

IN THE SUPREME COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION

DURBAN

CASE NO A471/95

DATE 1996/11/25

NAME OF SHIP: mv "STAINLESS KOBE"

In the matter between:

ZATSEPIN ANDREY
and SEVENTEEN OTHERS

FIRST TO EIGHTEENTH
APPLICANTS

and

THE FUND ARISING FROM THE SALE
OF THE mv 'STAINLESS KOBE'

RESPONDENT

DE NATIONALE INVESTERINGS BANK NV

FIRST INTERVENING CREDITOR

and

't WAPEN VAN MARION BV

SECOND INTERVENING CREDITOR

BEFORE THE HONOURABLE MR JUSTICE COMBRINK

EXTRACT: JUDGMENT

TRANSCRIBER

SECRETARIAL SERVICES

2/151 ON 1996/11/25 (Recording commences mid-sentence)

J U D G M E N T

COMBRINK J: Pursuant to orders that issued out of this Court a merchant vessel "Stainless Kobe" was attached, sold in execution and the proceeds of that sale constituted as a fund from which the creditors of the owners of the vessel had to be paid out of together with an order in terms whereof a referee, Glen Thatcher, a practising advocate, had been appointed as such for the purposes of receiving, considering and reporting to the Court on any claims lodged against the fund by any creditors. 10

In terms of his appointment the referee took up his office and received a number of claims emanating from creditors against the fund. The order, according to which the referee was given the powers he exercised pursuant to his appointment in that office, enabled him also to extend, in a limited way, the date for the late lodging of claims by creditors. Acting under the latter power the referee received the claim of De Nationale Investerings Bank NV, who is also the first intervening creditor in these proceedings (hereinafter referred to as "the Bank"), and supplemented his original report by what was referred to in the papers as a final report in respect of the claims submitted and processed in relation to the fund. 20

This application has been lodged by a creditor against the owners of the vessel and thus a creditor in respect of the fund for payment out of the fund of certain monies due to it by virtue of the second intervening creditor, styled 't Wapen van Marion BV, accommodating crew members employed by the owner in its hotel over a 30

/period

2/305

period of time. It is common cause that the 't Wapen van Marion's claims arose in two parts. I propose for convenience referring to the second intervening creditor as "the Hotel". Returning to that claim - the Hotel's claim against the fund is based upon accommodation given to and in favour of the ship owners in respect of personnel accommodated there and became due and payable in respect of the first part thereof on 23 July 1995 and in respect of the second part of the claim, 12 August 1995.

The order sought in this application by the Hotel is that the Court, in essence, relax the time constraint placed upon the functions of the referee in receiving and considering claims as contained in the original Court order in order to accommodate the late noting of such a claim by the Hotel. To that end an amended order prayed was put up during the course of argument, the second prayer of which, in its amended form reads - 10

"That Advocate G R Thatcher (hereinafter referred to as "the Referee") is hereby directed as Referee to receive and to consider and report to this Court on the claim of the Second Intervening Creditor, which claim is to be lodged with the Referee within three days of the date of this Order." 20

And together with that, certain ancillary relief, dealing largely with the manner in which the claim would be processed and considered, is also sought.

Before considering the application and the objections raised on behalf of the Bank against the order sought, certain relevant provisions of the Admiralty Jurisdiction 30

/Regulation

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Regulation Act, 105 of 1983, as amended, together with the Rules promulgated under that Act, require mention. The first is section 11(4)(c) which in context reads as follows -

"The claims mentioned in sub-section (2) are the following, namely -

(a) a claim in respect of costs and expenses incurred to preserve the property in question or to procure its sale and in respect of the distribution of the proceeds of the sale;

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(b) a claim to a preference based on possession of the property in question, whether by way of a right of retention or otherwise;

(c) a claim which arose not earlier than one year before the commencement of the proceedings to enforce it or before the submission of proof thereof and which is a claim - "

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Section 11 essentially deals with the ranking of claims and it is common cause in these proceedings that were I to find that the Hotel had, through this application, brought itself within the purview of section 11(4)(c) of the Act, it would be accorded the preference envisaged by section 11(4)(c) which would cause its claim to rank ahead of that of the Bank.

Mr Lopes, who argued the case for the Hotel, submitted that when regard is had to the fact that the referee had already reported to the Court on the exercise of his office in respect of claims against the fund and as

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/this

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this is essentially an application for condonation, the Hotel's claim is brought within the province of the ranking section, namely 11(4)(c), by virtue thereof that the process before me constitutes "proceedings to enforce (the claim)". Being such "proceedings", Mr Lopes argues, and in as much as this application was instituted by virtue of its being filed on 5 July 1996 and served on 8 July 1996 on all interested parties including the Bank, it fell within the period of twelve months and thus ought to be accorded the preference provided for under section 11(4)(c). 10

It is important in this regard to note that the first part of the Hotel's claim would have fallen inside the period of one year mentioned in Section 11(4)(c) if the proceedings had been brought before midnight on 22 July 1996 in respect of the first part of the claim and before midnight on 11 August 1996 in respect of the latter part. Mr Lopes argued that, as this application constitutes a "proceeding to enforce" the Hotel's claim and in as much as it had been lodged on 5 July 1996 with the Registrar of this Court, the claim was brought within a period of one year and that once this order is granted the Hotel would be entitled, if the claim is accepted by the referee, to preference above the claim of the Bank. 20

Mr Harper, appearing for the Bank, agreeing that the application before me constitutes "proceedings to enforce (the Hotel's claim)", argues that it cannot be entertained as such as it would offend and indeed be precluded by the provisions of section 10A(2)(a) of the Act. That subsection reads - 30

/"If an

2/637

"If an order is made referring all claims to a referee or if the Court so orders, all proceedings in respect of claims which are capable of proof for participation in the distribution of the fund shall be stayed and any such claim shall be proved only in accordance with such order."

