THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 413/2022

In the matter between:

DE BEERS MARINE (PTY) LTD **APPELLANT**

and

HARRY DILLEY (PTY) LTD **RESPONDENT**

Neutral citation: *De Beers Marine (Pty) Ltd v Harry Dilley (Pty) Ltd* (Case no 413/22) [2023] ZASCA 110 (19 July 2023)

Coram: SCHIPPERS, GORVEN, HUGHES, MABINDLA-BOQWANA and WEINER JJA

Heard: 16 May 2023

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Summary: Law of Salvage – International Convention on Salvage, 1989 – article 13(1) – recovery of autonomous underwater vehicle run aground on rocks – towage into harbour – recovery voluntary not under charter agreement – salvage operation – whether criteria for fixing salvage reward properly applied – reward disproportionate to services rendered in salvage operation – reward adjusted.

ORDER

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

1 The appeal succeeds in part. The order of the high court is set aside and replaced with the following:

> '1. In terms of article 13(1) of the International Convention on Salvage, 1989, being the schedule to the Wreck and Salvage Act 94 of 1996, a salvage reward of R80 000 is fixed.
>
> 2. The said reward shall bear interest *a tempore morae* in terms of s 5(2)(*f)* of the Admiralty Jurisdiction Regulation Act 105 of 1983, from the date of the service of summons to date of payment.
>
> 3. The defendant shall pay the costs of the action, including the costs of two counsel.'

2 Each party shall bear its own costs of appeal.

JUDGMENT

Schippers JA (Gorven, Hughes, Mabindla-Boqwana and Weiner JJA concurring)

[1] The appellant, De Beers Marine (Pty) Ltd (De Beers), is the owner of an autonomous underwater vehicle (AUV), a robotic submarine which it uses to map the seabed in its mining operations off the coast of Namibia. In September 2017 De Beers concluded an agreement with the respondent, Harry Dilley (Pty) Ltd (HD), for the charter of a work boat to assist De Beers in conducting sea trials in

False Bay, Western Cape, to commission new equipment installed on the AUV (the sea trials). In what follows, I refer to that agreement as 'the 2017 contract'. The work boat, MV Nkwaza (the Nkwaza), is owned and skippered by Mr Harry Dilley, the sole director of HD.

[2] During the sea trials on 27 October 2017, the AUV suffered a communication breakdown and ended up washed ashore on the rocks near Simon's Town. The AUV was re-floated and towed by the Nkwaza to Simon's Town harbour. HD subsequently instituted action against De Beers in the Western Cape Division of the High Court, Cape Town (the high court), claiming R10 million as a salvage reward. That amount was later reduced to R7 647 231.54, alternatively R5 525 288.23.

[3] The high court (La Grange J) held that HD was entitled to a salvage reward of R 5 525 288.23, assessed at 10% of the replacement cost of the AUV in 2017 – US $3.5 million or R55 252 882.20. The reward was said to have been determined with reference to article 13(1) of the International Convention on Salvage, 1989 (the Salvage Convention), which forms part of our law by virtue of s 2(1) of the Wreck and Salvage Act 94 of 1996. The high court granted De Beers leave to appeal to this Court.

The factual background

[4] The basic facts are uncontroversial and can be shortly stated. HD had assisted De Beers in carrying out sea trials to test equipment on its two AUVs in False Bay, for several years. On 15 October 2015 De Beers and HD concluded a written contract in terms of which HD agreed to charter its vessels, namely the MV Zest II and the Nkwaza, to De Beers to support the latter in carrying out research and development of its survey equipment (the 2015 charter agreement). That agreement came to an end on 31 August 2017.

[5] The 2017 contract was concluded after HD provided De Beers with a quotation for the charter of the Nkwaza for the sea trials. The quotation was for an eight-hour day (R9 850 excluding VAT) and an hourly rate of R1 250 excluding VAT, for any additional time. It was common ground that the terms of the 2015 charter agreement were tacitly incorporated into the 2017 contract. Clause 9 of the 2015 charter agreement provided:

'9. **PERFORMANCE OF THE CHARTER AGREEMENT**

9.1 The Charter shall be conducted in accordance with the Charter Agreement. Dilley shall be responsible for aspects of the operation of the Workboats subject to DBM's [De Beers Marine's] direction as to the nature of the support services to be provided by Workboats during the test work.

