THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 768/2018

In the matter between:

ATAKAS TICARET VE NAKLIYAT AS **APPELLANT**

and

GLENCORE INTERNATIONAL AG **RESPONDENT**

Neutral citation: *Atakas Ticaret VE Nakliyat AS v Glencore International AG* (768/2018) [2019] ZASCA 77 (30 May 2019)

Coram: Ponnan, Swain, Zondi and Schippers JJA and Gorven AJA

Heard: 23 May 2019

Delivered: 30 May 2019

Summary: Discretion of court to permit or refuse joinder in terms of s 5(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 left untouched by the International Arbitration Act 15 of 2017.

ORDER

On appeal from: KwaZulu-Natal Local Division of the High Court, Durban (Lopes J sitting as court of first instance):

1. The appeal is upheld with costs, including those occasioned by two counsel.
2. The order of the court below is set aside and in its stead is substituted the following:

'(a) The respondent, Glencore International AG (Glencore), is joined as the third defendant in the action in terms of s 5(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983.

(b) The applicant, Atakas Ticaret Ve Nakliyat AS, is granted leave to supplement its particulars of claim in order to plead its cause of action against Glencore.

(c) Glencore is ordered to pay the costs occasioned by the opposition to this application, such costs to include those consequent upon the employment of two counsel.'

JUDGMENT

Ponnan JA (Swain, Zondi and Schippers JJA and Gorven AJA concurring):

[1] On 18 December 2012 the appellant, Atakas Ticaret Ve Nakliyat AS (Atakas), a Turkish company, purchased a consignment of coal from the respondent, Glencore International AG (Glencore). Atakas chartered the MV 'Cecilia B' (the vessel) from EFE Shipping and Trading Limited of Istanbul to carry the consignment from the port of Richards Bay in KwaZulu-Natal, South Africa to Turkey. On 30 October 2013 and

shortly after the loading of the consignment had been completed, an explosion occurred in the number 6 cargo hold of the vessel. Subsequent investigations suggested that heated coal had been loaded, which heated further after the hold had been closed, and ignited. As a result of the explosion the voyage had to be abandoned and the cargo unloaded.

[2] On 26 June 2014 Atakas instituted a delictual action *in personam* against the operator of the coal terminal, the Richards Bay Coal Terminal (Pty) Ltd (RBCT), out of the High Court of South Africa, KwaZulu-Natal Division, Durban, in the exercise of its admiralty jurisdiction in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the AJRA). The latter denied liability and *inter alia* raised the following special plea:

'4.1 The Plaintiff was the purchaser of the coal and its loading on board the mv "Cecilia B" at the First Defendant's terminal occurred:

4.1.1 in terms of the contract concluded between the Plaintiff and the seller of the coal; and

4.1.2 pursuant to the seller's contractual obligation owed to the Plaintiff to deliver the coal on board the mv "Cecilia B".

4.2 The alleged damages suffered by the Plaintiff are in the nature of consequential loss.

4.3 The Plaintiff was vested with contractual remedies arising out of the delivery of hot coal as is alleged, alternatively could have secured or retained such remedies pursuant to its contract with the seller of the coal.

4.4 In the circumstances:

4.4.1 there is no justification for the extension of the Aquilian action so as to afford the Plaintiff a right to claim in delict against the First Defendant; and

4.4.2 the Plaintiff is not vested with any action in delict against the First Defendant for recovery of its alleged damages.

WHEREFORE the First Defendant prays that the First Defendant's special plea is upheld and the Plaintiff's action is dismissed with costs, such costs to include the costs consequent upon the employment of senior counsel.'

[3] On 23 February 2016 the vessel's owners were joined as the second defendant to the proceedings. Given the nature of RBCT's special plea, Atakas applied in terms of s 5(1) of AJRA to join Glencore as the third defendant in the action. In resisting the

joinder, Glencore raised three defences: first, that clause 17[1] of the sale contract (the sale contract) between Atakas and Glencore provided that disputes should be referred to arbitration; second, that the claim had prescribed and third, that the applicant's claims were too remote. The second and third defences were not persisted in.

