IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN
(Exercising Admiralty Jurisdiction)

CASE NO. A111/2012

NAME OF SHIP: Mt "ASPHALT VENTURE"

In the matter between:

WINDRUSH INTERCONTINENTAL SA First Applicant
MT "ASPHALT VENTURE" Second Applicant

versus

UACC BERGSHAV TANKERS AS Respondent

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**JUDGMENT**

**Delivered on : 09 APRIL 2015**

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**OLSEN J**

[1] On 21 September 2012 the vessel *Asphalt Venture* (now the second applicant) was arrested at the instance of UACC Bergshav Tankers AS (now the respondent). Security was furnished in order to secure the release of the *Asphalt Venture*. The first applicant (Windrush Intercontinental SA, the bareboat charterer of the *Asphalt Venture*) now joins the second applicant in an application to set aside the resultant deemed arrest of the second applicant, and for an order for the return of the security furnished.

[2] In the action *in* rem instituted against the second applicant by the respondent it claims to be cessionary of the rights of seven members (or former members) of the crew of the *Asphalt Venture*. A discussion of the cause of action pleaded, and of the basis upon which it is challenged in the current proceedings, is best preceded by an outline of the facts.

[3] In May 2008 the first applicant entered into a bareboat charterparty with the registered owner of the *Asphalt Venture,* Bitumen Invest A/S ("Bitumen"), in terms of which the first applicant took the vessel on charter from 7 May 2008 to 7 November 2015. The first applicant in turn entered into a sub-bareboat charterparty with Concord Worldwide Inc. ("Concord") for the same period.

[4] Concord (represented by its ship managers) entered into contracts of employment with the complement of fifteen crew members of the *Asphalt Venture*. (The contracts relating to the seven crew members who are central to the current dispute were concluded between April and August 2010.) The vessel was at that stage employed under a time charterparty to carry bitumen, apparently principally between Durban and the Indian Ocean Islands.

[5] On 28 September 2010 the vessel was hijacked by Somali pirates when it was about 100 nautical miles east of Mombassa. The vessel and its crew became prisoners of the Somali pirates. Concord then followed what, according to the founding affidavit, has become standard practice in such matters, by engaging with its insurers, instructing solicitors, consulting security advisers and, most importantly, appointing a negotiator to deal with the pirates.

[6] By these means an agreement was reached which resulted in a ransom of some USD 3.4 million being paid to the pirates on about 15 April 2011 in exchange for the promised release of the vessel and the fifteen crew members. The vessel was released with eight of the crew members. The pirates reneged on the negotiated arrangement by retaining seven Indian crew members as hostages. They offered the release of these seven remaining crew members against the release of some one hundred and twenty Somali detainees held in India awaiting trial, presumably on charges of or relating to piracy. Unfortunately, from the perspective of the seven Indian hostages, their government does not negotiate with pirates. The seven crewmen remained in captivity.

[7] Each of the seven crew members had been employed by Concord in terms of a written agreement specifically for service on the *Asphalt Venture*. The contracts

were concluded at different times between April 2010 and August 2010, and the fixed periods of employment varied between four months and nine months. The latest expiry date amongst the seven contracts was the end of February 2011. Accordingly, the specified period of employment of each of the seven hostages had terminated by the time the vessel was released in mid-April 2011. Notwithstanding this, Concord continued to pay the wages of all the crew up to 15 April 2011, when the ship and eight crew members were released. The eight crew members who were released were discharged from the vessel and Concord paid for their repatriation. Concord then continued to pay amounts equivalent to the wages of the seven detained crew members to their families up to and including October 2011. It is said that this was done on a voluntary basis. But at that stage Concord ran out of money and paid no more to or for the benefit of the seven hostages.

[8] Concord had run into difficulties before the end of October 2011. It could not meet its obligations in terms of the sub-bareboat charterparty as a result of which the first applicant terminated the sub-bareboat charterparty on or about 17 June 2011. Given what is set out above, the position as at 17 June 2011 was that

(a) none of the original fifteen of Concord's crew were in service on or of the vessel;

(b) upon the assumption that Concord retained an obligation to pay the wages of the seven crew members held hostage, notwithstanding all that had gone before, all such obligations to date had been discharged.

[9] If after 31st October 2011 Concord had continued on its earlier course, the next income the families of the seven hostages would have received would have been paid to them at the end of November 2011. The fact that this was not done obviously caused them considerable hardship.

[10] On 17 January 2012 a vessel belonging to the respondent, the *UACC Eagle,* was arrested in Mumbai, India by the dependent relatives of the seven crew members still in captivity, stating that they represented the crew members in that litigation. The arrest was sought to be justified upon the basis that under Indian law the *UACC Eagle* was a sister ship of the *Asphalt Venture.* It is common cause between the applicants

and the respondent that in fact there is and was no such relationship between the two vessels.

[11] Be that as it may, the sum of the claims made by the families was USD 6,787 million, and the quantum was premised upon the proposition that the plaintiffs were entitled to seek in respect of each of the hostages a "decree for daily wages" which each hostage would be entitled to be paid from November 2011 until each reached the age of 70 years. As the deponent to the respondent's answering affidavit put it, at a practical level, given the size of the claims that had been made against the respondent's vessel, and given (the deponent says) the time-consuming nature of litigation in the Indian courts, the respondent had little alternative but to reach a settlement with the dependant relatives of the seven crewmen. This was done in February 2012. The respondent undertook to pay the claims for crew wages for the period 1 November 2011 to 29 February 2012, to pay USD 306,000 into an escrow account to cover future wages to the end of December 2012, and to undertake to pay and guarantee the payment of crew wages for the period 1 January 2013 to 31 December 2013. (This latter obligation to cover the wage claim during 2013 was subject to a right on the part of the respondent to call for arbitration on the issue as to whether in terms of their service contracts the seven crew members were entitled to wages pending repatriation for the period covered by the agreement, i.e. until 31 December 2013). Against that the crew members held hostage, represented by their families, ceded their claims paid or guaranteed under the settlement agreement to the respondent, together with what they contended to be their associated maritime liens. Following the settlement agreement the respondent's vessel was released by order of the court in Mumbai.

