to the environment. In *The Citos*[25] Lord Blackburn was concerned with an admitted general statutory duty to remove a drifting ship in the fairway from danger to other shipping, but a denial of such a duty towards the owners of the vessel itself. The learned judge noted that the 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 the statutory duty. In *The Gregerso*[26] Brandon J, dealing with a ship grounded substantially athwart the channel in the River

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24*In re SS Winton; Avenue Shipping Co Ltd (in liquidation) v South African Railways and Harbours* 1938 CPD 247 at 264.
25Supra fn 18.
26 Supra fn 18.

Witham leading to the port of Boston (in Lincolnshire, not the United States). In that position she obstructed all entry to and exit from the port. The learned judge said:

'In this situation it was, in my view, the duty of the Boston Corporation, as the port authority, to exercise, as a matter of urgency, the powers of removal conferred on it by the various statutes to which I referred earlier. The duty was owed by the corporation to all users of the port, including the owners of the Kungsö herself.'

Despite the obvious factual and legal differences between these cases and the substance of the present appeal it seems to me that there is a common thread which renders them subject to a similar analysis. In the present context it is that where a legal duty rests on an port or similar authority to look to the safety of shipping and that duty extends to all users of the harbour, then any user in distress is entitled to invoke the duty in order to procure assistance for himself.[27]

[45] The conclusion that the court a quo was correct in finding that the appellant acted pursuant to both statutory and common law duties leaves the possibility of an argument based simply on action undertaken which exceeded the normal scope of such duties. But that was not the appellant's case and the agreed facts do not bear out such a hypothesis. Although the ship was drifting towards a situation of peril it had not reached that point; there is no suggestion that the salvage was rendered dangerous or difficult by reason of sea or weather conditions or that any of the crew of the tugs was placed at risk by the exigencies; apparently the ship's crew remained with the ship and there was no need for the salvor's men to board it. In short it appears that the whole affair required neither out of the ordinary skill nor courage.

Salvage reward irrespective of duty?

[46] The second issue for determination is whether the appellant, despite not being a volunteer, was nonelessness entitled to a salvage reward by reason of the provisions of the Convention and item 4.3 of the Tariff Book.

[47] The appellant does not contend that item 4.3 of itself entitles it to such a reward. Indeed, although that item confers a right to claim a reward, it does not presume that the requirements for such a claim are satisfied. Nor does it exclude proof of voluntary

27See also *Kennedy & Rose* op cit 1.185 and 1.186.

action as an element of such a claim.

[48] It was common cause that:

1 The *Cleopatra Dream* was a 'vessel' for the purposes of the Convention.

2 For the period from approximately 4h40 until the *Jutten* made fast, the vessel was in distress, drifting without power in the direction of Jutten Island, unable to drop either of her anchors, and in danger of grounding.

3 In so far as the vessel and her cargo were concerned, the services rendered by the appellant constituted a salvage operation as defined in art 1(a) of the Convention ie an act undertaken to assist a vessel in danger in navigable waters.

4 As a result of the services of the appellant's tugs, the vessel, her bunkers and cargo were saved without harm or damage or loss to the respondents. It is not in issue that this constitutes a 'useful result' as contemplated by art 12(1) of the Convention that 'gives right to a reward'.

[49] It is the appellant's contention that the facts enumerated in the preceding paragraph are, under the Convention, determinative of its right to a salvage reward. Counsel submitted that, ex facie art 12(1), the principle of voluntariness is not a consideration. Nor does such a requirement fit easily with the definition in art 1(a) of a 'salvage operation' which means '*any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or any other waters whatsoever*'.

[50] So, counsel for the appellant submitted, in so far as voluntariness remains an essential element of a salvage operation, art 17 of the Convention restricts this requirement to circumstances where such an operation is performed in terms of an existing contract (which is not the case here). Article 17 provides:

'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.'

[51] As Prof Hare points out,[28] although art 17 reinforces the voluntariness principle as far as contractual duties are concerned (eg towage), it does not deal with the

28 John Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) 414.

actions of potential salvors who act in terms of a duty whether under statute or at common law. From this he concludes that the Convention

'would allow the non-voluntary salvor who performs a salvage operation, and complies with the other requirements of the Convention, to claim salvage notwithstanding the existence of a pre-existing duty.'

[52] In his judgment Bozalek J found that the view expressed by Prof Hare was not supported by any other authority or writer and was contrary to arts 5(1) and (3) of the Convention. In addition, the learned judge was of the view that if the drafters of the Convention had 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. Counsel submits that this conclusion is flawed for the reasons which follow.

[53] First, it is not so that Prof Hare's view does not find support elsewhere. Counsel refers in this regard to Martin Davies '*Whatever happened to the Salvage Convention*'[29]:

'According to one view, art 17 is the only restriction on who can claim salvage reward, with the result that the Salvage Convention 1989 applies to any person performing a "salvage operation" that goes beyond the scope of an existing contract.'

