THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 41/2015

In the matter between:

VIKING INSHORE FISHING (PTY) LTD **Appellant**

and

MUTUAL AND FEDERAL INSURANCE CO LTD **Respondent**

Neutral citation: *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Co Ltd* (41/2015) [2016] ZASCA 21 (18 March 2016)

Coram: MAYA AP, WALLIS, SALDULKER and SWAIN JJA and VICTOR AJA

Heard: 8 March 2016

Delivered: 18 March 2016

Summary: Marine Insurance – hull policy – Inchmaree clauses – vessel lost in collision as a result of negligence – whether claim for indemnity barred by virtue of a breach of a Merchant Shipping Act warranty – application of warranty – whether collision resulting from a want of due diligence by the owner.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Yekiso J sitting as court of first instance):

The appeal is upheld with costs and the judgment of the court below is set aside and replaced with the following:

'There will be judgment for the Plaintiff for:

1 Payment of the sum of R3 990 000, together with interest on the sum of R3.5 million at a rate of 15.5% per annum from 8 October 2005 to date of payment.

2 Costs of suit, such costs to include the qualifying expenses of Captain Cox.'

JUDGMENT

Wallis JA (Maya AP, Saldulker and Swain JJA and Victor AJA concurring)

[1] Shortly after midnight on 8 May 2005 a few miles off the coast near Cape St Francis the fishing vessel *Lindsay* collided with the *Ouro do Brasil*, a bulk juice carrier on a voyage from Singapore to Santos, Brazil. Given the disparity in size of the two vessels[1] the outcome was virtually inevitable and tragic. The *Lindsay* capsized and sank soon after the collision and 14 crew members were drowned. Only the master, Captain Landers, who was off duty and asleep in his cabin near the bridge, and Mr

[1] The *Lindsay* had a gross registered tonnage (GRT) of 174.24 tons and overall length of 31.22 metres. The *Ouro Do Brasil* had a GRT of 15 218 tons and a length overall of 172 metres.

John Ehlers, a sparehand[2] who had been on watch at the time survived. Captain Landers nearly died as a result of the ingestion of diesel oil and has as a result of post-traumatic stress disorder been forced to give up his life on the sea.

[2] The respondent in this appeal, Mutual & Federal Insurance Co Ltd (Mutual & Federal), insured the *Lindsay* in terms of a marine hull insurance policy. The owner of the *Lindsay*, Viking Inshore Fishing (Pty) Ltd (Viking), claimed an indemnity under the policy for the agreed value of the vessel, namely R3.5 million plus VAT. Mutual & Federal rejected the claim and Yekiso J in the Western Cape Division of the High Court, Cape Town dismissed Viking's action in which it sought to recover that sum. This appeal is with his leave.[3]

The policy

[3] Three provisions of the policy are relevant to Viking's claim and Mutual & Federal's defence to that claim. First, there are the two clauses under which Viking contends that it is entitled to an indemnity. The policy incorporated the Institute Fishing Vessel Clauses and the relevant perils insured against were set out in clause 6.2, which reads as follows:

'This insurance covers loss of or damage to the subject-matter insured caused by

6.2.1 accidents in loading discharging or shifting catch fuel or stores

6.2.2 bursting of boilers breakage of shafts or any latent defect in the machinery or hull

6.2.3 negligence of Master Officers Crew or Pilots

6.2.4 negligence of repairers or charterers provided such repairer or charterers are not an Assured hereunder

[2] The term describes a seaman with only basic training whose principal role on a fishing vessel is to assist with the fishing operations and provide manual labour.

[3] There was some confusion about the terms upon which Yekiso J granted leave to appeal, but that was clarified on application to this Court, when Brand JA and Schoeman AJA gave unrestricted leave to appeal.

6.2.5 barratry of Master Officers or Crew,

provided such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers.'

[4] Further cover was provided by the inclusion in the policy of the Institute Additional Perils Clauses – Hulls, specifically devised for use with the Institute Fishing Vessel Clauses, which provided the following additional cover:

'1. In consideration of an additional premium this insurance is extended to cover –

1.1 …

1.2 loss of or damage to Vessel caused by any accident or by negligence, incompetence or error of judgement of any person whatsoever.

2. …

3. The cover provided in Clause 1 is subject to all other terms, conditions and exclusions contained in this insurance and subject to the proviso that the loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers.'

[5] These two clauses are of the type commonly described as Inchmaree clauses,[4] because they extend the indemnity under the policy to situations beyond perils of the sea. This description was important because of the terms of the Merchant Shipping Act[5] warranty (the MSA warranty), which provided the principal line of defence for Mutual & Federal. The warranty read as follows:

'Warranted that the provisions of the South African Merchant Shipping Act and the regulations appertaining thereto shall be complied with at all times during the currency of this policy, provided that this warranty shall be effective only to the extent of those regulations which are promulgated for the safety and/or seaworthiness of the vessel(s).

[4]After the vessel involved in *Thames & Mersey Marine Insurance Co Limited v Hamilton, Fraser & Co* (1887) 12 AC 484.

[5]Merchant Shipping Act 57 of 1951 (the MSA).

It is understood and agreed that this warranty shall in no way be construed to nullify the "Inchmaree" Clause, or any part thereof in the Institute Clauses attached to this Policy.'

We were informed that this is a standard clause in marine hull policies issued by South African underwriters in relation to South African vessels.

[6] The parties were at odds over the meaning and effect of the second proviso to the MSA warranty. Viking said that its effect was to render the warranty irrelevant to the assessment of its claim as that claim arose under the two Inchmaree clauses. Mutual & Federal said that the operation of the warranty could be reconciled with the Inchmaree clauses and therefore breaches of the warranty could properly be raised as a defence to Viking's claim. This was the primary issue in the appeal.