9.2 In the event that Dilley's representatives deeming the conditions as being unsafe for the test work, he shall immediately notify DBM's representative. This decision is final and not subject to negotiation. As soon as the test work is capable of being carried out, Dilley shall advise DBM of this fact and advise that length of time that the Workboats was not able to operate. For this period, the Workboat shall be regarded as being off hire and no hire shall be payable by DBM.'

[6] It was further common ground that the sea trials were carried out in accordance with De Beers' standard Operational Procedures for AUV Sea Trials, dated 24 April 2009 (the Operational Procedures). These procedures include an 'emergency AUV recovery procedure' set out in clause 3.3.1, which provides:

'**Loss of Communication while on the Surface**:

In the event that communication is lost to the AUV, while the vehicle is on the surface, as a result of rough seas or equipment failure, a towing line is then attached on the AUV and the rubber duck will tow the AUV back to the harbour or the towing line passed on to the workboat.'

[7] On the morning of 27 October 2017, the AUV was launched for sea trials without any difficulty. At Mr Dilley's instance, the area in which the trials were being conducted was moved north and east, because the wind was too close to the rocks at the Lower North Battery (where the AUV ran aground later). Mr Dilley

was not willing to operate his vessel near the rocky area. A short test dive was conducted at that site and no problem was encountered.

[8] The AUV then commenced a long dive of some three hours. Everything seemed to be in order until approximately 13h30 on 27 October 2017, when Mr Esterhuizen, a geo-technician employed by De Beers and its Contract Manager nominated in the 2015 charter agreement, was informed that the AUV had been washed ashore on the rocks at the Lower North Battery near Simon's Town. Mr Esterhuizen contacted Mr Makholiso, De Beers' representative on board the Nkwaza and reported the grounding and position of the AUV to him.

[9] The Nkwaza returned to Simon's Town harbour and Mr Dilley and Mr Makholiso drove to the North Battery site of the grounded AUV. It was not disputed that the AUV had to be recovered from that position as soon as possible to prevent any further damage. At the site Mr Dilley met with Mr Esterhuizen and two commercial divers, Mr Stephen Garthoff and his business partner, Mr Robin Day. In the ensuing discussion the divers offered to assist De Beers in re-floating the AUV. Mr Dilley suggested that Mr Garthoff and Mr Day should discuss a fee for their services, which they did. It was R10 000, which Mr Esterhuizen accepted after obtaining authority from De Beers.

[10] There was no discussion about the use of the Nkwaza in the re-floating of the AUV. Mr Dilley testified that he thought that Mr Esterhuizen might have assumed that De Beers had a contract with HD and therefore that the Nkwaza would be used to tow the AUV to Simon's Town harbour. Mr Esterhuizen in fact made that assumption. During the discussion Mr Dilley did not indicate that HD was no longer fulfilling its obligations under the 2017 contract, nor that the recovery of the AUV would be a salvage operation. It was agreed that the divers would collect their equipment and meet Mr Dilley at the harbour.

[11] Mr Dilley returned to Simon's Town harbour and met the divers. The Nkwaza left the harbour around 16h15 with the divers on board, and proceeded to a location some 150 metres off-shore where its echo sounder showed a depth of eight metres. At that location, just before Mr Garthoff left the Nkwaza to start his swim, Mr Dilley decided that he was embarking on a salvage operation. It was around 16h30 on 27 October 2017. He did not inform Mr Makholiso, who was on board the Nkwaza, of that decision.

[12] Mr Garthoff left the Nkwaza and with a tow rope, swam to the AUV in a wetsuit, using dive-fins, a mask and a snorkel. After he commenced his swim, the Nkwaza took up a position 250 to 300 metres off-shore. When he reached the AUV, Mr Garthoff manoeuvred it in order to set it afloat. As he put it, 'all it needed was just a tiny little push from me to spin it around and she was already floating'. He secured the rope from the Nkwaza to the front of the AUV. The AUV was re-floated at approximately 16h58. Mr Garthoff then attached himself to the AUV with a rigging-sling. He remained on the AUV as it was being towed by the Nkwaza into Simon's Town harbour, as he thought it was the safest place to be through the surf, and he had some concern about sharks. The Nkwaza brought the AUV alongside in the harbour. The entire recovery operation lasted just over an hour.