[12] As cessionary of the claims acquired in the manner set out above, in September 2012 the respondent issued a summons *in rem* out of this court against the second applicant. The respondent sought payment of what it had already paid to the families of the seven hostages, and an order declaring the respondent's entitlement as against the second applicant to payment of the amounts still to be paid in terms of the settlement agreement. (By the time that this application was first argued in August 2014 the due date of the final payment under the settlement agreement had of course passed.) The summons and the particulars of claim which

followed asserted that the seven hostages were and remained entitled to be paid the wages reflected in their employment contracts during the currency of those contracts and, following any valid determination thereof, until such time as each of them might be repatriated. It was alleged that the crew had been employed by Bitumen as owner; alternatively by Concord as sub-bareboat charterer; or further alternatively by the first applicant as bareboat charterer. It was alleged in the main that the claim by the seven hostages was for unpaid wages which gives rise to a maritime lien against the second applicant; and in the alternative that the action *in rem* could be maintained because one of Bitumen, Concord or the first applicant was both the owner of the second applicant and liable *in personam* to the crew (and consequently to the respondent as cessionary) for payment of the wages. In this latter regard the respondent pleaded its reliance on s 3(4)(b) of the Admiralty Jurisdiction Regulation Act, 1983, read with s 1(3).

[13] I should deal first with the alternative basis for the claim, to get it out of the way. The first applicant has stated in its founding affidavit that

(a) at the time of the arrest it was the deemed owner of the vessel as contemplated by s 1(3) of the Act; but that

(b) it had never concluded any employment contract with any of the hostages, that having been done by Concord.

Mr Mullins SC, who appeared for the respondent, has fairly conceded that a case has not been made out for the alternative claim on the papers before me, as a result of which the respondent must establish the existence of the maritime lien upon which it relies.

[14] The seven crewmen remained in captivity when this case was first argued in August 2014. Further written argument was delivered thereafter, the last instalment of which arrived in December 2014. Fortunately by then the parties were able to inform the court that the crewmen had been released.

<u>THE BASIS OF THE RESPONDENT'S CLAIM</u>

[15] According to its summons and particulars of claim it is the respondent's contention that the seven detained crew members were and remained entitled to be

paid their wages as mentioned already. Alternative employers were identified in the pleadings, but this case has to be determined upon the basis that Concord was the employer party to the contracts of employment.

[16] The pleadings themselves lack particularity concerning the precise basis upon which the obligation to pay wages in these peculiar circumstances is to be discerned from the contract. However, copies of each of the single page written agreements signed by each crew member and on behalf of Concord are annexed to the particulars of claim. Each contract records that the member of the crew is employed under "the attached terms and conditions", a copy of which is also annexed to the summons and particulars of claim. That document is the collective bargaining agreement for Indian officers of the International Bargaining Forum. It contains detailed provisions governing the employment of the crew of the *Asphalt Venture*.

[17] The single page contract actually signed records the personal particulars of the crew member, his rank, the vessel and the period of employment as well as details regarding wages. It also contains two simple provisions, one of which reads as follows.

> "In the event of the seafarer being stranded, the company undertakes to repatriate him to his port of engagement."

[18] In its answering affidavit the respondent asserts, and it is not disputed by the applicants, that the employment contracts are governed by Indian law. Article 34 of the collective agreement confirms that.

[19] In its answering affidavit the respondent accepts and asserts that the articles of the collective bargaining agreement which have a bearing on the crew's claim for wages are articles 5, 18 and 19.

[20] Article 5 is headed "Duration of Employment". It reads as follows.

> "An officer shall be engaged for the period specified in Appendix – 1 to this Agreement and such period may be extended or reduced by the amount shown

> in Appendix – 1 for operational convenience. The employment shall be automatically terminated upon the terms of this Agreement at the first arrival of the ship in port after expiration of that period, unless the company operates a permanent employment system."

The respondent accepts that the specified periods in respect of each member of the crew had expired prior to the release of the vessel by the pirates on 15 April 2011. Thereafter and on 28 April 2011 the vessel arrived in the port at Mombassa, but without the seven crew members on board.

[21] Article 18 of the collective bargaining agreement is headed "Termination of Employment" and Article 18.1a is to the effect that employment shall be terminated upon the expiry of the agreed period of service identified in Appendix – 1. Nothing is said in Article 18 about the first arrival of the ship in port after expiration of the agreed period. Neither is anything said along those lines in Appendix – 1 which, under the heading "Duration of Employment" reads as follows in its material part.

> "The maximum period of engagement referred to in Article 5 shall be nine months, which may be extended to ten months or reduced to eight months for operational convenience. Thereafter, the Officer's engagement shall be automatically terminated in accordance with Article 18 of this Agreement."

[22] There is no allegation made that Concord operated what Article 5.1 calls a "permanent employment system". Reading Articles 5 and 18.1a of the collective bargaining agreement together with Appendix – 1, it would appear that the employment of the seven crew members ended with the arrival of the *Asphalt Venture* in Mombassa on 28 April 2011. That contention was advanced in the applicants' founding papers. The respondent's answering affidavit contains no express admission of that fact; neither does it contain any express assertion to the contrary, nor any explanation as to why these articles of the employment agreements would not have had their intended effect in this particular case.

[23] Instead the respondent asserts that none of these circumstances deprived the seven crew members of their right to payment of wages until their repatriation. In this

regard reliance is placed in the first instance on Article 19 of the collective agreement which is headed "Repatriation". It reads as follows.

> "19.1. Repatriation shall take place in such a manner that it takes into account the needs and reasonable requirements for comfort of the Officer.
>
> 19.2. During repatriation for normal reasons, the company shall be liable for the following costs:
>
> (a) payment of basic wages between the time of discharge and the arrival of the Officer at their place of original engagement or home;
> (b) the cost of maintaining the Officer ashore until repatriation takes;
> (c) reasonable personal travel and subsistence costs during the travel period;
> (d) transport of the Officer's personal effects up to the amount allowed free of charge by the relevant carrier.
>
> 19.3. An Officer shall be entitled to repatriation at the Company's expense on termination of employment as per Article 18 except where such termination arises under Clause 18.2 (b) and 18.3 (a)."

(Articles 18.2 (b) and 18.3 (a) are not relevant to the present enquiry.)

[24] Unsurprisingly, whilst the applicants appear to recognise Concord's original obligation to effect repatriation (given Articles 19.1 and 19.3), they take the view that the provisions of Article 19.2 cannot apply as this is not a case of repatriation for "normal reasons".

[25] The respondent's answering affidavit was accompanied by the opinion of a senior advocate practising in Mumbai, Mr S Venkiteswaran who was asked to address questions of Indian law arising in this matter. In his opinion Mr Venkiteswaran makes the following statement.

> "In accordance with the Indian law and the terms of the contracts of employment, the 7 crew members would be deemed to be continued to be

> employed till their employment is terminated; and the employment can be terminated only simultaneously with their repatriation."

There is no explanation given in the opinion for this statement, which flies in the face of the provisions of the crew contracts which clearly contemplate repatriation, and the employer's obligations with respect to it, occurring and arising only after employment has terminated. Foreign law is a question of fact. An expert opinion which seeks to establish it must at the least state the witness's reasons for the contentions advanced as to the state of foreign law. And if a decision of a foreign court is relied on to support the conclusion the expert reaches, that will be insufficient if the *ratio* of the decision relied on is not given. (As to these propositions see *Continental Illinois National Bank and Trust Company of Chicago v Greek Seamen's Pension Fund* 1989 (2) SA 515 (D) at 544.)