[7] In the alternative to its defence based on the MSA warranty Mutual & Federal argued that the loss of the *Lindsay* resulted from a want of due diligence on the part of Viking as the owners of the vessel. Assuming that was the case, by virtue of the provisions of the two Inchmaree clauses there was no liability to indemnify Viking for its loss.

The facts

[8] There is no real dispute about the circumstances in which the *Lindsay* sank, and it is helpful to describe them briefly in order to set the stage for considering Mutual & Federal's defences. Before doing so it is appropriate to mention that Mutual & Federal denied both the fact of the sinking and that it had been occasioned by negligence on the part of either the persons on the bridge of the *Ouro do Brasil* or the master, officers and crew of the *Lindsay* or a combination of the two. They freely admitted that they did so for tactical reasons. In preliminary proceedings

Davis AJ, relying on *Williams v Tunstall*, accepted that there was nothing inappropriate in this.[6] She was wrong to do so. Since 1965, when the Uniform Rules of Court were first promulgated, Rule 18(5) has provided in regard to denials that:

'When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively but shall answer the point of substance.'

A tactical denial does not do that. Rule 9(3)(*b)* of the Admiralty Court Rules follows rule 22(2) of the Uniform Rules and rule 18 is excluded (Admiralty Rule 24), but I see no reason to construe those rules to permit the tactical denial of factual matter that the pleader knows is not in dispute. And *Williams v Tunstall* has been rejected by this Court. Harms DP said in relation to an attempt to rely on it that:

'The other objection, namely that motion proceedings give the applicant a procedural advantage because the respondent is not entitled to rely on a bald denial, as is possible in trial proceedings, and that it would be unfair to deprive the respondent of this advantage, no longer holds water. Litigation is not a game.'[7]

I agree. This case illustrates the abuse that arises from tactical denials, where a case that had already been the subject of extensive investigation in the course of a Court of Marine Enquiry was traversed afresh in circumstances where it was apparent that the insurer had no fresh evidence on which to base its case and where the principal witness on whom it wished to rely was unavailable. This involved a waste of time and costs.

[9] The principal facts emerge from the evidence of Captain Cox, who gave evidence at both the Court of Marine Enquiry that followed upon the sinking and the trial in the High Court. He analysed the information

[6] *Williams v Tunstall* 1949 (3) SA 835 (T) at 838-839.
[7] *Cadac (Pty) Ltd v Weber-Stephen Products Co and Others* 2011 (3) SA 570 (SCA) para 10.

available from the *Ouro do Brasil's* navigational equipment and information from Marine and Coastal Management in relation to the position of the *Lindsay.* Using that he was able to plot the course taken by the two vessels over the period of about 45 minutes before the collision. In turn this enabled him to express a view on the cause of the collision.

[10] The *Lindsay* had finished fishing operations for the day and was sailing in a broadly easterly direction. Its aim was to be in position the following morning to commence fishing at a different fishing ground selected by the master, Captain Landers. She was approximately 18 nautical miles from the coast. Another, much larger vessel, the *Umgeni* was following a similar course a mile[8] or so further from shore and overtaking the *Lindsay.* The *Ouro do Brasil* was travelling down the coast in a westerly direction.

[11] Captain Cox tracked the two vessels over the period from about midnight on 7 May 2005 until the collision at about 00.45 am on 8 May 2005. At the beginning they were over 30 miles apart. The vessels' initial courses would have taken the *Ouro do Brasil* across the bows of the *Lindsay*, but at a safe distance in front of it. According to Captain Cox, given the distance between them and allowing for their relative speeds and courses, would, if their courses had remained unchanged, have meant that the *Ouro do Brasil* would have safely passed to port of the *Lindsay*. This remained the position until about 00:30 am on 8 May 2005. Captain Cox's opinion to this effect was not challenged. Things changed when, at about 00.30 am, the *Ouro do Brasil* gradually altered course to starboard. At the time the vessels were between 6 and 7 miles apart. But the change in course, if not addressed, would have led to a

[8]References to a mile here and elsewhere in this judgment is to a nautical mile.

close quarters situation between the two vessels. It was not a situation that the *Lindsay* could avoid by itself turning to starboard because that would have risked bringing it into a collision situation in relation to the *Umgeni,* which was overtaking her on the starboard side.

[12] According to Captain Cox the starboard turn effected by the *Ouro do Brasil* was insufficiently bold to enable the *Ouro do Brasil*, as the give-way vessel,[9] to avoid a collision. Had its turn been bolder the *Ouro do Brasil* could have passed to port of the *Lindsay*. Instead the turn was too gentle and created the risk of collision. There is no explanation in the record for the *Ouro do Brasil* doing this, but as its own navigational equipment was not at that time showing the presence of the *Lindsay* it may not have realised the dangers involved in the manoeuvre. According to its supplemental deck log book it was trying to ensure that there was adequate room between it and the *Umgeni* for the two to pass safely. No-one from the *Ouro de Brasil* gave evidence at the trial so we are left in the dark as to the reasons for it adopting the course it did.

[13] From the perspective of the *Lindsay* it was the stand-on vessel[10] and therefore obliged in terms of the collision regulations to maintain its course and speed. Furthermore, because of the gentle nature of the movement to starboard by the *Ouro do Brasil,* it would have been difficult for those on the bridge of the *Lindsay* to appreciate that a dangerous situation with a risk of collision had been created. There was a wind blowing at force 6 on the Beaufort Scale (approximately 25 knots) and a south-westerly swell ranging from 4 to 6 metres in height. As the

[9]As the name implies this is the vessel that under the Collision Regulations must take avoiding action to prevent a collision.
[10]In terms of the Collision Regulations this is the vessel that must maintain its course or station when faced with a potential collision situation.