Second, as there would appear not to be any reported judgments on this issue, there is, in the circumstances, no authority one way or the other. Third, counsel submits, Bozalek J has assumed, wrongly, that the salvage law of all parties to the Convention required public authorities to act voluntarily before being entitled to a reward. Law in the Federal Republic of Germany, a signatory to the Convention,[30] in December 1987 (ie shortly before the Convention) was to the effect that 'even a public duty to render rescue services does not exclude the right to equitable remuneration, unless the rescuer is obliged to act without compensation'.[31] Fourth, counsel drew attention to the Roman law principles of *negotiorum gestio* on which, certain writers[32] have suggested,

29 39 *Journal of Maritime Law and Commerce* 463 at 486.
30 Nicholas JJ Gaskell '*The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage*' 16 Tulane Maritime Law Journal 1 at 8. Also, the Chairman of the Committee of the Whole who managed the drafting process, Prof Dr Norbert Trotz was German (ibid).
31*World Shipping Laws* ed by David C Jackson and Debra Morris (June 1992) Binder 2 'IIIA – Salvage Germany, Federal Republic'.
32 J P van Niekerk 'Salvage and Negotiorum Gestio: Exploratory reflections on the Jurisprudential Foundation and Classification of the South African Law of Salvage' *Acta Juridica* 1992 148; Ina H Wildeboer *The Brussels Salvage Convention* (1965) 40 ff. See also Sir C Robinson in *The Calypso*

the law of salvage is based:

'It is not only the man who has involved himself and administered another's affairs of his own free will and under no compulsion who is liable to this action but also the man who has administered them because for some reason he had to or thought he had to.'

Counsel conceded, however, that there is authority to suggest that the derivation from *negotiotum gestio* is, at least in English law, doubtful.[33] Fifth, there was no requirement of voluntariness in the 1910 Convention. The English delegation to that convention proposed that the requirement be inserted in art 2 but the proposal was not adopted.[34] Hence, counsel submitted that if a general requirement of voluntariness, over and above what is articulated in art 17, had been intended, the Convention would have said so in express terms.

[54] Counsel further submitted that Prof Hare's construction of art 17 operates independently of the provisions of art 5, a submission, he said, not appreciated by the court a quo. As it was common cause that art 17 does not apply in this matter, and as it contains the only requirement of voluntariness in the Convention, the appellant should, in the submission, be entitled to a salvage reward irrespective of whether the salvage operation was carried out in performance of a statutory or common law duty.

[55] If Prof Hare's conclusion (quoted in para 51 above) means only that a salvor who acts under a statutory duty, but exceeds that duty in the breadth or degree of his actions, may nevertheless qualify for a salvage reward under the Convention, then I agree with him. That is the common law and the Convention does not derogate from it. If, however, he intends to say (and I do not think that such was his intention) that the implication of art 17 is that under the Convention salvors who act strictly within the scope of a duty to the salved property may nevertheless qualify for a salvage reward, I can find no such indication in that article. In any event the entitlement of a public authority, including one acting under a duty, is expressly regulated by art 5 of the Convention.

(1828) 2 Hagg 209 at 217 and Gaskell (fn 29 above) at 27.
33 Reeder, *Brice on Maritime Law of Salvage* 4 ed (2003) 6 fn 28 and the authorities there cited.
34 Wildeboer (op cit fn 31) 65.

[56] As pointed out earlier the *travaux preparatoires* to the 1989 Convention (to which as an interpretative aid s 2(5) of the Wreck and Salvage Act directs us) include the Report of the CMI to the IMO that was approved by the XXXII International Conference of the IMO held in Montreal in May 1981 on the draft International Convention on Salvage. In the section of the Report headed Special Comments the following is said (in para 1.-1.1) about the definition of 'salvage operations':

'It is generally felt to be an important element of salvage that it must be voluntary, but this term may be ambiguous, and therefore, it has not been included in the definition itself. The cases where salvage operations are carried out on the basis of a pre-existing duty are dealt with in Art 1-3 which contains provisions for salvage operations controlled by public authorities and in Art 3-6, in which it is made clear that services which are rendered in due performance of a contract entered into before the danger arose shall not be compensated under the rules of the Convention.'

[57] Concerning 'Service rendered under existing contracts' (Art 3-6, which became art 17 in the Convention) the same Report contains the following comment:

'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.'

[58] As to Art 1-3 'Salvage operations controlled by Public Authorities', which became art 5 of the Convention, the commentary of the CMI is the following:

'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. This is in accordance with the system of the 1910 Convention, and Art. 1-3.1.

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 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.'

[59] Furthermore one must in reading and interpreting the Convention bear in mind that ‘the draft convention is not intended to set out the law of salvage in any exhaustive manner’ (General Comments to the 1981 CMI Report).

[60] Informed by these comments certain specific conclusions regarding voluntariness in the context of the Convention can be drawn:

1 The importance of voluntariness as a principle underlying the right to claim a salvage reward was not intended to be restricted whether by its omission from the definition of ‘salvage operations’ or by anything contained in the draft of what would become Arts 5 and 17.