[26] Unfortunately Mr Venkiteswaran died after he had furnished his opinion referred to above, and a second one. This led to the respondent furnishing a further opinion by an advocate practising in Mumbai, Mr S K Mukherji, who supports Mr Venkiteswaran's opinion on the issue as to whether the crews' right to receive wages survived the seizure of the vessel by pirates in September 2010, and their continued detention after 15 April 2011. Mr Mukherji went on to express the view that the employment (as opposed to merely a right to receive wages) survived, relying in that regard on the decision of the Indian Supreme Court in the matter of *O Konavalov v Commander, Coast Guard Region* 2006 (4) SCC 620, a judgment to which I will revert. Like Mr Venkiteswaran, Mr Mukherji did not properly address the question of the particular contracts in this case, and the provisions of the collective bargaining agreement which contained the conditions of employment.

[27] In reply the applicants also tendered an opinion of an expert in Indian law, namely that of Justice V N Khare, a retired Chief Justice of India. What he says may be summarised with this extract from his opinion.

> "After reading the contract for employment along with Clauses 5 and 19 of the Collective Bargaining Agreement, my considered opinion is that the 7 crew members remain entitled to be paid their wages until repatriation. However,

> based upon the facts of this case, and as will be elaborated herein below, I consider that the contracts for employment would have come to an end because of impossibility/frustration."

Justice Khare gives no explanation for his apparent view that the obligation on Concord in this case to effect repatriation falls within the provisions of article 19.2 which obliges the payment of basic wages between the time of discharge and the arrival of the officer at home in the course of repatriation "for normal reasons". However, given that the term "normal reasons" is inexact, and that Justice Khare has no apparent difficulty with the proposition that what happened in this case is not "abnormal", one must accept that on the evidence of the applicant's own witness on Indian law there is a *prima facie* case for the proposition that, impossibilty of performance aside, the contract compels the payment of the wage claim in issue in this case.

[28] It seems to me that it may ultimately become important to observe that there is a difference between a contention, on the one hand, that the crew members continued to be employed, and a contention on the other hand that they continued to be entitled to receive wages despite the fact that their employment had ended.

[29] Subject only to what Mr Mukherji has had to say about the implications of the decision of the Indian Supreme Court in *Konavalov*, it seems to me that the respondent has failed to establish a *prima facie* case for the proposition that the seven detained crew members were employed as such beyond the date in April 2011 when the *Asphalt Venture* docked in Mombassa.

[30] In his first opinion Mr Venkiteswaran went on to point out that the seven crewmen are also protected by the provisions of the Merchant Shipping Act, No. 44 of 1958 (India). It was not argued before me that this protection was not afforded to the seven crewmen in this case, and both Mr Venkiteswaran and Mr Mukherji make reference to s 141 (1) of that Act which reads as follows.

> "Where the service of any seaman engaged under this Act terminates before the date contemplated in the agreement by reason of the wreck, loss or

abandonment of the ship or by reason of his being left on shore at any place outside India under a certificate granted under this Act of his unfitness or inability to proceed on the voyage, the seaman shall be entitled to receive –

(a) in the case of wreck, loss or abandonment of the ship –

(i) wages at the rate to which he was entitled at the date of termination of his service for the period from the date his service is so terminated until he is returned to and arrives at a proper return port; …"

Although the provisions of this section are a little confusing, it seems to me that what it provides is that when service terminates before the arrival of the date for termination of employment contemplated by the agreement, and that premature termination of service arises, *inter alia*, by reason of wreck, loss or abandonment of the ship, then, notwithstanding the termination of service, wages must continue to be paid until repatriation. Both of Messrs Venkiteswaran and Mukherji appear to express the view, based on the judgment in *Konavalov*, that Indian law would regard the *Asphalt Venture* as having been "lost" as contemplated by s 141 of the Merchant Shipping Act (India); as a result of which an obligation to pay wages followed until the repatriation of the seven crewmen. In my view there is merit in this, if only at the required *prima facie* level. It is arguable that the vessel was lost to pirates, albeit temporarily. Assuming the seven crewmen were kept on board until shortly before the vessel sailed (after the ransom had been paid), the service of the affected crewmen (as seamen engaged on the vessel) terminated when they were removed from the vessel. That was in advance of the date of termination of employment contemplated in their contracts (i.e. apparently upon the first docking of the vessel in Mombassa on 28 April 2011).

[31] It is correct that Justice Khare has in effect said that no claim to wages can be sustained because with effect from 15 April 2011, when the vessel sailed without the crewmen, the performance of Concord's obligation to effect repatriation became impossible. He relies in that regard on a decision of the House of Lords in *Horlock v Beal* [1916 – 17] All ER 81 which concerned wage claims relating to the imprisoned crew of a British ship seized by Germany at the outbreak of the first world war. The

opinions produced by the respondent go the other way, citing the progress of Indian law over the last one hundred years and the differences between Section 141 (1) of the Merchant Shipping Act (India) and the legislation which prevailed in England in 1914. Unless it is established with certainty that Indian law would recognise impossibility of performance or frustration as having released Concord from its obligation to pay wages pending repatriation, I must confine myself, at least more or less, to what has been stated by the respondent as regards this issue. This, it seems to me, follows from what was said in *Hülse-Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA) para [12] in the context of an attachment to found or confirm jurisdiction (where the requirement of a *prima facie* case is the same as it is in the case of an arrest). Omitting authorities the paragraph reads as follows.

> "The requirement of a *prima facie* case in relation to attachments to found or confirm jurisdictions has over the years been said to be satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief – not even if the probabilities are against him; it is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused. … One of the considerations justifying what has been described as generally speaking a low-level test … is that the primary object of an attachment is to establish jurisdiction; once that is done the cause of action will in due course have to be established in accordance with the ordinary standard of proof in subsequent proceedings. … No doubt for this reason Nestadt JA … warned that a court "must be careful not to enter into the merits of the case or at this stage to attempt to adjudicate on credibility, probabilities or the prospects of success."

In this case the issue as to whether wages must be paid concerns the application of foreign law, a question of fact, to a given set of circumstances. Justice Khare may well be right. But that must be tested in due course.

[32] To summarise thus far, I conclude

(a) that the respondent has established a *prima facie* case for the proposition that Concord has been liable at all material times since October 2011 to pay wages

to the seven crewmen detained by the pirates, whether by reason of article 19.2 of the conditions of employment, or by reason of the provisions of the Merchant Shipping Act, No. 44 of 1958 (India), or both;

(b) that, subject to any contrary conclusion to be drawn from the case of *Konavalov* (still to be dealt with hereunder), the respondent has failed to establish a *prima facie* case for the proposition that the crewmen had been "employed" through that period, in the ordinary sense of the word, in terms of their contracts with Concord.