Lindsay rode up the swells and sank into the troughs it would not have been easy to control and the bow would have yawed back and forth. Those on board a small fishing vessel would have found it difficult to appreciate from a distance at night the relatively minor and slow change in course of the much larger *Ouro do Brasil*. At a late stage, and presumably because they realised the danger of a collision, they turned to port with a view to crossing in front of the *Ouro do Brasil*. However, their turn was insufficiently bold and merely created a situation where the starboard side of the *Lindsay* collided with the port bow of the *Ouro do Brasil*, with the catastrophic consequences already adverted to.

[14] All of this was relatively common cause at the trial, which is hardly surprising in view of the fact that a lengthy Court of Marine Enquiry had sat to investigate the cause of the loss of the *Lindsay*. What was not common cause were the circumstances on board the *Lindsay* that night and who constituted the navigational watch immediately before and at the time of the collision. The officer of the watch was the first mate, Mr Levendal. The first and principal point of dispute was whether he was in fact attending to the watch at the material time. Mutual & Federal's case was that he was not. It argued that the vessel was on auto pilot and the watch consisted only of Mr Koeries, a deckhand, and Mr Ehlers, neither of whom was entitled, so it said, even to form part of a navigational watch, much less be the only members of it. It argued that Mr Levendal's alleged absence from the bridge and the fact that Mr Koeries and Mr Ehlers were not certificated to form part of the navigational watch were in breach of the Safe Manning Regulations,[11] and hence the MSA warranty.

[11]Merchant Shipping (Safe Manning) Regulations, 1999 published in Government Notice R1548 in *Government Gazette* 20772 of 30 December 1999 as amended. Hereafter the Safe Manning Regulations.

[15] In advancing these contentions Mutual & Federal did not rely on any direct oral evidence from a witness. Instead it placed reliance on a statement by Mr Ehlers, recorded shortly after the incident, to the effect that only he and Mr Koeries were on the bridge as the navigational watch immediately prior to and at the time of the collision. Viking adopted a two-pronged approach to these statements. It contended that although potentially admissible as hearsay evidence in terms of s 6(3) of the Admiralty Jurisdiction Regulation Act (the Act) it should not have been admitted. If admitted, it submitted that no weight should have been attached to it in the exercise of the court's powers under s 6(4) of the Act. But even if it was admitted and established a breach of the MSA warranty that was irrelevant because such a breach could not be relied on by Mutual & Federal to negate its liability under the Inchmaree clauses.

Liability under the Inchmaree clauses

[16] There can be no doubt that the collision would not have occurred and the *Lindsay* would not have sunk were it not for negligence on the part of either or both of the crews of the two vessels. Captain Cox's evidence demonstrated that there was ample sea room available to them to pass each other safely and without risk of a collision. The unexplained alteration in direction of the *Ouro de Brasil* created the risk of collision and neither vessel thereafter took appropriate steps to avoid the collision.

[17] Clearly the risk that materialised was a risk covered by the policy in terms of the Inchmaree clauses. Counsel for Mutual and Federal explained in the course of his reply that his client's attitude was that Captain Cox's evidence established negligence on the part of those responsible for the navigation of the *Lindsay* and it accordingly accepted

that the risk that eventuated was one covered by these clauses and there was no need to differentiate between them. We can accept that concession without making any binding findings of fact on issues that may arise in further proceedings. That negligence gave rise to an obligation by Mutual & Federal to indemnify Viking for its loss, unless it was entitled to rely on a breach of the MSA warranty to avoid that liability or could show that the loss of the *Lindsay* was due to a want of due diligence by Viking in terms of the proviso to each of the Inchmaree clauses.

The MSA warranty

[18] Viking adopted a straightforward approach to the construction of the MSA warranty. It said that once it was claiming in respect of a risk insured under the Inchmaree clauses there was no scope for Mutual & Federal to rely on the warranty as a ground for avoiding liability. To hold otherwise would be to permit that which the proviso to the warranty did not allow, namely, nullifying the liability imposed on Mutual & Federal by the Inchmaree clauses.

[19] Mutual & Federal apparently argued in the High Court that the effect of this would be to draw a line through the first part of the warranty and that instead the two must be read together. This approach was accepted by Yekiso J. The effect instead was to draw a line through the proviso because it said explicitly that the MSA warranty should in no way be construed so as to nullify the liability arising under the Inchmaree clauses.

[20] In its heads of argument Mutual & Federal sought to harmonise the warranty and the Inchmaree clauses by saying that Viking would be

provided with an indemnity for the loss of the *Lindsay* caused by an accident or by negligence, incompetence or error of judgment of any person, provided that the loss did not result from want of due diligence 'but there would be no indemnity if the owner of the "Lindsay" did not ensure' compliance with the warranty. This formulation was no more satisfactory in reconciling the warranty's application in this case with the express provision that excluded its application to nullify liability under the Inchmaree clauses.

[21] It is not as if the straightforward construction of the warranty and the proviso rendered the warranty of no application. It continued to have full application to claims arising under the policy other than those arising under the Inchmaree clauses. These included under clause 6.1 of the Institute Fishing Clauses, liability for perils of the sea, where the warranty's requirement of compliance with safety and seaworthiness regulations might be thought to have particular relevance. Several examples spring to mind. An insured vessel setting out without the charts or navigation equipment required by regulations and running aground provided a perfect example of a situation where a claim for an indemnity in respect of an insured peril could be resisted on the grounds of a breach of the MSA warranty. A claim arising from a fire on board the vessel could be resisted if the regulations in regard to fire-fighting equipment had been breached. So there was ample scope for the warranty to apply within the limits defined by the policy and the belief that Viking's contentions drew a line through it was misplaced.

