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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

SUMMIT INDUSTRIAL CORPORATION .... appellant

and

CLAIMANTS AGAINST THE FUND
COMPRISING THE PROCEEDS OF
THE SALE OF THE m.v.
"JADE TRANSPORTER" .... respondents.

Coram: CORBETT, TRENGOVE, VILJOEN, GROSSKOPF, JJA,
et NICHOLAS AJA.

Date of Hearing: 13 November 1986 and 16 February 1987

Date of Judgment: 2 March 1987

J U D G M E N T

CORBETT JA

This appeal, from a judgment of the Full Bench of the Natal Provincial Division (per HOWARD J, MILNE JP

/ and ....

and LEON ADJP concurring), which has been reported (see 1985 (4) SA 133 (N)), concerns the interpretation to be placed on sec. 11(8) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Act").

According to its long title the object of the Act is to provide for the vesting of the powers of the admiralty courts of the Republic in the provincial and local divisions of the Supreme Court of South Africa, and for the extension of those powers; for the law to be applied by, and the procedure applicable in, those divisions; for the repeal of the Colonial Courts of Admiralty Act 1890, of the United Kingdom, in so far as it applies in relation to the Republic; and for incidental matters.

In pursuance of this object the Act provides that each provincial and local division of the Supreme Court shall have jurisdiction (designated "admiralty jurisdiction") to

/ hear ....

hear and determine any maritime claim (sec 2(1)).

The term "maritime claim" is defined in sec. 1 to mean any one of twenty-six categories of claim, which are listed in paras. (a) to (z) inclusive of the definition. These categories include -

(i) "any claim in respect of a mortgage, hypothecation, right of retention or pledge of, or charge on, a ship" (para (c));

(ii) "any claim arising out of any agreement for or relating to the carriage of goods in a ship" (para (h));

(iii) "any claim in respect of goods supplied or services rendered to a ship for the employment or maintenance thereof" (para. (ℓ));

(iv) "any claim in respect of the design, construction, repair or equipment of any ship or any dock or harbour dues or any similar

/ dues" ....

dues" (para. (m));

(v) "any claim by a master or member of the crew of a ship arising out of his employment" (para (n));

(vi) "any claim relating to any maritime lien ....." (para. (v)).

In terms of sec. 3 a maritime claim may, subject to certain requirements, be enforced either by an action in personam or an action in rem. In the case of an action in personam the requirements are jurisdictional. Thus such an action can be instituted only against certain classes of persons, defined by reference to specific grounds of jurisdiction (sec. 3(2)). One such class is a person -

> "whose property within the court's area of jurisdiction has been attached to found or confirm jurisdiction".

In the case of an action in rem the section provides that a maritime claim may be enforced by such an action (which

/ is ....

is instituted by the arrest within the court's area of jurisdiction of certain property) if either (a) the claimant has a maritime lien over the property to be arrested or (b) the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned (sec 3(4)). The property which may be arrested in order to institute an action in rem consists of —

> ".... one or more of the following categories against or in respect of which the claim lies:
>
> (a) The ship, with or without its equipment, furniture, stores or bunkers;
>
> (b) the whole or any part of the equipment, furniture, stores or bunkers;
>
> (c) the whole or any part of the cargo;
>
> (d) the freight" (Sec. 3(5)).

The term "maritime lien" is not defined in the Act, but its meaning has been discussed in various judgments (see eg. Euromarine International of Mauren v The Ship Berg and Others 1984 (4) SA 647 (N), at p 652 F-H; Oriental Commercial and

/ Shipping ....

Shipping Co Ltd v M V Fidias 1986 (1) SA 714 (D); Southern Steamship Agency Inc and Another v M V Khalij Sky 1986 (1) SA 485 (C); and the judgment a quo, as reported, at pp 141 G - 142 D). For the purposes of this case it is not necessary to investigate the circumstances under which a claimant acquires a maritime lien over property.