[33] An account of what the respondent has pleaded in its action against the second applicant may be completed briefly as follows.

(a) The respondent asserts that by virtue of their employment as members of the crew of the *Asphalt Venture*, any claim by the seven crew members for unpaid wages gives rise to a maritime lien and is accordingly enforceable by an action *in rem*.

(b) By the settlement concluded in Mumbai, all the amounts paid and secured in respect of the wages of the crew members in terms of that settlement, together with the maritime liens said to arise in respect of those claims, were assigned to the respondent.

(c) The High Court at Bombay approved the terms of the settlement agreement on 10 February 2012, thereby recognising and sanctioning the assignment of the claims and associated maritime liens to the plaintiff.

## THE BASIS OF THE APPLICATION

[34] The second applicant was arrested in the ordinary course without the applicants being heard. As is their right they now approach the court for an order setting aside the arrest.

[35] Stated in broad terms, the bases upon which the applicants seek to set aside the deemed arrest of the second applicant are as follows.

[a] Firstly, no claim for the wages which were allegedly ceded by the seven crew members to the respondent ever existed.

[b] Whether or not the seven crew members had monetary claims for amounts expressed as “wages”, no maritime lien arose in favour of the seven crew members because their employment was at an end, and because they rendered no service to the second applicant in respect of which such monies may be claimed.

[c] If the claims and maritime liens existed, the assignment of them under the settlement agreement was not valid; and if it was capable of being done with the sanction of the court, the Indian court did not in fact sanction the assignment.

[d] If the aforegoing challenges are not upheld, then a London arbitration and agreement conducted and concluded after the arrest divested the respondent of its claim and lien as a result of which the deemed arrest must now be set aside.

[36] I propose, as far as it is possible to do so, to deal with the applicants challenges to the case made by the respondent under four headings coinciding with the statement of the applicants’ case set out above.

DID A CLAIM FOR WAGES ARISE?

[37] It is not disputed between the parties that the respondent was obliged to establish a *prima facie* case for the existence of the money claim which it pursues against the second applicant. I have already concluded that the respondent has discharged that obligation.

[38] However, it is appropriate at this stage to deal with the case of *Konavalov* which is relied upon in the opinions provided by the respondent to support its contentions regarding Indian law. In his opinion Mr Mukherji has provided a lucid account of the facts in *Konavalov*, and I shall borrow from it.

(a) In December 1999 Indian customs officials boarded the vessel *Kobe Queen 1* off the coast of Tamil Nadu and found contraband on board. The vessel was brought to Chennai where two days later she was arrested by the Madras High Court at the instance of the owners of the ship's cargo. The owners of the ship could not be traced and appeared to have abandoned it.

(b) Thereafter and on 11 February 2000 the crew lodged a claim for wages out of the anticipated proceeds of the sale of the vessel. In March 2000 customs officials acting in terms of the Customs Act (India) seized the vessel and her cargo. The crew remained on board the ship.

(c) Then followed three further applications before the Madras High Court, in which the crew sought to be paid their wages from the proceeds of the sale of the cargo, or, alternatively, an order that the ship be sold so that they could be paid their wages out of those proceeds. They had been on board the ship since May 1999 and had not been paid. Customs opposed the grant of the relief but on 7 September 2000 the court found in favour of the crew by directing the coastguard authorities and the customs authorities to pay the wages and see to the repatriation of the crew, such expenses to be met out of the funds retained from the sale of the cargo. Customs appealed against that order with which it did not comply.

(d) The customs authority went one step further on 26 September 2000, whilst the appeal was still pending, by making final orders confiscating the vessel.

(e) Given these circumstances the crew's consulate made arrangements for their repatriation, and all of them had left by the time the appeal of the customs authority came to be decided in January 2001.

(f) The High Court allowed the appeal by the customs authorities in January 2001. It held that the effect of the confiscation order made on 26 September 2000 was to vest the ship in the government, as a result of which the crew had no rights against the vessel.

(g) The case accordingly got to the Supreme Court on an appeal by the crew against the order that their claim for wages did not lie against the ship.

[39] It will be seen immediately that there is at least one material difference between the facts in this case and those in *Konavalov*. In *Konavalov* the crew were on board the vessel throughout the period in respect of which they claimed wages. In this case the crew were not on board the vessel at all during the period in respect of which the wage claim is said to arise. The first month in respect of which the claim is made is November 2011, some seven months after the seven crew members were last on board.

[40] A consideration of the judgment of the Supreme Court in *Konavalov* reveals that there was no enquiry into the question as to whether the crew had a claim for wages against a specific person. The issue of the wage claim was dealt with exclusively in conjunction with the issue as to whether there was a maritime lien for service to the vessel. It is in that context that the following was said by the court in paragraph [19] of the judgment (excluding authorties).

> "In our view, the members of the ship in question from the day of the engagement till their deportation were lawfully in the employment of the ship. In maritime law, the ship or the vessel is personified and attached with several liabilities … . One of the distinctive features of admiralty practice is proceedings *in rem* which are against maritime property i.e. vessel, cargo or freight as the case may be. This rests on the principle that the ship is the matter causing harm, loss or damage to others or to their property."

It is this passage upon which the opinions presented by the respondent rely in contending that the employment of the seven crewmen under their contracts continued throughout the period in issue in this case, and could not terminate in

advance of repatriation. In my view neither this passage nor anything else said in *Konavalov* supports that contention.

[41] The relationship between a seaman's employment contract and a seaman's lien for wages was discussed in *The Ever Success* [1999] 1 Lloyd's Rep 824. The court endorsed the views expressed by Thomas : *British Shipping Laws – Maritime Liens* on the subject of the relationship between the employment contract and the crewmen's lien. The following extracts from paragraph 311 of the work quoted by the learned Judge explain the position.

> "The lien of the seaman has regularly been supported by reference to considerations of public policy and jurisprudentially explained by reference to a seaman's "service to the ship". It was the "service" and not the "contract of employment" which procured the lien and pledged the security of the ship."
>
> "Despite the judicial tendency on occasions to associate the wages lien loosely with the contract, it is not the case that the maritime lien arises out of the contract. The lien is established by reference solely to the maritime law and its existence is not wholly dependent upon an express or implied contractual term".

[42] Clark J continued as follows at page 831.