[22] That renders it unnecessary to explore Mutual & Federal's grounds for contending that the warranty was breached. Had that been necessary it would also have been necessary to analyse the scope of the warranty in

far greater detail. Mutual & Federal adopted the approach that at every moment of every day during the period of cover Viking was obliged to comply with every regulation promulgated under the MSA for the safety and seaworthiness of the vessel. It contended that any departure from this rigorous degree of compliance entitled it to avoid liability under the policy, citing the classic statement by Innes CJ on the nature of a warranty in *Lewis Ltd v Norwich Union Fire Insurance Co Ltd*.[12]

[23] Those contentions adopted an extreme view of what was required from the insured in order to comply with the warranty. I am by no means satisfied that it was a correct view. Such warranties are to be construed favourably towards the insured because of their impact upon the liability of the insurer.[13] In other words they are to be given a practical and businesslike construction in the light of the purpose of the clause and the insurance policy.[14] They are therefore not lightly to be construed as invalidating cover on grounds unrelated to the loss.

[24] Looking at the MSA warranty in this light, it is plainly intended to require the insured to comply with those regulations promulgated under the MSA that have to do with safety and seaworthiness. But it is less plain that Mutual & Federal's liability under the policy is always contingent upon such compliance. Where that liability arises from an insured peril having nothing to do with the safety or seaworthiness of the vessel, such as for example, violent theft by persons from outside the vessel, piracy, breakdown of or accidents to nuclear installations or reactors, contact

[12]*Lewis Ltd v Norwich Union Fire Insurance Co Ltd* 1916 AD 509 at 514-515; *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* 2006 (1) SA 488 (SCA) para 6.
[13]*Kliptown Clothing Industries (Pty) Ltd v Marine & Trade Insurance Co of SA Ltd* 1961 (1) SA 103 (A) at 106H-108D.
[14]*Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

with aircraft or similar objects, or earthquake, volcanic eruption or lightning,[15] it can hardly be thought that the identity and qualifications of the crew on board or the absence of fire fighting equipment or life jackets, should affect Mutual & Federal's liability to make good a loss under the policy. That points towards a construction of the warranty that it applies when the breach of regulations is materially connected to the loss that has occurred.

[25] Then account must be taken of the ordinary eventualities that may accompany a sea voyage. A life jacket may be lost overboard or be damaged. A fire extinguisher used to stop a small fire from spreading may be exhausted. Various items of the vessel's equipment may malfunction, be broken or lost. Is it to be thought that the vessel must in every such instance return immediately to port to remedy the deficiency spurred on no doubt by the thought that until it did so it would have no marine hull cover under the policy? I doubt it. And what is to happen if, while the vessel is returning to port for that very purpose, it is lost for reasons unrelated to the deficiency? It seems a very harsh construction of the warranty to say that there is no cover in such circumstances. That suggests that there may be a time qualification arising under the warranty. Properly interpreted it may possibly only require compliance with the regulations when the vessel sets out on a voyage, and cover is not lost if during the voyage it ceases to be compliant.

[26] These and other difficult issues of construction would have arisen had a breach of the MSA warranty been available to Mutual & Federal to resist Viking's claim for an indemnification under the policy. As in my view it is not available for that purpose because the claim arises under the

[15]All perils covered by clause 6.1 of the Institute Fishing Vessel Clauses.

cover provided by the Inchmaree clauses, it is not necessary to develop this enquiry any further. The next issue is whether the loss of the *Lindsay* resulted from want of due diligence on the part of Viking.

Due diligence

[27] There appears not to be any extensive authority on the question of the requirement in the proviso to Inchmaree clauses that the cause of the loss should not be want of due diligence on the part of the insured or the owners or managers of the insured vessel. It is of course an expression that is used in other contexts in the area of maritime law. Under the Hague-Visby rules the carrier is required before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy; properly to man, equip and supply the ship; and to make the holds refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation. But exercising due diligence to equip a vessel to carry cargo safely, which is a positive obligation resting on the carrier, is not necessarily the same thing as demonstrating that loss or damage to an insured vessel was caused by a want of due diligence. I agree, however, with Professor Rose that, just as in the former case it is necessary for the carrier to show the exercise of reasonable care, in the latter instance a failure to exercise reasonable care that is causally related to the loss will operate to exclude the insurer's liability under the proviso to the Inchmaree clause.[16] I also agree that the need to adduce proof of due diligence only arises when the insurer has advanced some evidence that the cause of the loss or damage was a want of due diligence.[17] It is unnecessary to express a firm view in regard to the onus of proof on this issue and whether it rests on the insurer to show a

[16]Francis D Rose *Marine Insurance: Law and Practice* 2ed (2012) para 13.12 at 259.
[17]Ibid para 13.13.

causal want of due diligence or on the insured to show that there was no want of due diligence. My inclination, however, in accordance with the practice of underwriters,[18] and the view in *Arnould*,[19]would be to say that it is for the insurer to show a want of due diligence. That is in accordance with the ordinary construction of such clauses.

[28] Mutual & Federal's arguments under this head were not always clear, but as I understand them they sought to raise two related points. The first was that the mate, who was supposed to be on duty at the time of the collision, was not present on the bridge, and that the *Lindsay* was effectively in the hands of Mr Koeries, assisted by Mr Ehlers. The second was that neither of these two was certificated to undertake a navigational watch.