[13] The high court held that HD had rendered voluntary services which exceeded what could reasonably be considered as due performance of the 2017 contract. The sea trials came to an end when the AUV had run aground on the rocks and the Nkwaza had returned to the harbour. The court concluded that the evidence, the express terms of the charter agreement and the surrounding circumstances, did not justify the inference that HD had rendered towage services under the contract. This meant that instead of a contract fee, HD was entitled to a salvage reward.

[14] In determining the salvage reward, the high court took into account the following factors. The replacement value of the AUV was R55 252 882.80. The salvage service was rendered promptly. HD had all the necessary equipment for the salvage operation. Mr Dilley's skills as a mariner and experienced salvor were essential to the successful recovery of the AUV, and to prevent it from sustaining further damage. Given the weather conditions during the salvage operation, the Nkwaza was exposed to 'a fair degree of danger'.

[15] Against this background there are two questions which this Court must consider. The first is whether the services by HD were rendered voluntarily or in accordance with its obligations under the 2017 contract. If the services were rendered voluntarily, the second issue is whether the salvage reward of R5 525 288.23 is justified, having regard the criteria for fixing the reward set out in article 13(1) of the Salvage Convention.

Were the services rendered voluntarily?

[16] It is a settled principle that a claimant's entitlement to a salvage reward depends on whether it rendered the services in respect of which it claims 'voluntarily', ie without any pre-existing contractual or other legal duty.[1] As stated in *Kennedy & Rose*,[2] the adjective 'voluntary' has acquired a specific meaning in the law of salvage, namely, 'that the service was not rendered by virtue of a pre-existing legal obligation, in particular a contractual or public duty'.

[17] Although the Salvage Convention does not expressly include a general rule that in order to qualify for a salvage reward, a salvage operation must be voluntary, 'it does so by implication, by laying down general rules for the recovery of salvage and certain qualifications'.[3] Thus, article 17 of the Salvage

[1] F D Rose, D Steel and RAA Shaw *Kennedy & Rose: Law of Salvage* 8 Ed (2013) para 8-001; *Transnet Ltd t/a National Ports Authority v The MV Cleopatra Dream and Another* [2011] ZASCA 12; 2011 (5) SA 613 (SCA) para 30; *Transnet Ltd v MV Mbashi and Others* 2002 (3) SA 217 (D) at 224B-C.
[2] *Kennedy & Rose* fn 1 para 8-001.
[3] *Kennedy & Rose* fn 1 para 8-002.

Convention restates the general principles of English common law that a salvor must be a volunteer to claim a reward.[4] 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'.

[18] Counsel for De Beers submitted that the services rendered by HD were services as contemplated in article 17 of the Salvage Convention, and that they constituted performance of its obligations under the 2017 contract. This submission was founded on certain tacit terms allegedly incorporated into the 2017 contract (the alleged tacit terms), which De Beers pleaded as follows:

'5.5.2 The charter services would include the following:

5.5.2.1 The work boat would be positioned according to instructions given by the defendant to enable it to monitor the AUV offshore during the trials;

5.5.2.2 The work boat would tow the AUV should the need arise.

5.5.2.3 The work boat would patrol the boundary of the area where the sea trials were taking place and to warn other vessels in the vicinity that the defendant was conducting sea trials.

5.5.2.4 The plaintiff would comply with all reasonable instructions given by the defendant's responsible employee on board the work boat, which instructions would include where the trials were to take place, where the work boat was to be positioned to monitor the AUV, when dives were to be executed and when and where to tow the AUV should the need arise.'

[19] The alleged tacit terms, so it was argued, fall within the general text of clause 9.1 of the 2015 charter agreement and the description of the AUV recovery procedure in clause 3.1.1 of the Operational Procedures. Any request by De Beers that HD render the services described in paragraph 5.5.2 of the plea, would have been subject to HD's right (preserved in clause 9.2 of the 2015 charter agreement) to declare the conditions for test work unsafe, and the work boat would have been regarded as being off-hire. The wording of the 2015 charter agreement,

[4] D Rheeder Halsbury's Laws of England 5 ed (2008) Vol 94 para 908.

incorporated into the 2017 contract, it was submitted, supports the conclusion that the parties would have agreed to the alleged tacit terms. Mr Dilley had recorded overtime hours in his diary for the day in question, which showed that he regarded the relevant services as having been rendered under the 2017 contract. A further pointer to that fact is that the Nkwaza was not insured for salvage and HD would not have been able to claim from its insurer, had the Nkwaza suffered loss or damage in the recovery of AUV.