> "The maritime lien is in respect of service to the ship. In the absence of some very unusual contractual provision, that service will ordinarily be measured by reference to the seaman's contract of service (not it may be noted services) under which he was hired, whether by the shipowner, or (as in this case) the putative shipowner, provided of course that there is sufficient connection between the service and the ship in the sense discussed below. It follows that I accept Mr Lord's submission that it is never appropriate for the court to evaluate the services of each seaman on a quantum meruit basis. The proper approach is to ask whether in the relevant period the claimant was rendering a service to the ship as a member of the crew. If he was, he was entitled to a maritime lien in respect of his wages in respect of that period assessed in accordance with his contract."

[43] It seems to me that the decision of the Indian Supreme Court in *Konavalov* is consistent with what was said on the subject of a lien for wages in *The Ever Success*. One assumes that in *Konavalov* the measure of wages ordered to be paid was taken from the original contracts of employment of the crew.

[44] The answer of the court in *Konavalov* to the contention that the confiscation of the vessel by the customs authority put paid to any claim for wages or a lien in respect of them, is relied upon in the opinions provided by the respondent, where it is contended that Indian law would take a view favourable to the seven crewmen in question here where they rely both on their contracts of employment and on s 141 of the Merchant Shipping Act (India) to make their claims for wages up to the date of their repatriation. The court in *Konavalov* noted the "high pedestal" upon which the seamen's right to wages has been put by law, and said the following in paragraph 50 of the judgment (page 642).

> "The argument advanced by learned counsel for the first respondent that the maritime lien is extinguished by confiscation has no force and is without any merit. The courts have recognised and upheld the welfare of the citizens and have always recognised the rights of those who are the lowest strata of society *especially when it comes to workers and their wages*. The seamen have suffered a lot without wages from May 1999 till the time they were deported by the Consulate. They have suffered a lot of mental and physical agony in spite of that they have not been given their wages to a date due to a narrow approach. The State should always be fair and reasonable in settling the lawful claims."

In determining, as I have, that the respondent has made out a *prima facie* case for the proposition that Indian law would recognise the wage claims of the seven crewmen which are in issue in this case, I have taken into account this generous attitude to crew claims evidenced by the judgment of the court in *Konavalov*. But, as already stated, I cannot see how *Konavalov* supports the proposition that the seven crew members would be regarded as employed (presumably by Concord) at any time during which the claims in issue in this case are said to have arisen.

<u>IS THE CLAIM (ESTABLISHED *PRIMA FACIE*) SUPPORTED BY A MARITIME LIEN?</u>

[45] The parties are in agreement that the question as to whether the benefit of the maritime lien has been established by the respondent is to be determined applying the *lex fori*. (*Transol Bunker BV v N V Andrico Unity and Others* 1989 (4) SA 325 (A))

[46] Section 6 of the Admiralty Jurisdiction Regulation Act deals with the law to be applied in South Africa by admiralty courts. The first two sub-sections should be quoted.

> "(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall –
>
> (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;
>
> (b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.
>
> (2) The provisions of sub-section 1 shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that sub-section."

Subject to the provisions of s 6 (2), the law in the United Kingdom as at November 1983 must be applied by this court in determining the issue as to whether the seven crewmen enjoyed the benefit of a maritime lien. The applicants of course stress the facts that, at the time these claims are said to have arisen, the contracts in terms of which the seven crewmen had been employed had terminated, and that no service to the vessel at all was performed by the seven crewmen during the whole of the period

during which the claims are said to have accrued. It is stressed in the applicants' affidavits that the touchstone of the maritime lien in respect of wages is the benefit to the vessel of the service of the crew, and that without it no maritime lien can arise.

[47] Referring to such cases as *The Tacoma City* [1991] 1 Lloyd's Rep 330 (CA), *The Arosa Star* [1959] Lloyd's Rep 396 at 402, and *The Westport* (No. 4) [1968] 2 Lloyd's Rep 559 counsel for the respondent argues that the concept of "wages" is given an extended meaning when considering the related maritime lien, and includes such things as shore leave, sick leave, or repatriation expenses; all of which illustrate that actual service to the vessel is no longer a necessary condition for the establishment of a maritime lien for wages. But those examples are in my view at a distance from the facts of this case where during the period of accrual of the claim no service at all was rendered.

[48] Nevertheless, the cases to which counsel for the respondent refers establish the principle that what is encompassed within the word "wages" is what may fairly be described as a benefit due to the member of the crew "as recompense for the execution of his duty". (See *The Westport* at 562.) If it is correct, as the respondent contends, that the seven crewmen were engaged in terms of a contract governed by and subject to Indian law, which promised them wages from the date of termination of their employment to date of repatriation, without regard to the duration of the delay and without regard to the fact that the employer giving the undertaking might not be at fault with regard to any delay in repatriation, then that promise must, it seems to me, be one given as recompense for service actually rendered during the course of employment under the contract, and therefor one supported by a maritime lien. One would think that this proposition would be entirely uncontentious if raised in more mundane circumstances where common dilatoriness or ordinary logistical problems delay repatriation for, say, a month or two. The difficulty in this case, and the anomalies which appear to arise from it, are not in my view a product of the attempt to attach a maritime lien to the claim. They arise, I would suggest, primarily from the application of the provisions of the employment contracts and the Indian statute to circumstances to which they may not have been intended to apply; with serious consequences for the second applicant which, if there is merit in the respondent's claim, has sailed since its release by the pirates with an ever increasing burden of

debt on it, entirely unconnected with the business of anyone but Concord which disappeared from the scene in June 2011, some 5 months before the debt began to accrue against the second applicant.

[49] The admiralty jurisdiction of this court is established by s 2 of the Admiralty Jurisdiction Regulation Act. The fundamental feature of a claim that may be decided in admiralty is that it is a "maritime claim". Section 1 of the Act contains the list of matters classified as maritime claims and the one relating to the crew's claim is contained in paragraph (s) which may be rendered as follows.

> "…any claim for, arising out of or relating to-
>
> (s) the employment of any master, officer or seaman of a ship in connection with or in relation to a ship, including the remuneration of any such person and contributions in respect of any such person to any pension fund, provident fund, medical aid fund, benefit fund, similar fund, association or institution in relation to or for the benefit of any master, officer or seaman".

The applicant accepts that the claim made by the seven crewmen is a maritime claim. Counsel for the respondent goes further, and argues that the decision as to whether the claim is supported by a lien must take into account the ambit of the definition of the maritime claim.

[50] In *The Halcyon Skies* [1976] 1 Lloyd's Rep 461 (QB) the question before the court was as to whether, in an action for wages, and with the priority accorded to a wages claim of a maritime lien, a seaman could claim pension fund contributions which his employer should have paid on his behalf. In reaching the conclusion that the claim did give rise to a maritime lien the court held (at 470) that whilst legislation extending the jurisdiction of admiralty courts to new claims did not give rise to maritime liens in respect of those claims, legislation enlarging existing jurisdiction with respect to existing claims carrying the benefit of maritime liens had the effect of enlarging the ambit of the lien.