[4] Although not presaged in the papers, the International Arbitration Act 15 of 2017 (the IAA) became the centrepiece of Glencore's first defence when the joinder application was argued before the court on 9 March 2018. That the IAA had not been mentioned earlier is hardly surprising because it only came into operation on 20 December 2017, after both the answering and replying affidavits had been filed. As it turned out, it was only when Glencore's heads of argument were filed shortly before the matter was argued, that reference was made to the IAA for the first time. Glencore contended that: (i) clause 17 of the sale contract is an 'arbitration agreement' as defined in s 1 of the IAA;[2] and (ii) in terms of the IAA, read with article 8 of the Model Law,[3] the court was required to stay the proceedings and refer the matter to arbitration unless it found the sale contract to be null and void, inoperative or incapable of being performed.[4] Accordingly, so the contention went, if Glencore was joined as a co-defendant it would deliver a special plea in which reliance would be placed on article 8

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[1] Clauses 17 and 18 of the sale contract provide:
'17. Any dispute arising out of in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration (LCIA), which Rules are deemed to be incorporated by reference into this clause. The seat, or legal place, of arbitration shall be London. The language to be used in the arbitration shall be English.'
18. This contract, including the arbitration clause, shall be governed by, interpreted and construed in accordance with the substantive laws of England and Wales excluding the United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980 (CISG).'

[2] It was accepted that the arbitration clause in the sale contract is an 'arbitration agreement' as defined in s 1 of the International Arbitration Act.

[3] UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the said Commission on 7 July 2006 'UNCITRAL Model Law on International Commercial Arbitration GN 1454, GG 41347, 20 December 2017'. The Model Law is incorporated as Schedule 1 to the International Arbitration Act.

[4] Article 8 of the Model Law provides:
'(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his or her first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that agreement is null and void, inoperative or incapable of being performed.
(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued and an award may be made, whilst the issue is pending before the court'.

of the Model Law to seek a stay of the action against it. The court (per Lopes J) upheld Glencore's argument. It referred to various foreign authorities called in aid by Glencore and concluded that it would be 'futile to order the joinder of Glencore in the action'. The issue of whether joinder would be ordered on the facts, if a discretion remained, was not addressed by the court.

[5] Section 5(1) of the AJRA provides:

'A court may in the exercise of its admiralty jurisdiction permit the joinder in proceedings in terms of this Act of any person against whom any party to those proceedings has a claim, whether jointly with, or separately from, any party to those proceedings, . . . or in respect of whom any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between the party and the person to be joined and which should be determined in such a manner as to bind that person, . . . and notwithstanding the fact that he is not otherwise amenable to the jurisdiction of the Court . . .'.

The powers of joinder in terms of the section are far-reaching.[5] The extension of the court's admiralty jurisdiction in terms of s 5(1) 'was, from a practical point of view, clearly necessary in the interests of convenience and in order to prevent multiple proceedings'.[6] Of s 5(1), Scott JA stated:

'. . . the object of the Legislature was clearly to permit all the parties to a dispute to be joined in an action. The absence of such provision could well result in an undesirable situation of courts in different countries having to adjudicate on the same or substantially the same issues arising out of the same incident or set of facts.' [7]

[6] In determining whether to grant a joinder application, the court exercises a discretion.[8] Part of the assessment by a court in the exercise of its discretion will include a consideration of whether there exists an alternate forum that has been agreed as the place for the resolution of disputes. This is because s 7(1)[9] of the AJRA allows a

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[5] *MY 'Summit One': Farocean Marine (Pty) Ltd v Malacca Holdings Ltd* 2005 (1) SA 428 (SCA); [2004] 3 All SA 279 (SCA) (*MY 'Summit One')* para 17.
[6] G Hofmeyr *Admiralty Jurisdiction: Law and Practice in South Africa* 2 ed (2012) at 212.
[7] *MY 'Summit One'* fn 5 para 18.
[8] *Ibid.*
[9] Section 7(1) provides:
'*(a)* A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other court in the Republic or any other court or any arbitrator,

defendant brought before a South African admiralty court to seek a stay or discharge of the action by reason of an arbitration agreement or other relevant factor suggesting jurisdiction in another forum.[10] The AJRA is a special Act which governs all admiralty matters that come before our courts. It confers wide-ranging jurisdiction upon[11] and vests South African admiralty courts with the powers set out therein. Those powers include ordering that any matter pending or arising in proceedings before it be referred to arbitration (s 5(2)*(e)*) or staying proceedings to enable the matter in dispute to be referred to arbitration (s 7(1)*(b)*). Given that the vast majority of admiralty disputes are subject to agreements that can be classified as international arbitration agreements (almost every charterparty, contract of carriage, construction and repair contract and provision of supplies contract includes such a provision) the effect of an implied repeal or restriction on the scope of the discretion conferred on a court by ss 5(1) and 7(1) of the AJRA would be extraordinarily far reaching.