[20] In *Alfred McAlpine*,[5] Corbett AJA said that an 'implied term' (in the sense of a tacit term or a term implied from the facts):

'. . . is used to denote an unexpressed provision of the contract which derives from the common intention of the parties as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties.[6]

Corbett AJA went on to say:

'The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term.'[7]

[21] The first inquiry is whether there is any room for importing the alleged tacit terms into the 2017 contract, having regard to its express terms and those of the 2015 charter agreement.[8] The 2017 contract essentially confirms the booking of the vessel charter for the sea trials at a daily and hourly rate. HD's obligations in terms of clause 5 of the 2015 charter agreement, mainly comprise the provision,

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[5] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* [1974] 3 All SA 497 (A), 1974 (3) SA 506 (A) at 532H.
[6] *Alfred McAlpine* fn 5 at 531.
[7] *Alfred McAlpine* fn 5 at 532H-533A; *City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO* [2006] 1 All SA 561 (SCA); 2006 (3) 488 (SCA) para 19.
[8] *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* [1965] 3 All SA 24, 1965 (3) SA 150 (A) at 175C.

operation and maintenance of the work boats, and making them available for test work for the duration of the charter agreement. Clause 6 sets out the duties of De Beers, namely to advise HD timeously of the work boat required, the test area, and the duration of the requested charter agreement.

[22] Nothing in these agreements point to a tacit term, not even remotely, that HD would be required to position its work boat 'to monitor the AUV when dives were executed', let alone to enable HD or De Beers 'to monitor the AUV offshore'. On the contrary, the parties never contemplated that HD would monitor the AUV – for which De Beers was solely responsible – nor that HD would render recovery services if the AUV ran aground on the rocks. This construction of the express terms of the 2015 charter agreement is consistent both with clause 9, quoted in paragraph 5 above, and clause 3.3.1 of the Operational Procedures.

[23] Clause 9 underscores HD's responsibility for all aspects of the operation of the work boats, subject to De Beers' direction concerning the nature of the support services provided by HD. Clause 9 necessarily excludes any support services by HD if the AUV runs aground and lands on the rocks, for the simple reason that such event brings an end to the test work. As is evidenced by clause 3.3.1 of the Operational Procedures, the parties applied their minds to, and made express provision for, the towage of the AUV to the harbour by HD in defined circumstances: where communication is lost with the AUV as a result of rough seas or equipment failure while it is on the surface of the water. Plainly, the parties deliberately and unambiguously excluded a recovery operation by HD when the AUV is out of the water, as happened in this case. In these circumstances, an alleged tacit term – that the work boat would tow the AUV should the need arise – cannot be incorporated into the 2015 charter agreement or the Operational

Procedures.[9] In short, the alleged tacit terms contradict the express terms of the contract between the parties.[10]

[24] Apart from this, when the terms of the 2017 contract and the 2015 charter agreement are considered in a reasonable and businesslike manner, the parties would not have intended that the alleged tacit terms should be included in their contract.[11] It was agreed that the HD would charter work boats to De Beers to enable it to undertake research and development of its survey equipment; and that in order to perform particular test work, De Beers required work boats best suited to that test work, which would be done by way of a charter agreement. In terms of that agreement, De Beers chartered particular work boats from HD, which was responsible for their operation.

[25] Had the alleged tacit terms been suggested to the parties at the time, they would not have agreed to them. More specifically, they would not have agreed to the term that 'the work boat would tow the AUV should the need arise', which would include recovery of the AUV if it was grounded on rocks. Viewed objectively, the alleged tacit terms cannot be inferred from the express terms of the contract or the surrounding circumstances. So, nothing turns on the fact that Mr Dilley recorded overtime hours in his diary concerning the towage of the AUV. In any event, it also contains the following note: 'AUV salvage done on a no cure no pay contract'. This shows that he considered that HD had been engaged in a salvage operation. And the fact that the Nkwaza was not insured for salvage operations is neither here nor there. So too, Mr Dilley's failure at the relevant time to disclose to De Beers' representatives that he was embarking on a salvage operation.

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[9] *South African Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; See G B Bradfield *Christies' Law of Contract in South Africa* 7 ed (2016) at 197 and the authorities collected in fn 139.
[10] *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA); [2005] 4 BLLR 313 (SCA) para 15.
[11] *City of Cape Town v Bourbon-Leftley* fn 7 para 19.