[29] Even if both those propositions were correct, a matter to which I will revert, that does not seem to be decisive of the issue. What must be established is a want of due diligence on the part of the insured, the owner or the manager – in this case Viking – causing the loss. And that does not depend on the conduct of the crew but on the conduct of those responsible at a higher level of management in the company. It must, as *Arnould* expresses it, 'be personal failure of the assured, owners or managers, or their alter ego in the case of corporate bodies, rather than a failure by a subordinate'. Want of due diligence is concerned with equipping the vessel for the voyage and not with seagoing or operational negligence, which is one of the perils insured against.[20] That is illustrated by the Canadian case of the *Brentwood* to which we were referred.[21]

[18] Julian Hill (ed) *O'May on Marine Insurance* (1993) 137.
[19] Jonathan Gilman QC *et al Arnould's Law of Marine Insurance and Average* 17 ed (2008) para 23-62.
[20] *Arnould* fn 17 supra.
[21] *Coast Ferries Ltd v Century Insurance Co of Canada and others* [1975] 2 SCR 477.

[30] In the *Brentwood* the master of a converted ferry carrying goods in coastal trade caused her to be loaded with only an 18 inch freeboard at the stem, aggravated by a rake of one foot down by the stem. When travelling at 7½ knots the vessel generated a bow wave of two feet in a flat calm. This broke over the bow so that water entered the hold via the ventilators causing the vessel to capsize. The master was plainly negligent in loading the vessel in this fashion bringing the claim within the Inchmaree clause. But the owner had commissioned inclination tests that demonstrated the safe limits of loading and the proper distribution of cargo. It had been advised in a written report that a minimum safe freeboard midships was 18 inches at even trim, which meant a freeboard at the stem of 2½ to 3 feet. But the insured failed to inform the master of the contents of the inclination tests or the advice given by the naval architect who undertook the tests and failed to give loading instructions in accordance with that information. There were no draft marks on the vessel and it had on a number of occasions gone to sea more heavily laden than recommended by the naval architect. The court held that this amounted to a want of due diligence on the part of the owner. It said:

'The duty of due diligence imposed upon the owner is not satisfied if for years he closes his eyes and does nothing.'[22]

[31] There were at least two officers on board the *Lindsay* who held appropriate qualifications in regard to navigation and watchkeeping, namely Captain Landers, the skipper, and Mr Levendal, the mate.[23] The evidence showed that they shared the watches, with Captain Landers on duty during the day when they were fishing and Mr Levendal taking the night watch. There was no evidence that this was an unsatisfactory

[22]At 483.

[23]The bosun may also have had such qualfications.

arrangement or that it was departed from in practice. In fact in regard to the night when the tragedy occurred Captain Landers said that he handed the watch over to Mr Levendal at about 21.00 hours before retiring to his cabin to sleep. Mr Bacon's evidence was that Mr Levendal was an experienced, skilled and meticulous mate, who Viking had encouraged to sit for his master's ticket, but who preferred to continue as mate on board its vessels. Even if it were established by Mutual & Federal that on this night there was a departure from the path of rectitude and Mr Levendal inexplicably neglected his duties that would not be the result of a want of due diligence on Viking's part.

[32] But it is as well to deal with the suggestion that Mr Levendal was neglecting his duties that evening. In my view there was no evidence that this was the case. Captain Landers testified that Mr Levendal took over the watch at about 21.00 hours. Before the incident the *Lindsay* had been operating on auto pilot. That was not, one would expect, a decision that Mr Koeries, a deckhand not even qualified as an able seaman, would have made of his own volition, particularly given the weather and sea conditions and the fact that the *Lindsay* was making its way to new fishing grounds. Only Mr Levendal could have set the course to do that. Equally, the attempt to avoid the imminent collision by turning to port and trying to cross in front of the *Ouro do Brasil*, rather than taking the instinctive step of trying to turn away to starboard, is indicative of the person in charge being an experienced seaman and realising that a starboard turn would likely bring the *Lindsay* into collision with the *Umgeni*. One of the interesting features of the interviews with Mr Ehlers is that he never mentioned the presence of two large vessels, only the 'skuit' (boat) with which they collided. It is plain that the ship he talked about was the *Ouro do Brasil*, which collided with the *Lindsay*.

[33] Yekiso J accepted that Mr Levendal was not on the bridge at the time of the incident on the basis of an interview conducted eight days after the collision by Captain Campbell with Mr Ehlers, who did not give evidence. In that interview Mr Ehlers was asked some questions arising from a statement that he attested before Captain Campbell. To put his later answers in context it is appropriate to set out the material portion of his statement. In doing so it is appropriate to record that Mr Ehlers was unable to write his own statement and while the document is largely in English it is apparent that he was Afrikaans speaking. The material portion of the statement read:

'I went to the bridge at 23h30. I saw this "Skuit" as soon as I was on the bridge.

I told the deckhand on watch that "hy moet oppas die skuit kom vinnig nader …" The reply was "moenie worry nie die skuit gaan verby ons".[24]

I then went outside to phone my wife and have a smoke. The next moment we were struck by the other vessel.

Our vessel capsized and I swam to the life raft.'

At the foot of the statement it is recorded that "Mr Reddell has read this statement back to me and I agree to that this is my full statement at this time.' How skilled Mr Reddell was in acting as an interpreter we do not know.

[34] Captain Campbell then asked a number of follow-up questions. But there were many important areas that he left untouched. For example there was a significant problem with the times given by Mr Ehlers in this statement. He suggested that the collision occurred fairly soon after he reported for duty on the bridge because the 'skuit' was visible and closing fast. But at that time the *Lindsay* and the *Ouro de Brasil* were some 30

[24]In translation these passages would read 'he must look out, the ship is rapidly coming closer' and 'Don't worry. The ship is going past us.'

miles apart and certainly not visible to one another. The collision occurred nearly an hour and a quarter later during which time he had thought it appropriate to leave his post for a cigarette and conversation with his wife. The statement's reliability was immediately suspect.