It will be noted that in terms of the provisions of sec. 3 thus far discussed an action in rem requires the arrest of property "against or in respect of which the claim lies". Prior to the passing of the Act this was the only basis upon which an action in rem could be instituted in the courts of South Africa exercising admiralty jurisdiction. It was not, for example, permissible to seek to institute an action in rem to enforce a claim arising in respect of ship A by the arrest of ship B, even though the two ships were owned by the same person (see Tharros Shipping Corporation SA v Owner of the Ship "Golden Ocean" 1972 (4) SA 316 (N);

/ Euromarine ....

Euromarine International case, supra, at p 658 H - 659 A).
In this connection, however, the Act introduced an important innovation in the form of the "associated ship" and enacted, subject to certain qualifications which are not presently relevant, that an action in rem might be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose (sec. 3(6)). And "associated ship" was defined to mean a ship, other than the ship in respect of which the maritime claim arose --

> " (i) owned by the person who was the owner of the ship concerned at the time when the maritime claim arose;
>
> or
>
> (ii) owned by a company in which the shares, when the maritime claim arose, were controlled or owned by a person who then controlled or owned the shares in the company which owned the ship concerned". (Sec. 3(7)(a)).

/These................

These provisions thus contemplate two categories of ship: the ship in respect of which the maritime claim arose, referred to in sec. 3(7)(a) as "the ship concerned" - a convenient label - and "the associated ship", linked with the ship concerned by common ownership or control, either directly, ie. where the same person owns, and therefore controls, both ships (sec. 3(7)(a)(i)) or indirectly, ie. where the two ships are owned by companies the shares in which are controlled or owned by the same person at the time when the maritime claim arose (sec. 3(7)(a)(ii)). Sec. 3(7) does not specifically deal with the position where a person owns or controls one ship directly and the other indirectly, but presumably (it is not necessary to decide the point) the subsection would be interpreted as covering that situation and the one ship would be regarded as an associated ship *vis-a-vis* the other. Associated ships which are linked directly, ie. owned by the same person,

/ are ....

are often referred to as "sister ships"; and those which are linked indirectly, ie are owned by companies the shares in which are controlled or owned by the same person, are often called "group ships".

Sec. 9 of the Act provides that a court may in the exercise of its admiralty jurisdiction at any time order that any property which has been arrested in terms of the Act be sold and the proceeds thereof held as "a fund in the court" or otherwise dealt with. And sec. 11 makes detailed provisions with regard to the ranking of claims in regard to a fund in the court. It is the interpretation of sec. 11, and more particularly subsec. (8) thereof, which has given rise to the dispute in the present matter. But before turning to this it is necessary to recount the relevant facts.

The case arises from the financial collapse of a group of ship-owning companies known as the Eddie Steamship

group. These companies are controlled and owned by a Mr W H Eddie Hsu of Taiwan. Included in the group are Outer Ocean Navigation Corporation Ltd, which owned, *inter alia*, m.v. *Emerald Transporter*; Far Eastern Navigation Corporation Ltd, which owned, *inter alia*, m.v. *Jade Transporter* and m.v. *Iron Transporter*; and Eddie Steamship Co. Ltd, which owned, *inter alia*, m.v. *Steel Transporter*.

On 22 June 1984 Gulf Oil Trading Company ("Gulf Oil") of Delaware, USA, made application to the Durban and Coast Local Division, in the exercise of its admiralty jurisdiction, for an order for the attachment of m.v. *Jade Transporter* to found jurisdiction in an action *in personam* to recover the cost of fuel oil and diesel oil (termed "bunkers") and lubricating oil (termed "lubes") supplied to certain vessels within the Eddie Steamship group (case number 4565/84). On the same day a warrant of arrest *in rem* was issued in favour of Hollandsche Bank-Unie M V

/("HBU") ....

("HBU") in respect of the m.v. *Jade Transporter* as the first step in an action *in rem* to recover amounts due in terms of a mortgage of the vessel (case number 4570/84); and in pursuance of this warrant a notice of arrest was issued.