[51] In *The Tacoma City* (supra) the following passage from paragraph 313 of Thomas (*op cit*) is quoted with apparent approval.

> "…As with the case arising from the statutory expansion of the court's jurisdiction so also the judicial expansion of a substantive concept of a wage has been accompanied by corresponding expansion in the maritime lien. To the extent that a claim is in the nature of a "wage" it is accompanied by a maritime lien."

[52] *The Halcyon Skies* and *The Tacoma City* straddle November 1983. It seems to me that at that time the law of the United Kingdom applicable in terms of s 6 (1) of the Admiralty Jurisdiction Regulation Act held that a statutory expansion of the jurisdiction of our admiralty courts with regard to a claim which has the benefit of a lien also extends the ambit of the lien in our law, so that the two may coincide. If the amendment of the definition of a crew claim in 1992 expanded the ambit of the claim beyond what the law of the United Kingdom then allowed, then in terms of s 6 (2) of the Act our statute prevails; the lien follows the claim as newly defined. Reading the Act, as we must now, in the light of the provisions of the Constitution may generate a different interpretation of the definition to the one which would have been apparent in the pre-constitutional era. In my view the lien our law would recognise would follow the current interpretation of the definition of the claim which establishes jurisdiction. (I would accordingly respectfully disagree with the view expressed by the learned author Hofmeyr, *Admiralty Jurisdiction Law and Practice in South Africa*, 2ed, pgs 265 – 266, that the Act defines the limits of jurisdiction in respect of seamen's wages, and English law the ambit of the supporting lien.) Looked at from this perspective, the complaint in this case that there was no service to the ship appears to rest on a contention that the claims do not arise out of or relate to the employment of the crew in relation to the *Asphalt Venture*. If I am correct in my understanding of the implications for our law of *The Halcyon Skies* and *The Tacoma City*, the argument is contradicted by the concession that the claim is a maritime claim. However, notwithsanding the aforegoing, I am of the view (expressed earlier) that the claim, established *prima facie* in these proceedings, passes the traditional test of recompense for execution of duty, with the result that the lien supports the claim.

[53] Nevertheless it is worth observing that similar support for the respondent's argument that the definition of a crew claim materially affects the question as to the existence of a supporting lien may be found along another route. In *Bankers Trust International Ltd v Todd Shipyards Corporation : The Halcyon Isle* [1980] 3 All ER 197 (PC) the Privy Council considered the question as to whether a maritime lien afforded by the law of the United States of America to a ship repairer should be recognised in the distribution of a fund generated by the sale of a ship arrested in Singapore, the law of that state being in all material respects the same as English law. In *Transol Bunker BV v MV Andrico Unity and Others* (supra) the Appellate Division was confronted with the same question, on this occasion as to the recognition of a maritime lien established by Argentinian law. Both cases concerned liens of a type which would not be recognised by the *lex fori.* The majority in the case of *The Halcyon Isle* denied recognition to the foreign lien, and in *The Andrico Unity* the Appellate Division came to the conclusion that *The Halcyon Isle* established that according to English admiralty law, as it was in November 1983, a South African court exercising admiralty jurisdiction would not recognise the Argentinian maritime lien.

[54] The analysis of the reasoning of the majority in *The Halcyon Isle* which is made at page 338 of the judgment in *The Andrico Unity* is a central feature of the decision in *The Andrico Unity* to follow the judgment of the Privy Council in *The Halcyon Isle*. Corbett J pointed out that in dealing with the issue of priorities

> "Lord Diplock emphasised the dual characteristics of a maritime lien : namely, its enforceability by an action *in rem* against the ship, notwithstanding the subsequent sale of the ship to a third party and the ignorance of such third party; and secondly, its status in the order of priorities and the distribution of a limited fund (…). His Lordship further warned (…) that the recognition of any new class of claim arising under foreign law as giving rise to a maritime lien in English law because it does so under its own *lex causae* would not only affect the question of priorities but also extend the classes of persons entitled to bring an action *in rem* against a particular ship."

Corbett J continued as follows after quoting passages from the judgment in *The Halcyon Isle*.

> "It is thus clear that in the view of the majority in *The Halcyon Isle* (supra) these two characteristics of a maritime lien go hand in hand; and that if legal effect be given to a foreign maritime lien (not recognised by the domestic rules of English law) because it enjoys status as such according to the *lex loci contractus*, this will be so for the purpose of both priorities and the right to bring an action *in rem*; and vice versa. There is no possibility of recognition or non-recognition of a foreign lien for one of these purposes and not for the other. Indeed, it seems most unlikely that English law, or any other cognate system of law, would have one rule for priorities and another (different) rule for *locus standi* to bring the action *in rem*."

[55] The current definition of a maritime claim for crew's remuneration (reproduced earlier) was introduced by amendment to the Admiralty Jurisdiction Regulation Act by Act 87 of 1992. The same amending Act substituted s 11 which deals with the ranking of claims (i.e. priorities) and, unlike the earlier section, expressed the ranking of the crew claim simply by reference to paragraph (s) of the definition of "maritime claim" in s 1 of the Act. If, as was held in *The Andrico Unity*, it is most unlikely that English law (and accordingly our admiralty law) would have different rules for ranking and for *locus standi* to bring an action *in rem*, then it is unsurprising that in our law we would recognise the right of crew members to launch an action *in rem* for a claim which falls within and ranks as a component of paragraph (s) of the definition of "maritime claim" in s 1 of the Act. The privileged priority afforded to crew claims is justified by similar, if not the same, considerations which result in them being supported by the maritime lien.

[56] In his written argument counsel for the applicants has raised what he calls the issue of a "lien for future wages". As I understand it the argument has two contexts, one of which should be dealt with here. Counsel points out that when the ship sailed (after the ransom had been paid) the position was that the hostages could not then provide any further services to the ship, and it was absolutely impossible for them to do so in the future. Their wage claims at that stage had been discharged in full. (Indeed they continued to be discharged until October 2011.) When the ship sailed there was no lien on it for wages as none were accrued and unpaid. One may extend

the propositions relied upon by counsel by referring to the fact that when the second applicant passed from the deemed ownership of Concord to the deemed ownership of the first applicant in June 2011, no burden of unpaid wages travelled with the vessel into its new deemed ownership because there were at that time no unpaid wages. As I understand it the argument is that as the law recognises no lien for future wages, and as the seven crewmen could render no service to the vessel in order in the future to earn wages, no lien could arise in respect of the claims made now, which commenced their accruals in November 2011. However, in my view the acceptance in our law (and British admiralty law) of a crewman's lien with respect to financial obligations to be discharged by the employer after the crewman has terminated his employment and left the ship (of which repatriation expenses are the obvious example, as to which see *The Kingston* 1991 SCOSA D80 (D) at D88), means that the time when the debt arises is not material; the material question is as to whether, when it arises, it has the qualities which place it within the scope of the maritime lien (over the vessel concerned) for wages.