Mr Harper's argument runs along these lines. He contends that the moment the order in casu was made appointing the referee all further proceedings other than the lodging of claims in terms of the order with the referee would be stayed and cannot be commenced by virtue of any proceeding instituted with a view to enforcing any claim against the fund. The argument accordingly is that the proceedings of the instance amount to a proceeding which falls within the purview of section 10A(2)(a) and cannot thus be instituted. That being the case, so the argument submitted by Mr Harper concludes, the only way upon which the application can be looked at is that it constitutes an application which, if successful, would result in the submission of proof of the Hotel's claim to the referee once he is again seized of the matter and, when regard is had to the terms of the order being sought in casu, that will take place within three days of the referee's so-called "reappointment".

In elaboration of these submissions, Mr Harper pointed to a recent decision in this Court in connection with an action for damages arising out of a breach of contract in which the question arose whether prescription in terms of section 15 of the Prescription Act, 64 of

/1969,

2/762 1969, had taken place or not. That case, briefly stated, concerned the following. The plaintiff had instituted action against a party and subsequently brought an application for the joinder of another party as a second defendant in the action. The application for joinder was granted and subsequently, as I understood the facts as envisaged to me in argument, the second party had been joined as a second defendant. The case concerned the very simple question whether the application of intention to join the second defendant constituted a process which would serve to interrupt the period of prescription that applied in that case. MESKIN J, found that the application to join constituted no more than a notification and was not a process which served to interrupt prescription in terms of the relevant sections of the Prescription Act. 10

In my view, that case is no authority for the problem I am confronted with on these papers. I have before me an application which is designed to ask for an order which would again place before the referee a claim, albeit late, to be dealt with in terms of the powers conferred upon the referee in respect of monies and claims relating to the fund established by the sale of the ship. 20

If Mr Harper's argument is correct and the application itself would fall within the purview of section 10A(2)(a) of the Act, it would mean that in certain circumstances a creditor such as the Hotel in these circumstances would be rendered remediless. A creditor may receive late notice of the machinery available to lodge and get his claim paid and find himself in a situation where, although he is able to move in time, 30

/the procedure

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the procedure available to him does not accommodate a speedy remedy which would enable him to preserve the ranking of his claim as provided for in section 11. A number of possibilities could arise which would, if Mr Harper's argument is correct, result in his simply not being able to submit his claim to the referee in due time so as to bring it within the one year period referred to in section 11(4)(c). I do not intend to analyse specific examples which would bring about such a result. It seems to me that with a bit of imagination one could conceive of numerous of those. 10

In my view the answer to Mr Harper's objection lies in the following: that the provisions of section 10A(2)(a) did not intend to stay a proceeding to enforce a claim such as the instance but was intended to refer only to claims brought outside the provisions whereby claims are submitted to the referee in respect of the established fund. Mr Harper argued that if this interpretation were accorded to the relevant provisions of the Act, it would lead to inconsistency, as I understand the argument, in that in respect of the provisions of section 10A(2)(a), "proceedings" there referred to would have a different meaning compared to the word "proceedings" as referred to in section 11(4)(c). It might well be that that is the result produced but when regard is had to what I conceive to be the object and purpose of the measures in question, then that is exactly the result which the legislature aimed to achieve. Namely, that a fund be created and that an even-handed distribution amongst the creditors take place out of that fund, and that in support of the achievement of that 20 30

/objective,

2/1040

objective, section 10A(2)(a) was directed at precluding any other claims being brought against the fund, save those specifically referred to, to be dealt with by the referee in terms of the order appointing him and empowering him to act. I do not find that it is so inconsistent with the language used in section 11(4)(c) of the Act that that interpretation is not tenable. In the circumstances I am of the view that the applicant's claim falls within the province of section 11(4)(c) and that the referee may receive it and deal with it on that basis. 10

The amended order prayed, which I am about to grant contains in the latter part thereof a provision that costs of the application shall be paid out of the fund in accordance with section 11(1)(a) read with section 11(4)(a) of the Admiralty Jurisdiction Regulation Act. It was argued by Mr Harper that as this application was one for condonation and per se one in which the applicant should bear the costs of the application himself. I do not consider that this application is on all fours with the usual application for condonation and, bearing in mind 20 the energetic opposition which it elicited, I am of the view that success should be visited with an appropriate cost order. In the circumstances I am of the view that, in the exercise of my discretion thereanent, costs ought to be granted as prayed.

In the result I make an order in terms of the amended order prayed.