At this time the m.v. *Jade Transporter* had arrived off Richards Bay, Natal, in order to obtain bunkers at the Richards Bay terminal. The vessel remained outside the territorial limits, however, evidently in order to evade service and execution of the attachment and arrest orders already granted. This position continued throughout June, July and the early part of August. In August two further warrants of arrest *in rem* in respect of various maritime claims were issued: one in favour of Gulf Oil on 3 August 1984 (case number 5368/84) and one in favour of Scallop Petroleum Company ("Scallop") on 10 August 1984 (case number 5485/84). Eventually the m.v. *Jade Transporter* was com-

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pelled to enter territorial waters to take on gas oil and on 11 August 1984 service was effected simultaneously of the warrants of arrest <u>in rem</u> in cases 5368/84 (claimant Gulf Oil) and 4570/84 (claimant HBU) and the application to attach in case no 4564/84 (claimant Gulf Oil). Subsequently warrants of arrest <u>in rem</u> of the m.v. <u>Jade Transporter</u> to enforce various maritime claims were issued in favour of HBU in case number 5732/84, in favour of appellant, Summit Industrial Corporation ("Summit"), in case number 5894/84 and in favour of the master and crew of the vessel, in case number 5554/84. Process in these cases, together with that in case number 5485/84 (claimant Scallop), was served simultaneously on 3 September 1984.

In the meanwhile, on the application of Gulf Oil, the Durban and Coast Local Division, in the exercise of its admiralty jurisdiction, and evidently in terms of sec. 9 of the Act, had ordered the sale of the m.v. <u>Jade Transporter</u> by public auction and had ordered that after payment of

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certain costs and expenses the balance be held as a fund in the court to be dealt with in accordance with sec. 11 of the Act. The sale took place on 18 September 1984 and realised the sum of US $5 710 000,00 (R9 626 542,87).

On 28 September 1984 the Court (again the Durban and Coast Local Division) appointed Mr. S R Cooper of Cape Town referee for the purpose of receiving, considering and reporting to the Court on all claims against the fund constituted by the proceeds of the sale of the m.v. Jade Transporter and ordered that all such claims be filed with the referee. Mr Cooper duly carried out his mandate as referee and on 3 December 1984 submitted a lengthy report to the Court dealing with the various claims made upon the fund.

In his report the referee differentiated between what he termed "a direct claim", i.e. where the claim concerned arose in respect of the m.v. Jade Transporter,

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and "an associated claim", ie where the claim concerned arose in respect of a vessel other than the m.v. _Jade Transporter_, being a vessel in respect of which the m.v. _Jade Transporter_ was an associated ship. The direct claims recommended for acceptance by the referee included claims for outstanding salaries or wages by the master, officers and crew of the m.v. _Jade Transporter_; claims arising from the supply of bunkers and lubes and other requirements and services to the m.v. _Jade Transporter_; and claims arising from a loan secured by a mortgage bond over the m.v. _Jade Transporter_. The associated claims recommended for acceptance included claims arising from the supply of bunkers, lubes and other requirements and services to ships in relation to which the m.v. _Jade Transporter_ was an associated ship; claims arising from bill of lading contracts for the carriage of goods by ships in relation to which the m.v. _Jade Transporter_ was an associated ship; and claims arising

/ from ....

from loans secured by the mortgaging of ships in relation to which the m.v. Jade Transporter was an associated ship. In the case of Summit three classes of claims were recommended for acceptance by the referee: (a) direct claims in respect of bunkers, lubes and other related products and/or services supplied to the m.v. Jade Transporter; (b) associated claims in respect of the supply of bunkers to a sister ship, the m.v. Iron Transporter; and (c) associated claims in respect of bunkers supplied to group ships.

Having categorized and made his recommendations as to the acceptance of claims, or portions thereof, the referee then proceeded in his report to deal with the ranking of such claims. Before setting out his recommendations in this regard it is necessary to set forth and discuss to some extent the relevant provisions of the Act.

Subsec. 11 deals generally with the ranking of claims and subsections (1) and (8) thereof read as follows:

/ "(1) Claims..........