[57] I conclude that a maritime lien arose in the hands of or for the benefit of the seven crewmen with respect to their wage claims, the existence of which they have established at a *prima facie* level, and which still remain to be proved in the action.

<u>WERE THE CLAIMS AND MARITIME LIENS ASSIGNED TO THE RESPONDENT?</u>

[58] Counsel for the applicants has argued that if assignment of the claims was legally possible with the sanction of the Indian court, then, as a matter of fact, the Indian court did not sanction the assignment. He refers in support of this argument to the terms of the order of the Indian court, which is reproduced in the papers together with some account of the basis upon which the matter was presented to the court. The order does not approve the assignment of the wage claims and associated liens with clarity.

[59] Interpreting the written account we have of the proceedings in India, which resulted in the release of the respondent's vessel by reason of the settlement with the families of the seven crewmen, is difficult without knowledge of Indian practice and

procedure. Justice Khare, whose opinion has been put up by the applicants, had this to say.

> "A maritime lien for wages though not generally assignable, can be assigned with the leave of the court. In the present case the Bombay High Court has categorically granted liberty to the plaintiffs to assign their maritime lien, to the extent of the settlement agreement."

[60] Furthermore, in its replying affidavit (with which the opinion of Justice Khare was delivered) the following was said by Mr Clark on behalf of the applicants.

> "Having regard to the opinion of Mr Khare filed evenly herewith, the first applicant no longer takes issue with the assignment to the respondent of the claims for the payment of wages and the accompanying maritime liens, to the extent that such existed at the time, on the basis that these were sanctioned by the Bombay High Court."

[61] I accordingly conclude that it is not open to the applicants now to argue that if a valid assignment depended on the sanction of the court in India, such was not made or given.

[62] In his written argument counsel for the applicants argues that in any event the maritime lien could not as a matter of law be transferred by a cession or assignment. In support of this proposition I was referred to *The MT Argun* 2003 (3) SA 139 (C); *The Petone* (1917) P.198 / *Aspinall* Vol 14, New Series 283; *The James W Elwell* (1921) 15 Aspinall MAR.LAW.CAS 418 and *The Sparti* [2000] 2 Lloyd's Rep 619. In essence the argument is that a maritime lien is a personal right and that, certainly in the case of a crew claim, it is personal to its holder and cannot be transferred. I will deal with this argument, notwithstanding the concession made in reply by the applicants.

[63] I am not at all sure that the judgment in *The Argun* stands as authority for the proposition that the crew's lien is not transferable. As the learned Judge in that case himself pointed out, the view of Tetley, *Maritime Liens and Claims*, is that *The Petone* is only authority for the proposition that a volunteer who pays a seaman's wages

without the prior consent of the court does not merely by that act acquire the maritime lien associated with the wage claim. As I understand the facts in *The Argun*, the learned Judge held that there was no payment or assignment of the debt for wages and the crew were never paid. If that is correct it is not clear that the learned Judge's analysis of the various cases referred to (which are referred to again in this case by counsel for the applicants) should be regarded as authoritative.

[64] I have difficulty in following the reasoning in *The Sparti* where there was a very simple assignment of the claims of the crew, whether they lay against the employer or the vessel. The learned Judge in that case found it unnecessary to decide what the position might have been had the court sanctioned the transaction.

[65] However, it seems to me that the authorities to which the applicants' counsel has referred do not determine the issue in South African law. Section 11 (8) of the Admiralty Jurisdiction Regulation Act reads as follows.

> "Any person who has, at any time, paid any claim or any part thereof which, if not paid, would have ranked under this section, shall be entitled to all the rights, privileges and preferences to which the person paid would have been entitled if the claim had not been paid".

[66] It might be argued that the phrase "all the rights, privileges and preferences", despite its wide terms, should be narrowly construed by reason of the provision being part of the section dealing with the ranking of claims. But one would have thought the word "preferences" would have been sufficient, or that the word "ranking" would have been used instead of "rights, privileges and preferences", if it was intended in s 11 (8) merely to deal with the subject of the ranking of the claim. This, it seems to me, is the way in which the section was viewed by Scott J in *Mak Mediterranee Sarl v The Fund Constituting the Proceeds of the Judicial Sale of MC Thunder* 1994 (3) SA 599 (C) at 607 – 608 where the judgment reads as follows.

> "A question which caused some difficulty in the past was whether a person who voluntarily pays a seaman's claim for wages acquired the latter's lien and priority. By the early $20^{th}$ century, however, and particularly following the

> judgment of Hill J in *The Petone* [1917] P 198, it had become established that a person who voluntarily pays the claim of a seaman does not acquire the latter's lien and priority unless, before making such payment, he obtains the leave of the court. In other words without the consent of the court, the seaman's maritime lien with all its advantages is not transferrable (…).
>
> Seen against this background, it would appear likely that the purpose of s 11 (8) was to obviate the need of a person who voluntarily pays the claim of a lienee such as a seaman, to have to obtain the leave of the court before being able to step into the shoes of the lienee".

(See also *The Olympic Countess* 2008 (1) SA 376 (SCA), paras 9 – 11.)

[67] In this case, of course, I proceed upon the basis that the leave of the court was indeed obtained.

[68] I accordingly conclude that the maritime lien afforded to the seven crewmen in respect of their claim for wages was indeed ceded or assigned to the respondent, and that this court must recognise the respondent's title.

[69] I must deal with one further issue under the present heading, and that is the other aspect of the applicants' argument based upon a proposition that there is no lien for future wages. Their contention is that, there being no lien for future wages, the "future element" of the claims of the seven crew members at the time of the assignment in India, and again at the time of the arrest of the second applicant in South Africa, could not be assigned (in India) or justify an arrest (in South Africa) because no lien had come into existence, the wage claims not yet having fallen due in each case. The argument was first raised in written argument submitted by counsel for the applicants. It elicited a protest from counsel for the respondent that it could not be considered as it had not been raised in the papers. Counsel for the respondent contends that the argument has a factual element, and that the conclusion sought to be drawn from it is one which could have been dealt with on affidavit if the issue had been raised. The conclusion or aim of the argument made by counsel for the applicants is that as there is no proper evidence of what part of the total claim in

respect of which security was given related to claims already accrued, and what part to claims yet to accrue, the arrest must be set aside and the whole of the security returned.