2 Art 3-6 (afterwards 17) was directed not at restricting the category of cases regarded as ‘voluntary’ to the contractual situations therein addressed but to confirming that a ‘salvor’ carrying out operations under a contract entered into before the danger arose does not become entitled to a salvage reward unless his services exceed due performance under that contract, ie because his services do not become ‘voluntary’ until they exceed his contractual obligation. So understood, I think the appellant’s construction of art 17 is misdirected.

3 Art 1-3 (afterwards 5) addressed two specific situations (i) the preservation of national laws and international conventions relating to salvage operations by or under the control of public authorities, and (ii) confirmed that salvors carrying out such operations are entitled to avail themselves of the rights and remedies provided for in the Convention, ie organisation and intervention by public authorities cannot be used as a reason to deprive the private salvor of his right to salvage.

[61] Counsel for the appellant relied, independently of art 17, upon art 5 of the Convention. That article provides:

‘(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.'

His submissions in this regard were:

1 In art 5 the entitlement of a port (public) authority to a salvage reward is expressly recognised, irrespective of the existence of any duty, whether statutory or otherwise even in cases where the salvage operation is carried out by or under control of a public authority.

2 Art 5(2) reverses any pre-Convention common law rule, so that public authorities under a duty to perform salvage operations would only be disentitled from claiming salvage by reason of art 5(3) if a new rule to that effect were introduced by legislation, something which has not happened in South Africa. The intention to change the pre-Convention position is evident, counsel submits, from the use of the word 'nevertheless' at the beginning of art 5(2).

3 Because s 2(1) of the Wreck and Salvage Act confers the force of law on the Convention, 'the law of the State', as that phrase is used in art 5(3) of the Convention, means the Convention itself.

[62] I do not accept counsel's interpretation of art 5. It seems to me that the article is divisible by reference to its sub-articles. Sub-article 1 recognises that national laws and international conventions may exist relating to salvage operations by or under the control of public authorities; it excludes any effect of the Convention on the provisions of those laws and conventions. Sub-article 2 allows salvors carrying out such operations to avail themselves of the rights and remedies provided for in the Convention. Such salvors would include both private salvors which the public authority may be using in its operations and the public authority itself. Sub-article 3 regulates the *extent* to which a public authority under a duty to perform salvage operations may avail itself of the Convention rights and remedies according to the law of the State where the public authority is situated. The extent to which a private salvor may avail itself is not so regulated. If the local law limits the public authority to reward only if it exceeds its statutory duty, that is the qualification the authority must satisfy.

[63] The introductory word 'Nevertheless' (in subart (2)) is problematic. But,

consistent with what appears to be the structure of the three subarticles, it simply indicates that despite the provisions of the unaffected laws and conventions, all salvors referred to in sub-art (1) have a right to avail themselves of Convention rights and remedies to the extent that the local law does not curtail such rights and remedies.

[64] It follows that I disagree that Art 5 recognises the entitlement of a public authority to a salvage reward. Each case involving a claim by a public authority for salvage in consequence of operations carried out by itself or under its control must therefore begin within a determination of how the domestic law regulates a claim by it for salvage. Once that is determined one will also know the limitations, if any, on its entitlement to a salvage reward under the Convention. That exercise has already been undertaken in the first leg of this judgment: the conclusion was that the appellant has no right in the circumstances to a salvage reward because the whole scope of its operations was carried out subject to and within the normal limits of its duty and not voluntarily. It follows that the appellant has no entitlement to avail itself of the rights provided by art 12 of the Convention.

[65] Counsel's third submission set out above is not correct. Art 5(1) expressly provides that the Convention shall not affect any provisions of national law relating to salvage operations by or under the control of public authorities. Such national law includes the common law of South Africa. The law of the State referred to in art 5(3) according to which the extent of a public authority's right to avail itself of the rights and remedies provided by the convention must be determined, is the common law unaffected by the Convention.

[66] Counsel for the appellant submitted that consideration must be given, in interpreting Art 5, to the purpose of the Convention as expressed in the introductory recordals viz to 'ensure that adequate incentives are available to persons who undertake salvage operations'. He submitted that the drafters of the Convention no doubt wished to encourage public authorities to perform salvage operations by ensuring that they too enjoyed adequate incentives. In so far as the attempt to satisfy the general intention to encourage salvage operations is concerned, the Convention does not, in my view, indicate any such purpose in relation to salvage by public

authorities. It is clear, I think, that they were intended to share in the increased benefits provided for salvors generally in those instances where their national laws permitted them to avail themselves of the rights and remedies of the Convention.

[67] In the result I conclude that Bozalek J was correct in finding that the Convention evidences no intention to exclude voluntariness in respect of salvage operations performed by a public authority acting under a duty. Nor is the effect of art 5 read with s 2(1) of the Wreck and Salvage Act to amend or supersede the common law.

[68] Both issues argued in the appeal having been decided against the appellant, the appeal is dismissed with costs.

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J A Heher
Judge of Appeal

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