"(1) Claims with regard to a fund in a court in terms of this Act or security given in respect of property in connection with a maritime claim or the proceeds of property sold pursuant to an order or in the execution of a judgment of a court in terms of this Act shall be paid in the following order:

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

(b) claims to a preference based on possession, whether by way of a right of retention or otherwise;

(c) claims which arose within one year before the commencement of the proceedings, in respect of —

(i) wages and other sums due to or payable in respect of the master, officers and other members of the ship's complement, in connection with their employment on the ship;

(ii) port, canal and other waterways dues and pilotage dues;

(iii) loss of life or personal injury, whether occurring on land or on water, directly connected with the employment of the ship;

/ (iv) loss..........

(iv) loss of or damage to property, whether occurring on land or on water, resulting from delict and not capable of being based on contract, directly connected with the operation of the ship;

(v) the repair of a ship or the supply of goods or the rendering of services to a ship for the employment or maintenance thereof;

(vi) salvage, removal of wreck and contribution in respect of a general average act or sacrifice;

(d) claims in respect of mortgages, hypothecations, rights of retention of, and other charges on, the ship, effected in accordance with the law of the flag of the ship;

(e) claims in respect of any maritime lien not falling under any category mentioned in any of the preceding paragraphs;

(f) all other claims.

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(8) Where the fund arises by reason of an action _in rem_ against an associated ship, the ranking of claims set out in this section shall, notwithstanding the provisions of section 3(6), apply with

/ regard ....

regard to claims in respect of the associated ship, and claims in respect of the ship concerned shall be paid thereafter in the order set out in this section."

In the <u>Euromarine International</u> case (<u>supra</u>, at p 656 G) MILNE JP stated that the meaning of sec. 11(8) was that —

> "....notwithstanding that s 3(6) gives the right to a marine claimant to bring an action <u>in rem</u> by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose, claims of the nature described in ss (1) of s 11, which lie against the associated ship, are to be paid in preference to claims which lie against the associated ship by reason of the provisions of s 3(6). In other words, claims which lie directly against the associated ship have preference over claims for which it is, as it were, vicariously liable."

This differentiation in the ranking of claims has been described as giving rise to two queues, the first queue,

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which enjoys priority over the second queue, consisting of the direct claims against the vessel and the second queue consisting of the associated claims. To this extent the meaning and effect of sec. 11(8) are reasonably clear. What is not so clear is when the subsection comes into operation and what its field of operation is.

In his report the referee came to the conclusion that the system of queueing applied only where the fund arose by reason of an action in rem against an associated ship; that in this instance the fund arose by reason of an action in personam , viz the action instituted by Gulf Oil under case number 4564/84; that consequently sec. 11(8) had no application; and that accordingly all claims against the fund arising from the sale of the m.v. Jade Transporter had to be "pooled" and ranked in accordance with the provisions of sec. 11(1), read together with other relevant sub-sections of sec. 11.

/ After ....

After the submission of the referee's report HBU made application to the Durban and Coast Local Division, in terms of sec. 11(4) of the Act, for an order authorising the Registrar of the Court to distribute the fund in accordance with certain defined rankings. The system of ranking prayed for differed from that recommended by the referee. In particular, HBU took issue with the interpretation placed by the referee on sec. 11 of the Act, contending that in the instant case sec. 11(8) applied and that all direct claims in respect of the m.v. Jade Transporter had to be ranked and paid in priority to associated claims. This application was opposed by various claimants upon the fund. The Court referred the matter for hearing by the Full Court of the Natal Provincial Division in terms of sec. 13(1)(b) of the Supreme Court Act 59 of 1959.

It appears that at about the same time various other ships in the Eddie Steamship group had also been arrest-

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ed and sold to create funds in the court. These included the m.v. Emerald Transporter and the m.v. Steel Transporter. When the present matter came before the Full Court of the Natal Provincial Division the Court heard at the same time an appeal against a judgment of the Durban and Coast Local Division (per WILSON J) relating to the claims against the fund comprising the proceeds of the sale of the m.v. Emerald Transporter (see Banque Paribas v The Fund comprising Proceeds of Sale of the M V Emerald Transporter 1985 (2) SA 452 (D)) and an application in terms of sec. 11(4) of the Act to settle the ranking of certain claims against the fund comprising the proceeds of the sale of the m.v. Steel Transporter. Common to all these matters was the proper interpretation to be placed on sec. 11(8) of the Act.