[35] Captain Campbell asked what Mr Ehlers saw when he saw a 'skuit' and was told that he saw a red light. In the context of this collision that would have been the port light of the *Ouro do Brasil*, which he said was showing on the *Lindsay*'s port side. At the time he said he was standing near the steering wheel of the *Lindsay* on the bridge. When asked whether there was an officer on the bridge with them he said there was not and indicated that the skipper and the bosun were sleeping and the mate (Mr Levendal) was in his cabin. He was not asked why the mate was in his cabin, or what he was doing there. He did not know what turn the *Lindsay* took before the collision but said that when the collision occurred he was on the starboard landing, that is, outside the bridge, and that the collision was on the starboard side in the vicinity of the stocker pond near the stern of the vessel. It caused the *Lindsay* to capsize to starboard.

[36] All of this might seem reasonably clear were it not for a curious passage at the end of the question and answer session. Mr Ehlers was asked whether everything he had told Captain Campbell was true which he answered affirmatively. He was asked whether he was sure and again answered affirmatively. But then the transcript goes on as follows:

'Statement. The Mate made a turn by us.[25]

107 At what time?

I have no idea.

108 When the Mate came on the bridge, could you see the big ship?

[25]This must be an English translation of the idiomatic Afrikaans expression "Die Maat het 'n draai by ons gemaak' meaning that the mate came there and engaged with them.

> The Mate came to the bridge, Royden mentioned the other vessel, the Mate said he was going to the toilet and was coming back quickly, and then the accident happened.'

[37] For some reason Captain Campbell did not think it necessary to explore this with Mr Ehlers. But it cast doubt on everything that had gone before. It placed the mate on the bridge and aware of the presence of the *Ouro do Brasil*. But it did not explore when this happened or what happened then. This was important given the problems with the times given in his statement. According to his answers Mr Ehlers was outside the bridge on the starboard landing at the top of the ladder leading up to the bridge smoking. Presumably if he thought a collision was imminent he would not have been having a cigarette and phoning his wife to wish her well for Mothers' Day. He knew nothing of the manoeuvres undertaken in order to avoid a collision, yet the collision occurred astern of where he was standing and on the same side – the starboard side – of the vessel. Even the obvious question whether the mate in fact left the bridge to go to the toilet, which was situated off the bridge down a short flight of stairs, was not asked.

[38] This interview with Mr Ehlers was not particularly illuminating in regard to the conduct of Mr Levendal on the night in question. Such light as it did cast on that was effectively doused when, at the Court of Marine Enquiry, Mr Ehlers repudiated it. He then added to his original statement that the mate had been on the bridge when he came on duty. When he (Ehlers) mentioned the presence of the 'skuit', the mate said that it was far away from them. Mr Ehlers then attributed the comment that the 'skuit' would pass them to the mate and not Mr Koeries. He accepted that he had not told the truth to Captain Campbell.

[39] Yekiso J admitted all this evidence and then decided that the statements made by Mr Ehlers at his interview with Captain Campbell were to be preferred to those he made at the Court of Marine Enquiry. In doing so he indicated that he was adopting the approach to be adopted when a court is confronted by irreconcilable versions of the facts set out by Nienaber JA in *Stellenbosch Farmers' Winery*.[26] But that approach relates to irreconcilable versions emanating from different witnesses. In this case they emanated from the same witness and different considerations must apply. That is not to say that there may not be circumstances in which a court may accept some aspects of a witness' evidence and reject other aspects – even possibly where they are diametrically opposed – but it cannot arrive at that decision on a conventional weighing of the probabilities. The reason why the witness' version has changed necessarily intrudes and assumes central importance. This highlights the problem with the approach of the trial court. Nienaber JA listed a number of factors such as the witness' candour and demeanour when giving evidence; any possible bias; internal and external contradictions and the calibre and cogency of the witness' performance when giving evidence. Testing the reliability of the evidence is vital and that could not be done in this case because Mr Ehlers did not give evidence.

[40] Leaving these difficulties aside the trial court did not pay regard to a warning about the quality of Mr Ehlers as a witness contained in the loss adjuster's report prepared by Mr Arnold on behalf of Mutual & Federal. Mr Arnold also interviewed Mr Ehlers, in the presence of Mr

[26]*Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) para 5.

Hattingh, the shore manager for Viking. He noted in his report that Mr Hattingh said that the version of events given to him by Mr Ehlers was the fifth or sixth differing version he had heard from him. Mr Arnold's conclusion was blunt. He said that 'Ehlers is endeavouring to hide the truth or alternatively advising persons what he believes they want to hear.' In some respects he regarded his evidence as nonsensical.

[41] The judge was faced with two issues. The first was whether to admit as evidence the statements by Mr Ehlers and the second, if he did so, was to determine the weight to be attached to them. Section 6(3) of the Act permits the admission of hearsay evidence in admiralty proceedings subject to such directions and conditions as the court thinks fit. The general approach to the admission of such evidence is generous.[27] Once admitted the principal issue under s 6(4) is the weight to be attached to the evidence. It is unnecessary to have regard, as did the trial court and as submitted by Mutual & Federal in its heads of argument, to s 3 of the Law of Evidence Amendment Act 45 of 1988. The power of a court exercising its admiralty jurisdiction to admit hearsay evidence is not constrained by the requirements of that Act.