[26] The high court thus correctly declined to import the alleged tacit terms into the parties' contract. It follows that HD's services in taking Mr Garthoff out to sea to enable him to swim to the AUV and secure a tow rope to it, and its towage by the Nkwaza to Simon's Town harbour, cannot 'be reasonably considered as due performance of a contract entered into before the danger arose', within the meaning of article 17 of the Salvage Convention. HD's services were rendered voluntarily: it was engaged in a salvage operation.

The salvage reward

[27] The high court accepted the evidence of Mr David Abromowitz, an expert yacht broker and maritime appraiser called by HD, regarding the replacement cost of the AUV in 2017, namely $3.5 million or R55 252 882.80. The court fixed the salvage reward at 10% of the replacement value – R5 525 288.23 which, it said, was fair and just 'as contended by [HD's senior counsel]'.

[28] Article 12 of the Salvage Convention states that a salvage operation must have a useful result before there is a right to a reward. Article 13(1) sets out the criteria for fixing the reward. It provides:

'The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

(a) the salved value of the vessel and other property;

(b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;

(c) the measure of success obtained by the salvor;

(d) the nature and degree of the danger;

(e) the skill and efforts of the salvors in salving the vessel, other property and life;

(f) the time used and expenses and losses incurred by the salvors;

(g) the risk of liability and other risks run by the salvors or their equipment;

(h) the promptness of the services rendered;

(i) the availability and use of vessels or other equipment intended for salvage operations;

(j) the state of readiness and efficiency of the salvor's equipment and the value thereof.'

[29] Before considering the appropriateness of the reward in this case, it is necessary to consider the parties' submissions concerning the nature of the discretion conferred by article 13(1) of the Salvage Convention. Counsel for De Beers submitted that it was a discretion in the loose sense, ie that the high court was entitled to have regard to a number of disparate and incommensurable features in coming to a decision.[12] On behalf of HD, it was submitted that the high court exercised a discretion in the true sense when determining the salvage reward: the court had a wide range of equally permissible options available to it.[13]

[30] In *Trencon*,[14] it was held that the nature of the power determines the standard for appellate intervention. In essence, a standard of correctness in the case of a loose discretion, and in the case of a true discretion, a stricter standard of judicial exercise.[15] The nature of the discretion depends on the proper interpretation of the power conferred. But not every power fits into the binary distinction drawn in *Trencon* and often used in our law to understand a discretion. Article 13(1) of the Salvage Convention appears on its face to be a loose discretion, ie, a decision reached by recourse to stated criteria that is subject to appeal if an incorrect decision is made.

[31] However, the English law of salvage, which now is also subject to the Salvage Convention,[16] indicates that the power in article 13(1) is more nuanced, and does not fit into the distinction between a true and loose discretion. Rather, it is a power to fix a reward that must serve a particular purpose (to encourage salvage operations) and is determined by reference to stated criteria. In this regard, the cases establish two principles. The first is the general principle that

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[12] *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A); [1996] 3 All SA 669 (A) at 361H-I, [1996] 3 All SA 669; *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) paras 86-87.
[13] *Media Workers Association of South Africa and Others v Press Corporation of South Africa Limited (Perskor)* 1992 (4) SA 791 (A) at 800D-E; *Trencon Construction* fn 12 paras 85 and 88.
[14] *Trencon Construction* fn 12 para 83.
[15] *Trencon Construction* fn 12 paras 86-88.
[16] *Kennedy & Rose* fn 1 para 16-009.

the determination of the amount of a salvage reward is a matter of discretion on which views may differ. In *The 'Amerique'*,[17] the Privy Council referred to the general principle stated in *The Clarisse*,[18] in which Lord Justice Knight Bruce said:

'It is a settled rule, and one of great utility with reference to cases of this description, that the difference (that is the difference between the sum awarded, and that which the Appellate Court may think ought to have been awarded) must be very considerable to induce a Court of Appeal to interfere upon a question of mere discretion.'

[32] In other words, if the judge of first instance had taken into consideration everything that needed to be considered, the reward could be set aside only if the appellate court is satisfied that 'it is so exorbitant, so manifestly excessive, that it would not be just to confirm it'.[19] It follows that an appellate court does not vary the decision of the court of first instance merely because it might have awarded a smaller sum, had the case come before it.[20] It also does not interfere with a salvage reward because the amount is so large, or so small, that no reasonable person could fairly arrive at that sum. [21]

[33] The second principle, and the one on which *The 'Amerique'* was decided, was stated by Sir James Colville as follows:[22]

'The rule seems to be that though the value of the property salved is to be considered in the estimate of the remuneration, it must not be allowed to raise the *quantum* to an amount altogether out of proportion to the services actually rendered.'