The Full Bench came to the conclusion that a literal interpretation of sec. 11(8) would result in its applicability depending upon (reported judgment at p 139

/ D) — ....

D) —

> "..... the mere chance that the creditor at whose instance the ship is sold and the fund arises ("the selling creditor") happens to have an associated ship claim rather than a direct claim in respect of the ship sold and institutes an action _in_ _rem_ rather than an action _in personam_ to enforce his claim."

This, the Court held, was an absurd result and one which could never have been intended by the Legislature. Consequently the Court considered itself justified in departing from the literal meaning of the words of the statute. The Court further held that in order to give the subsection efficacy and avoid the absurd consequences of a literal interpretation it was necessary to imply, or read into, the opening words of the subsection (and after the word "where") the words "any claim against". The opening words of the subsection should thus be interpreted to mean —

/ "Where...............

> "Where any claim against the fund arises by reason of an action *in rem* against an associated ship ...."

(see reported judgment at p 139 F-I).

Applying this extended interpretation to the facts of the instant case the Court held that the referee's construction of sec 11(8) was incorrect; that the subsection applied; and that the direct claims in respect of the m.v.*Jade Transporter* should take precedence over the associated ship claims (see reported judgment p 145 D-F). Accordingly the Court made an order which included the following paragraph, numbered 3(a) (at p 146 J - 147 A):

> "It is declared that the claims of Gulf Oil Trading Co, Scallop Petroleum Co and Summit Trading Industrial Corporation in respect of the supply of goods to ships other than the mv *Jade Transporter*, in relation to which the mv *Jade Transporter* was an associated ship as envisaged by s 3(7)(a)(i) or (ii) of the Act, rank for payment in terms

/ of..................

> of s 11(8) of the Act after the direct claims in respect of the mv Jade Transporter".

Summit, having obtained the necessary leave from the Court *a quo*, now appeals against portion of this judgment and order, viz. that portion which declares that the claims of Summit in respect of the supply of goods to ships in relation to which the m.v. Jade Transporter was an associated ship by reason of the provisions of sec. 3(7)(a)(i) of the Act rank for payment in terms of sec. 11(8) of the Act after the direct claims in respect of the vessel. In other words Summit, while accepting the Court *a quo*'s general interpretation of sec. 11(8), contends that an associated ship claim arising in respect of a sister ship (ie. as defined in sec. 3(7)(a)(i)) should be treated differently from an associated ship claim arising in respect of a group ship (ie. as defined in sec. 3(7)(a)(ii)); and that the sister ship claim should fall into the first queue, together

/ with ....

with the direct claims, while the group ship claim falls into the second queue. It accordingly asked (and here I refer to counsels' heads of argument) that para. 3(a) of the order of the Court be amended to include the following words at the end thereof:

> "...... unless such claim is a claim *in personam* against the owner of the mv *Jade Transporter*, in which event it shall rank with the direct claims in respect of the mv *Jade Transporter* under section 11(1)(f) of the Act."

At the initial hearing of the appeal by this Court only Summit appeared. During the course of the argument members of the Court expressed reservations about the correctness of the Court *a quo*'s interpretation of sec. 11(8); and in addition the Court indicated that the record did not sufficiently evidence and describe the sequence of events leading up to the sale of the m.v. *Jade Transporter*

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and the creation of the fund. Eventually at the request of counsel for Summit the matter was postponed in order to enable Summit to supplement the record and to provide a chronology of events; and to present argument on the following issues (I quote from the order):

> "(a) whether the interpretation by the Court *a quo* of Section 11(8) of the Admiralty Jurisdiction Regulation Act No 105 of 1983 ("the Act") in the manner reflected at pages 220 - 221 of the Appeal Record is correct;
>
> (b) whether the interpretation by the Court *a quo* of Section 11(1)(c)(v) of the Act in the manner reflected at page 227 of the Record is correct;
>
> and generally on the matters raised in Appellant's Notice of Application for Leave to Appeal."