[42] Although the approach to the admission of hearsay evidence in admiralty is a generous one there will be cases where the court must draw the line and refuse to admit the evidence. In my view this was one such case. The statements made by Mr Ehlers were tenuous and conflicting. They failed to explain why Mr Levendal, a competent and meticulous seaman, would neglect his duties in the manner suggested. There was information via Mr Arnold that Mr Ehlers was not reliable. The attempts

[27] *Cargo laden and lately laden on board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 841D – 842H.

to find him and bring him to court to give evidence were limited and ineffective. As a result the various statements could not be tested under cross-examination. And there were no other witnesses to provide corroboration of what he said. Even a generous approach to the admission of hearsay in admiralty, which I do not in any way decry, must have its limits in the interests of a fair trial. In this case those limits were in my view exceeded. But even if I am wrong in that the question of the weight to be attached to those statements remained. In my view it was impossible for the court to attach any weight to them. They were thoroughly unreliable.

[43] In those circumstances the main evidential plank of Mutual & Federal's case was removed. It is not possible to determine on the evidence presented in this case where Mr Levendal was when the collision occurred and what he was doing. I am careful to say that this is the conclusion to be reached on the evidence tendered in this case. Whether in other litigation – and Mr Arnold's report referred to other cases having been instituted – additional and better evidence can be produced is a matter on which it would be inappropriate for this court to express a view.

[44] The other basis upon which Mutual & Federal relied for saying that the loss of the *Lindsay* was due to a want of due diligence on the part of Viking related to the qualifications of Mr Koeries and Mr Ehlers to act as members of the watch. It said that in terms of regulation 4(1)(ii) of the Safe Manning Regulations it was the responsibility of Viking to ensure that no rating formed part of a navigational watch 'unless he or she holds appropriate valid certification entitling him or her to do so'. Neither Mr

Koeries nor Mr Ehlers held any such certification and so it was said that there was a want of due diligence by Viking.

[45] Once again there is a problem with the issue of causation. The proviso to the Inchmaree clauses operates when the want of due diligence caused the loss or damage. It is not clear on what basis the absence of certification would have that causative effect. Presumably it would need to be joined with some evidence that an incompetent watch was kept and that this meant that the *Lindsay* did not avoid a collision when it could have done so. There is no such evidence.

[46] But in any event it is not apparent that there was a breach of the regulations in this respect. The *Lindsay* was crewed in a manner compliant with the requirements of regulation 18 of the Safe Manning Regulations as appeared from a certificate issued by the South African Maritime Safety Authority (SAMSA), which in terms of s 2(1) of the MSA is the Authority in regard to safety matters. Captain Louw of SAMSA pointed out that on a fishing vessel such as the *Lindsay* only one certificated rating is required to be on board in terms of regulation 18. As it is not practical for that rating to be on duty 24 hours a day ‘other crew on board must be used to keep a lookout’.

[47] There is a difficulty in ascertaining what is meant by the reference to a rating being ‘certificated’ to form part of a navigational watch. Mutual & Federal stressed the importance from a safety perspective of the watchkeeping role especially at night when travelling in a busy sea lane. It suggested therefore that some form of special certification is required. But it was unable to point to a provision in which any such

certification was identified. The word 'certificated' is defined in regulation 1(1) as meaning:

'… duly certificated under the Act or deemed under the Act to be so certificated …'

That requires one to go to the MSA in order to ascertain what is meant by this expression. Chapter III of the MSA deals with 'certificates of competency, service and qualification' without making any provision for a certificate enabling a seaman to participate in a navigational watch. Certification is dealt with in s 73(1) which provides that:

'Subject to the provisions of this section, the owner and the master of every South African ship operating at a port in the Republic or going to sea from any port whatsoever shall ensure that there is employed on board that ship, in their appropriate capacities, the number of officers and other persons, duly certificated as prescribed by regulation, or deemed to be so certificated.'

That takes us back to SAMSA's certification of what crew and officers the *Lindsay* required in terms of the Safe Manning Regulations. The evidence showed that it was properly crewed.

[48] I have been unable to find any provision of the MSA or any regulation under the MSA that provides for a special certification for crew to be qualified to participate in a navigational watch. It may be that regulation 4(1)(ii) overlooked this. Or it may be that it is resolved by having regard to s 85 of the MSA, which provides that:

'Notwithstanding the provisions of section 73 the Authority may, in its discretion and for such periods and under such conditions as it may specify if it is satisfied that no suitable holder of a certificate of the required grade and granted under this Act or referred to in section 83 or 84 is available, permit a South African ship to go to sea from any port whatsoever … without the prescribed number of certificated officers or other persons, and whilst such permission remains in force any person who acts in terms thereof shall not, if the conditions under which it was granted are complied with, be deemed to have contravened the provisions of section 73.'

SAMSA's attitude appears to be as expressed by Captain Louw. He made it clear that the use of other crew on board to keep a lookout is permissible, in view of the fact that there would only be one able seaman on board. That may constitute a permission in terms of the provisions of s 85. In any event it is clear that there is no proper foundation for Mutual & Federal's complaint under this heading.

[49] It follows that the contention that the loss of the *Lindsay* was due to a want of due diligence on the part of Viking must fail. That means that the appeal must succeed and Viking is entitled to an indemnity under the marine hull policy. There was some argument in this court, albeit not raised in the pleadings or canvassed at the trial, about the proper quantum of that indemnity. It is to that issue that I now turn on the assumption that these were questions of law that could properly be raised for the first time on appeal.

Quantum

[50] The policy was a valued policy. The subject matter of the insurance was dealt with under two headings, namely, hull, machinery and equipment and everything connected therewith and increased value of hull and/or disbursements. An amount of R2.8 million was the value under the first head and R700 000 under the second. The cover to the policy said that the amount insured was for "100% of values and amounts herein'. On that basis Viking claimed R3.5 million plus VAT of R490 000 and interest at a rate of 15.5% per annum from 8 October 2005, being the date when Mutual & Federal repudiated liability under the policy. Neither the amount of the claim nor the rate of interest was disputed during the trial, but arguments were raised in respect of both before us.