[34] That principle was echoed in *The Glengyle*,[23] where the Glengyle had been involved in a collision with another ship. She had been abandoned by her master,

[17] *The 'Amerique'* 1874 LR 6 PC 468 at 475.
[18] 12 Moore PC 340 at 346.
[19] The *'Amerique'* fn 17 at 472.
[20] *Master and Owners of SS, Baku Standard v Master and Owners of SS Angele* [1901] AC 549 at 552.
[21] *The Accomac* [1891] P 349 at 354.
[22] The *'Amerique'* fn 17 at 472.
[23] *The Glengyle* CA 1898 P 97. See also *The Ocean Crown* [2009] EWHC 3040 Admlty; [2010] 1 Lloyd's Rep 468 paras 43-45.

passengers and crew who feared that the sinking of the Glengyle was imminent. Her cargo and freight (of very large value) were rescued from certain total loss by purpose built, dedicated salvage vessels, kept in readiness to assist vessels in distress, which towed the Glengyle to a place of safety. At first instance, Gorell Barnes J found that values of the salving vessels were large and that 'these vessels and the lives of those on board were exposed to grave danger'. The value of the salved fund was £76 596 and the salvage reward, £19 000 – about 25% of the value of the fund. After citing *The 'Amerique'*, the judge said:

'The value salved is an element – an important element – in considering the amount to be awarded; but the Court must not be induced by it to award a sum which is out of proportion to the services of the salvors.'

[35] The Court of Appeal declined to reduce the salvage reward. It held that the judge in the court below had not placed too much stress on the value of the property salved. It could not be said that the reward was so excessive that it had to be set aside, having regard to 'not only imminent danger of the certain loss of the *Glengyle* and her cargo, but danger and possible loss to the salving vessels and their crews'.[24]

[36] It should however be noted that prior to the Convention, the tribunal or court would consider the factors present in the case at hand, whereas the Convention prescribes, in article 13(1), the criteria to be taken into account when fixing a salvage reward.[25] The court is required to analyse those criteria in the light of the facts, so as to distil an appropriate award in money terms.[26] The main criteria in the assessment of a salvage reward are the dangers to the property salved, the nature and burden of the services provided by the salvors, and the salved value,[27] having regard to the policies of encouraging salvage and

[24] *The Glengyle* fn 23 at 110 and 111.
[25] *Kennedy & Rose* fn 1 para 16-019.
[26] *The Voutakos* [2008] EWHC 1581 (Admlty); [2008] 2 Lloyd's Rep 516 para 9.
[27] Articles 13(1) *(a)*, *(d)*, *(e)* and *(g)* of the Salvage Convention.

environmental services, and promoting the safety of human lives. The other criteria are effectively emanations of the main criteria.[28]

[37] In this case the whole salvage operation took about an hour. Its success was mainly due to the efforts of the divers. Mr Garthoff assumed all the risks and was exposed to the most danger, for example, the swell and wind conditions at the rocks, where he had to gain access to the AUV so as to secure the tow line, and the risk of being hit by the AUV whilst the line was being secured to it. Mr Day was on the Nkwaza and set up the ropes from the stern to the bow. Although they were paid R10 000 for their services, it should be borne in mind that this was an agreed fee – not a salvage reward.

[38] By contrast, the Nkwaza, which is not a dedicated salvage vessel, was not really imperilled, given the distance that the boat maintained from the coast at all times. Although Mr Dilley has extensive experience and skill as skipper of the Nkwaza, and making a 180 degree turn to transfer the tow rope from the bow to the stern of the vessel (in order to tow the AUV) involved some difficulty, the towage of the AUV was uneventful. It did not require any special or extraordinary nautical skill. As already stated, the towage of the AUV while on the surface of the water by a work boat to a position of safety, was envisaged in clause 3.3.1 of the Operational Procedures. And the finding that the Nkwaza was exposed to a fair degree of danger is unsustainable on the evidence. The value of the Nkwaza was not high (a market value of R500 000 and a replacement value was R6 million). HD is not a professional salvor, incurred no loss or additional expenses, and did not use any of its own salvage equipment in the operation. All the equipment used was supplied by the divers.[29]

[28] *Kennedy & Rose* fn 1 para 16-018.
[29] Articles 13(1)*(f)* and *(i)* of the Salvage Convention.