It was also directed that the order and copies of the additional documents be served upon the attorneys acting for the other interested creditors.

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At the resumed hearing this Court had before it the additional documentation asked for and the chronology of events. Of the other interested creditors (ie. apart from Summit) only HBU appeared by counsel and submitted argument. Counsel for HBU also supported the Court *a quo*'s interpretation of sec. 11(8).

The first question to be considered is the correct interpretation of sec. 11(8). The argument revolved mainly around the opening words, or "preamble", reading —

> "Where the fund arises by reason of an action *in rem* against an associated ship ...."

It was argued by counsel for Summit (in support of the general submission that, in interpreting the subsection, the Court should depart from the literal meaning) that a fund could not properly be described as arising "by reason of an action *in rem*". In my view, there is no substance

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in this argument. The phrase "by reason of" (Afrikaans "na aanleiding van") indicates a causal relationship between the arising of the fund and an action in rem taken against an associated ship (cf. Commissioner for Inland Revenue v Widan 1955 (1) SA 226 (A) at pp 233-4; Svenska Oljeslageri Aktiebolaget v Lewis Berger & Sons Ltd 1960 (2) SA 601 (A), at p 611 A-B). It is true that the institution of an action in rem does not, per se, give rise to a fund in the court. For a fund in the court to be created the court must make an appropriate order in terms of sec. 9 for the sale of the ship and the holding of the proceeds of the sale as such a fund; and in pursuance thereof the sale must take place and the proceeds duly held as a fund in the court. Plainly the Legislature was aware of this and consequently the words of the preamble to sec. 11(8) must be interpreted as contemplating a chain of causation consisting basically of (i) the institution of an action in rem by the arrest

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of an associated ship, (ii) an application to court in terms of sec. 9 for the sale of the arrested ship and the holding of the proceeds of the sale as a fund in the court, (iii) an order of court granting the application, (iv) the sale of the ship and (v) the holding of the proceeds of the sale as a fund in the court. Admittedly the precise nature of the causal connection between links (i) and (ii) is a matter upon which the subsection is not clear. Obviously if the claimant who institutes the action _in rem_ referred to in (i) applies to court for the sale of the ship, etc. in terms of sec. 9, the causal connection is there. But suppose that the party at whose instance the ship is sold has instituted both an action _in rem_ against the ship as an associated ship and either an action _in rem_ or an action _in personam_ to enforce a direct claim in respect of the ship? One of these alternatives applies to the factual situation in the present matter, where Gulf Oil which applied

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for the sale of the ship had instituted an action in rem against (and arrested) the m.v. Jade Transporter as an associated ship and had also attached the vessel to found jurisdiction in an action in personam against the owner (though there is no evidence of the institution of this action in personam). It may be that in such a case the action in rem against the ship as an associated ship would be regarded as a cause of the sale of the ship, albeit not the only cause, and that this causal connection would be sufficient to bring sec. 11(8) into operation. As I shall later show, however, it is not necessary to decide the point in this appeal. I might add that similar problems could arise where there are joint or simultaneous applications under sec. 9 by claimants having different types of claims.

Admittedly where applicants, under sec. 9 have only direct claims in rem and/or claims in personam, it would seem that sec. 11(8) has no application.

/ And.................

And it is this consideration which is said to give rise to an absurdity justifying a departure from the literal wording of the preamble along the lines indicated by the Court a quo.

The general rule is that the words of a statute must be given their ordinary, grammatical meaning unless to do so —

> "...... would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account......"

(per INNES CJ in Venter v Rex 1907 TS 910, at p 915).

In that event the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the legislature. (See also Ebrahim v Minister of the Interior 1977 (1) SA 665 (A), at p 678 and the authorities there cited.) The

/ principle.............

principle in Venter's case (supra) has generally been used in order to cut down the wide meaning of the words employed by the legislature, but in exceptional cases it may also be permissible for a court to expand the literal meaning of the words (see Barkett v SA National Trust & Assurance Co Ltd 1951 (2) SA 353 (A), at p 363 A-F).