[51] In regard to the portion of the claim relating to hull, machinery and equipment counsel drew attention to the following provision:

'Deductibles as per Clause 12.1 of 5% of Hull and Machinery Sum Insured (such deductible to be applied before the addition of VAT)

In addition all claims are subject to an Annual Aggregate Deductible of R1 000 000 incorporating a Stop Loss of R400 000.'

On the basis of this provision counsel submitted that the amount of R2.8 million fell to be reduced by the stop loss amount of R400 000.

[52] There is no merit in this argument. Clause 12.1 made provision for deductibles and the statement of an amount that would be deductible from the aggregate of all claims arising out of each separate accident or occurrence. The amount was left blank. But the clause went on to say that it did not apply to a claim for an actual or constructive total loss, such as the loss of the *Lindsay*. Counsel accepted this but said that the sentence that followed made provision for such a deductible. That is incorrect. What it did was put an annual aggregate maximum on the deductibles as well as a stop loss on the amount of the deductible in respect of any single claim in circumstances where the policy made provision under clause 12.1 for a deductible. As clause 12.1 did not make such a provision, which is hardly surprising in relation to a valued policy, these provisions did not affect Viking's claim.

[53] The second argument raised by counsel related to the interest rate of 15.5% claimed by Viking. Under s 5(2)*(f)* of the Act the court is empowered to make 'such order as to interest, the rate of interest in respect of any sum awarded by it and the date from which interest is to accrue, whether before or after the date of commencement of the action, as to it appears just'. The effect of this was to free a court sitting in an

admiralty case from the provisions of the Prescribed Rate of Interest Act 55 of 1975 (the Interest Act). No doubt that was deliberate as it enabled the court, which will frequently be seized of matters involving disputes arising in other countries and currencies where interest rates may bear little or no relation to the rates current in South Africa or the interest rate prescribed under the Interest Act, to exercise a discretion based on the justice of the case as to the appropriate order in regard to interest.[28]

[54] Viking claimed interest on the capital sum due to it less VAT at a rate of 15.5% per annum from the date upon which Mutual & Federal repudiated liability under the policy. It was submitted that the appropriate date was the date of issue of summons. I do not agree. An indemnity should have been furnished by 8 October 2005. Instead Mutual & Federal repudiated liability and have kept Viking out of the money to which they were entitled for over ten years. I can see no reason why they should not pay interest from that date.

[55] As regards the rate of interest that is more debatable. The world has been experiencing record low interest rates for a number of years since the financial crisis of 2007 and 2008. But it was only in 2014 shortly before the commencement of the trial that the rate prescribed under the Interest Act was reduced to nine per cent. Mutual & Federal submitted that it would be more appropriate for interest to be levied at this rate. In doing so it submitted that this would also mean that the interest accrued on the debt would not exceed the amount of the capital and hence would not exceed what is permissible under the *in duplum* rule. Counsel referred

[28]This appears to have been overlooked in *The MV Sea Joy: Owners of the Cargo lately laden on board the mv Sea Joy v The MV Sea Joy* 1998 (1) SA 487 (C) at 508E-I. In *MT Argun: MT Argun v Master and Crew of the MT Argun and Others* 2004 (1) SA 1 (SCA) para 38, Farlam JA correctly said that s 5(2)*(f)* confers a wide and unfettered discretion. The underlying reasons for this are set out in Shaw *Admiralty Jurisdiction and Practice in South Africa* 83-84.

us to the recent decision of the Constitutional Court in *Paulsen*,[29] which overturned the decision of this court in *Oneanate*[30] that had held that the operation of the *in duplum* rule was suspended once litigation commenced.[31] In a curious argument he submitted that we should award Viking a lower rate of interest because then the *duplum* would not be reached. Why that would be relevant escapes me. If the *duplum* has been reached then Mutual & Federal's liability is frozen at double the capital sum it is obliged to pay Viking. Any saving accruing to it in consequence of that would be minor given the lengthy period during which it has withheld payment from Viking.

[56] Viking's claim is a South African claim against a South African insurer where the loss has been felt in South Africa currency. It was reasonable therefore for it to claim interest at the rate generally payable on judgment debts in South Africa. This was not challenged and no evidence was led by Mutual & Federal to show that this was an inappropriate rate of interest. Had that been done it would have been open to Viking to lead evidence to show that it would be just for it to recover interest at that rate. Because it was not questioned at the trial it was deprived of the ability to lead such evidence, for example, evidence that it had to borrow money to replace the *Lindsay*, or evidence of financial loss it suffered in consequence of Mutual & Federal refusing to pay the indemnity for which it had contracted. In those circumstances it seems to me inappropriate to depart from the conventional rate of interest. The

[29]*Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC).
[30]*Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* [1997] ZASCA 94; 1998 (1) SA 811 (SCA).
[31]The manifestly unfair consequence of the *Paulsen* judgment for Viking is that it has through not particular fault on its part taken over ten years for it to enforce its right to an indemnity and nine years since the commencement of action, yet it will not be able to recover interest for the entire period of delay because of the operation of the rule.

consequences of that insofar as the *in duplum* rule is concerned will have to be worked out when payment is made.

Order

[57] I make the following order:

The appeal is upheld with costs and the judgment of the court below is set aside and replaced with the following:

'There will be judgment for the Plaintiff for:

1 Payment of the sum of R3 990 000 together with interest on the sum of R3.5 million at a rate of 15.5% per annum from 8 October 2005 to date of payment.

2 Costs of suit, such costs to include the qualifying expenses of Captain Cox.'

M J D WALLIS

JUDGE OF APPEAL

[46]

[47]

Appearances

For appellant: R W F Macwilliam SC
Instructed by:
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For respondent: D A Gordon SC (with him A V Voormolen SC)
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