[39] That leaves the salved value of the AUV: 'the worth, in financial terms, of the property which has been saved for the benefit of its owners'.[30] HD bore the onus of proving all matters in issue, including values.[31] Both Mr Abromowitz and De Beers' expert, Captain Godfrey Needham, a salvage broker and consultant, and Master Mariner, agreed with the statement on the technical condition and value of the AUV provided by its supplier, Atlas Maridan, based in Denmark. According to that statement, De Beers is the only company in the world operating an AUV of the kind in question. At the time, its estimated value in a purchase condition was 100 000 EUR; and 10 000 EUR if the vehicle was scrapped. Captain Needham valued the AUV at R2 766 000, using the Atlas Maridan estimate in a purchase condition with additional equipment, less the costs of repairs.

[40] The high court erred in rejecting Captain Needham's evidence concerning the salved value of the AUV. The court could not attribute to the AUV a value of some R55 million based on its replacement value determined many years after it was built, because that was not the value of what was salved. Article 13(1)*(a)* of the Salvage Convention refers to the 'salved value of the vessel and other property'. That is the value of the AUV after it has been salved. It is not even its value before the mishap that led to it being salved. It is what survives after salvage that matters. If the property salvaged is worthless, there can be no reward. This Court is therefore at large to determine an appropriate reward in the light of the criteria in Article 13(1).

[41] The analysis of the article 13(1) criteria above, shows that there was no risk or danger to the Nkwaza during the salvage operation, making it very nearly a question of towage. Although the AUV was not at risk of loss or destruction, there was valuable equipment on board which had been damaged. It was imperative

[30] *Kennedy & Rose* fn 1 para 15-001.
[31] *Kennedy & Rose* fn 1 para 15-002.

that the AUV had to be recovered as soon as possible to prevent it from sustaining further damage. That would have happened had it not been recovered promptly.

[42] The salved value of the AUV at the relevant time was R2 766 000 and on the evidence, it was of strategic and operational importance to De Beers. The salvage operation was successful and carried out promptly, not least because of HD's readiness to respond. Looking at the case objectively, and having regard to the role of the court which is to take account of all the circumstances in assessing the award, which must not be out of proportion to the services rendered or to the value of property salved,[32] it seems to me that a salvage reward of R80 000 is appropriate. On an overall application of the criteria, this reward is fair to both parties and gives effect to the principle that the salvee should pay for the benefit received; that the salvor should be rewarded for the service provided; and that the reward should reflect public policy.[33] And public policy in the law of salvage is implemented in the practice of making awards on a generous scale, so as to encourage salvage services.[34]

Costs

[43] It was argued on behalf of De Beers that in the event of a substantially smaller reward being made, HD should be ordered to pay De Beers' costs of the action. The argument however loses sight of the fact that De Beers had denied liability for any salvage reward, and HD was compelled to institute the action to enforce its claim. There is accordingly no reason to interfere with the high court's order in relation to costs.

[44] Both parties were partly successful on appeal. For this reason, the appropriate order is that each party should pay its own costs.

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[32] *The 'Voutakos'* fn 26 para 44.
[33] *Kennedy & Rose* fn 1 para 16-013.
[34] *Kennedy & Rose* fn 1 para 16-014.

[45] In the result, the following order is issued:

1 The appeal succeeds in part. The order of the high court is set aside and replaced with the following:

‘1. In terms of article 13(1) of the International Convention on Salvage, 1989, being the schedule to the Wreck and Salvage Act 94 of 1996, a salvage reward of R80 000 is fixed.

2. The said reward shall bear interest *a tempore morae* in terms of s 5(2)(*f)* of the Admiralty Jurisdiction Regulation Act 105 of 1983, from the date of the service of summons to date of payment.

3. The defendant shall pay the costs of the action, including the costs of two counsel.’

2 Each party shall bear its own costs of appeal.

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A SCHIPPERS

JUDGE OF APPEAL

Appearances:

For appellant:	M Wragge SC
Instructed by:	Hiscox and Associates, Cape Town
	Symington De Kok Attorneys, Bloemfontein
For respondent:	M Fitzgerald SC and R Fitzgerald
Instructed by:	Edward Nathan Sonnenbergs Inc, Cape Town
	Honey Attorneys, Bloemfontein