As has been remarked in various judgments, it is dangerous to speculate on the intention of the legislature (see eg. the reference in Savage v CIR 1951 (4) SA 400, at p 409 A) and the court should be cautious about thus departing from the literal meaning of the words of a statute (see remarks of SOLOMON JA in Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530, at p 554-5). It should only do so where the contrary legislative intent is clear and indubitable (see Du Plessis v Joubert 1968 (1) SA 585 (A), at pp 594-5). Moreover, it is not the function of the court to supplement a statutory provision in order to provide for

/ a casus ....

a casus omissus (see Walker v Carlton Hotels (SA) Ltd 1946 AD 321, at p 330; Barkett's case, supra, at p 363 F-G).

I do not think that a departure from the literal meaning of the preamble to sec. 11(8) is justified. Giving the words their literal meaning does not lead to any absurdity. It brings about a "queueing" in the very circumstances obviously intended by the Legislature, ie. where a fund in the court arises "by reason of" (ie. in the manner indicated above) an action in rem against an associated ship. Counsel for Summit sought to argue that the literal interpretation gave sec. 11(8) "no practical field of operation". I have difficulty in accepting this. And I notice, too, that this assertion does not accord with the views expressed in Shaw, Admiralty Jurisdiction and Practice in South Africa at p 100. Analysis shows that the so-called absurdity lies not in the application of sec. 11(8) within its stated field of operation, but in the fact that

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the statute does not provide for the same system of queueing where a fund arises in other circumstances, such as where the ship is sold in pursuance of an action *in rem* to enforce a direct claim or an action *in personam*; or indeed whenever there are associated claims against a fund. It may well be that in this regard sec. 11(8) is deficient but, as I have shown, it is not the function of the court to remedy a *casus omissus*. If remedial action be needed, then that must be taken by the Legislature.

Furthermore, I have difficulty in accepting the interpretative modification of the preamble adopted by the Court *a quo* and supported by counsel before us. Grammatically, it involves substituting a new subject in the sentence constituting the preamble. *Any claim against the fund* is substituted for *the fund*. This is a very drastic alteration and one which virtually rewrites the sentence and changes its sense. Instead of having to determine how the fund

/ arose..................

arose one would, in applying the preamble in accordance with this interpretation, have to enquire whether there were any claims against the fund which arose from an action *in rem* against an associated ship. I know of no precedent for so fundamental a change in a statutory provision being wrought by a process of interpretation. In addition, the amended wording adopted by the Court *a quo* introduces the anomalous concept of a claim arising from an action *in rem*. A claim would, in ordinary parlance, arise by reason of one or other of the transactions or events referred to in the definition of maritime claim; and, with respect, I do not find the explanation given in the judgment *a quo* (at p 140 A-B) entirely convincing. And finally, as is conceded in the judgment *a quo* (at p 140 D-F), the construction adopted by it does not apparently render the subsection applicable in all cases where the claims against a fund include one or more associated ship claims and consequently falls short of achieving what is conceived to be

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the entire object for which the subsection was enacted.

For these reasons I am of the opinion that sec. 11(8) must be interpreted in accordance with the ordinary meaning of the language employed by the Legislature. Ordinarily the next question would be whether, so interpreted, sec. 11(8) is applicable in the instant case. The Court a quo, on its interpretation, decided that the subsection did apply (thus rejecting the view of the referee). It may well be that even on the literal interpretation preferred by me - and for reasons already adumbrated - sec. 11(8) would apply in this case. There is, however, no appeal against that part of para. 3(a) of the order of the Court a quo which declares that there should be two queues of claims; and consequently this Court is not called upon to pronounce on the correctness of that decision. Nor is it necessary to consider what effect, if any, a statement in the supporting affidavit to Gulf Oil's application for the sale

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of the m.v. Jade Transporter (to the effect that in the application Gulf Oil was proceeding in terms of its action in personam against the owner of the m.v. Jade Transporter) has upon the applicability of sec. 11(8).