[7] If accepted, the effect of the judgment of the court a quo is to put a red line through those provisions of the AJRA. However, as explained in *Minister of Justice and Constitutional Development and others v Southern African Litigation Centre and others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA) para 118:

'. . . repeal by implication is not favoured. An interpretation of apparently conflicting statutory provisions which involve the implied repeal of the earlier by the later ought not to be adopted unless it is inevitable. . . . Any reasonable construction which offers an escape from that is more likely to be in consonance with the real intention of the Legislature. . . . As it was put in *Wendywood Development (Pty) Ltd v Rieger & another* 1971 (3) SA 28 (A) at 38:

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tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body.

(b) A court may stay any proceedings in terms of this Act if it is agreed by the parties concerned that the matter in dispute be referred to arbitration in the Republic or elsewhere, or if for any other sufficient reason the court is of the opinion that the proceedings should be stayed.'

[10] See *MV Iran Dastghayb Islamic Republic of Iran Shipping Lines v Terra-Marine SA* [2010] ZASCA 118; 2010 (6) SA 493 (SCA).

[11] Section 2(1) provides:

'Subject to the provisions of this Act each provincial and local division, including a circuit local division, of the Supreme Court of South Africa shall have jurisdiction (hereinafter referred to as admiralty jurisdiction) to hear and determine any maritime claim (including, in the case of salvage, claims in respect of ships, cargo or goods found on land), irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.'

"It is necessary to bear in mind a well-known principle of statutory construction, namely, that statutes must be read together and the later one must not be so construed as to repeal the provisions of the earlier one, unless the later statute expressly alters the provisions of the earlier one or such alteration is a necessary inference from the terms of the later statute."'

Here, there is an interpretation that offers an 'escape' from an implied repeal of the earlier by the latter. It is article 1(5) of the Model Law, which provides:

'This Law shall not affect any other law of the Republic by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.'

The phrase 'any other law' in article 1(5) plainly encompasses the AJRA. Thus, what the court a quo conceived as an insurmountable obstacle (namely, the IAA) to the exercise of its discretion under ss 5(1) and 7(1) of the AJRA was more illusory than real.

[8] In my view, the IAA accordingly left untouched the discretion to permit or refuse the joinder of Glencore. The court a quo did not exercise that discretion and this court is now free to do so.[12] In heads of argument filed with this court on behalf of Glencore the following appears:

'14. Glencore agrees the existence of a prima facie case is a prerequisite for the excise by a court of its discretion to order the joinder of a party to an action in terms of section 5(1) and that convenience is a relevant factor. Glencore also agrees that the object of section 5(1) is to avoid multiple proceedings.

15. Glencore also does not dispute that Atakas demonstrated that it has a prima facie case for its contention that the coal loaded on board the vessel heated and that the explosion on board the vessel on 30 October 2016 was caused by its heating. Glencore, however, does not accept that it breached the sale agreement or that the heating of the cargo was the cause of the explosion.'

In the light of those concessions, it seems to me appropriate to permit the joinder of Glencore as the third defendant in the proceedings.

[12] *MY 'Summit One'* fn 5 para 18.

[9] In the result:

1. The appeal is upheld with costs, including those occasioned by two counsel.

2. The order of the court below is set aside and in its stead is substituted the following:

‘(a) The respondent, Glencore International AG (Glencore), is joined as the third defendant in the action in terms of s 5(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983.

(b) The applicant, Atakas Ticaret Ve Nakliyat AS, is granted leave to supplement its particulars of claim in order to plead its cause of action against Glencore.

(c) Glencore is ordered to pay the costs occasioned by the opposition to this application, such costs to include those consequent upon the employment of two counsel.’

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V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellant:	R W F MacWilliam SC (with him PJ Wallis) Instructed by: Webber Wentzel, Cape Town McIntyre van der Post, Bloemfontein
For Respondent:	M Wragge SC Instructed by: Clyde & Co., Cape Town Lovius Block, Bloemfontein