What this Court is required to deal with, however, is the contention by Summit that para. 3(a) should be amended by the addition of the rider quoted above, which in effect draws a distinction between claims arising from actions in rem against sister ships and those against group ships and places the former in the first queue and the latter in the second queue. I can find no foundation for such a distinction. The only substantive provisions in the Act relating to queueing are to be found in sec. 11(8). Once it is established that in terms of the preamble the subsection applies, then the subsection prescribes how the claims are to be divided into (a) those "in respect of" the associated ship (which is the ship whose sale has created the fund) and (b) those "in respect of" the ship concerned, and

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ordains that the claims falling under (a) shall have precedence over those falling under (b). It is clear to me that when sec. 11(8) speaks of a claim "in respect of" a particular ship, it means a claim which arose in respect of that ship. Consequently in allocating claims to the two categories prescribed by sec. 11(8) the simple enquiry is: did the claim arise in respect of the associated ship or the ship concerned?

A simple example of the working of sec. 11(8) may aid clarification. Claimant X has a maritime claim in respect of ship A (the ship concerned) for, say, the supply of bunkers to the ship. To enforce his claim X arrests and institutes an action _in rem_ against ship B, an associated ship _vis-a-vis_ ship A. X furthermore applies for and obtains a court order under sec. 9 for the sale of ship B and the creation of a fund in the court. This is done. Another claimant against the fund, Y, has a direct claim

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in respect of ship B derived from say, the supply of bunkers to ship B. When the claims against the fund come to be ranked, sec. 11(8) clearly applies and in terms thereof Y's claim falls into the first queue and X's claim into the second queue. And it matters not whether ship A was a sister ship vis-a-vis ship B, or merely a group ship.

This seems to me to be the plain meaning of sec. 11(8). If this is not a suitable or desirable result, then this is a further matter which might engage the attention of the Legislature, if and when the Act comes to be amended.

Accordingly I hold that there is no basis for the amendment to the order of the Court a quo which Summit seeks to achieve by this appeal; and the appeal by Summit must be dismissed with costs.

HBU appeared at the resumed hearing of the appeal

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in order to present argument with reference to issue (b) of the order of this Court quoted above. This is the point dealt with in the reported judgment of the Court a quo at pages 141 B to 142 I. Before us the submission of counsel for HBU was that the Court a quo had correctly decided the point. Briefly, the point was as follows. It had been argued on behalf of one of the parties in the Court a quo that, when sec. 11(8) applies, claims falling under sec. 11(1)(c)(v) - those of the "necessaries man" - rank in the first queue, irrespective of whether such claims are direct or associated ship claims. The argument was founded on the use in sec. 11(1)(c)(v) of the indefinite article in the phrase "a ship", as opposed to the definite article in the phrase "the ship" appearing in other paragraphs of sec. 11(1). The Court a quo rejected this argument and held that associated ship claims of the necessaries man fell into the second

queue. I agree, with respect, with this conclusion and the reasoning of the Court a quo in support of it and do not find it necessary to elaborate thereon. It follows that the submissions of counsel for HBU to us are accepted.

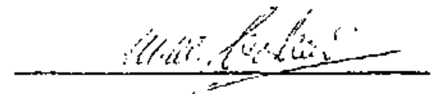
This raises the question of the costs of HBU before this Court. HBU did not obtain - and did not seek to obtain - any alteration to the judgment of the Court a quo. On the other hand, this Court did invite submissions in regard to this question and it was clearly in HBU's interests that the judgment a quo on this issue be upheld. In all the circumstances I am of the view that HBU is entitled to the costs of its appearance before this Court as against the Fund.

/ It is................

It is ordered as follows:

(1) The appeal of Summit Industrial Corporation is dismissed with costs.

(2) It is directed that for the purposes of sec. 11(7) of Act 105 of 1983 the costs attendant upon the appearance by Hollandsche Bank-Unie M V before this Court in this matter were costs reasonably incurred in the enforcement of the claims of Hollandsche Bank-Unie M V against the Fund comprising the proceeds of the sale of the m.v. Jade Transporter.



M M Corbett.

TRENGOVE JA)
VILJOEN JA)
GROSSKOPF JA) CONCUR.
NICHOLAS AJA)