[70] I agree that this issue is one which ought to have been raised on the papers. My own view is that upon a proper construction of the settlement agreement (which is included in the papers) the parties must have intended that the monthly wage claims would pass with their associated liens to the respondent as and when each was paid by the respondent. The settlement agreement provided for its termination in the event of the release of a member of the crew, to the extent that his claims had not yet accrued and been paid by the respondent. However this argument, and any others which go to the issue, have not been properly traversed.

[71] As far as the issue of “future wages” is raised in connection with the arrest of the vessel in South Africa, on the face of it the applicants’ tender of security for the whole of the claim has not been dealt with as an issue on the papers. At the time of tendering security the point could have been taken, but was not taken, that a lien could not possibly exist in respect of wage claims not yet accrued. Of course, if that point had been taken and conceded, the risk facing the applicants was repeated arrests of the second applicant as, with the passage of time, further claims accrued. The fact that security in full was provided seems to suggest that there may have been a compromise as regards the quantum of the security, which would have amounted to a compromise on the issue as to whether an action *in rem* could be sustained in respect of wage claims not yet accrued. None of this was canvassed on the papers.

[72] In my view if the defence the applicants wish to raise in the action includes issues relating to “future wage claims”, then these must be raised in the plea yet to be delivered, and dealt with in the action.

<u>THE LONDON ARBITRATION AND AGREEMENT</u>

[73] When the *UACC Eagle* was arrested in Mumbai it was under a bareboat charter to United Arab Chemical Carriers Limited (“UACC”). UACC and the respondent were the parties to a London arbitration and a subsequent settlement agreement which

were raised as an issue by the applicants in a fourth set of affidavits delivered in July 2014. The settlement agreement was included as an annexure to the fourth set. The award was not, apparently because it was confidential, and therefore not available to the applicants. However the orders and declarations made by the arbitrator are reproduced in written argument produced after the hearing by applicants' counsel, without objection from the respondent.

[74] Judging from the orders made by the arbitrator the arbitration concerned both unpaid hire and an indemnity (presumably contractual) claimed by the respondent against UACC with regard to the respondent's disbursements to the families of the seven crew members made in terms of the Indian settlement agreement. Paragraph 4 of the arbitrator's order directed UACC to pay the respondent USD705,100.81 "by way of indemnity", and paragraph 6 declared UACC to be "liable to indemnify" the respondent in respect of the remaining payments due under the Indian settlement agreement.

[75] After the award was made and on 7 August 2013 UACC and the respondent concluded a settlement agreement with respect to the indemnity which was the subject of the orders of the arbitrator. It involved payment to the respondent of what it had expended in acquiring the claims of the crew members. The agreement required the respondent to continue with the litigation against the applicants in South Africa, and unconditionally to pay to UACC whatever the respondent may recover from the applicants. Clause 10 of the settlement agreement read as follows.

> "This agreement is not intended to cede or assign to UACC, [the respondent's] claim or right of action in the South African proceedings".

[76] The points raised by the applicants are best stated by quoting from the two material paragraphs of its affidavit dealing with the London issues.

> "It is submitted, that as a consequence of the aforegoing, [the respondent] no longer has *locus standi* to continue with the South African proceedings alternatively, [the respondent] has suffered no loss recoverable under the South African proceedings and, notwithstanding clause 10 of the London

> settlement, has in effect ceded its claim and cause of action entirely to [UACC]."
>
> "It further follows, that in terms of the dealings between [the respondent] and [UACC], [the respondent] has been settled and discharged in full in respect of its payments and undertakings to the Indian families in respect of the crew's wages and any claim based on the maritime lien is not enforceable against [the applicants]."

[77] The terms of the indemnity owed by UACC to the respondent are not before me. They will presumably be available in the action, as might also the full award of the arbitrator. The decision in these proceedings must be based on what is available on the papers.

[78] In answer to the applicants' contentions quoted above, the respondent has alleged and pleaded in its further affidavit that two claims are involved, the one made by the respondent in its action *in rem* instituted out of this court, and the other one made before the arbitrator in London under a contract which afforded the respondent an indemnity from UACC. The obligation arising from the contractual indemnity has been discharged. The obligation which arises in respect of the crew's wage claim has not.

[79] In effect it is the respondent's contention that all the London arbitration and the London agreement brought about was to establish where the loss will lie if the respondent is unsuccessful in its action against the applicants. In my view that is the correct analysis of the position.

[80] The applicants' alternative contention, that the respondent must fail because the London arbitration and agreement brought about that it has suffered no "loss", is in my view without merit. The respondent does not prosecute the present litigation in order to recover "loss" or damages arising out of what transpired in India. It in effect bought the claims of the seven crew members in India, and prosecutes them here. It does not sue for the price it paid for the claims. It sues to enforce the claims themselves. When in London it extracted performance of the indemnity owed to it by

UACC the respondent took care to ensure that it did not "on-sell" the claims of the seven crew members to UACC. There is no reason to doubt that if UACC had sought to commence proceedings in South Africa alleging title to the claims of the seven crewmen, and done so on the basis of the documents before me relating to the London arbitration and agreement, the applicants would have objected to their *locus standi* to do so, and would have done so successfully because

(a) what was discharged by UACC was the obligation as to the indemnity, not the crew claims; and
(b) it was expressly agreed that the crew claims would not be transferred to UACC.

<u>CONCLUSION</u>

[81] I conclude that this application cannot succeed. It would appear that my decision that a maritime lien attaches to the money claim, which the respondent has only established at a *prima facie* level at this stage, will have to be revisited (if the respondent is successful in proving its money claim on a balance of probabilities at trial) in the light of the findings ultimately made by the trial court as to the nature of the money claim. The issues to be decided in the action are not yet certain, as a plea must still be delivered.

I make the following order.

**The application is dismissed with costs, including the costs of submitting written arguments after the hearing on 6 August 2014, all such costs to include the costs of senior counsel.**

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OLSEN J

| | | |
|---|---|---|
| DATE OF HEARING | : | Wednesday, 06 August 2014 |
| DATE OF JUDGMENT | : | Thursday, 09 APRIL 2015 |
| FOR THE APPLICANTS | : | MR D A GORDON SC |
| INSTRUCTED BY | : | COX YEATS<br>21 RICHEFOND CIRCLE<br>RIDGESIDE OFFICE PARK<br>UMHLANGA ROCKS<br>DURBAN<br>(REF.: A Clark/09W925001/tv<br>(TEL.: 031 – 536 8500) |
| FOR THE RESPONDENT | : | MR S R MULLINS SC |
| INSTRUCTED BY | : | SHEPSTONE & WYLIE ATTORNEYS<br>24 RICHEFOND CIRCLE<br>RIDGESIDE OFFICE PARK<br>UMHLANGA ROCKS<br>DURBAN<br>(REF.: S Dwyer/T Edwards/GARD3.30)<br>(TEL.: 031 – 575 7000) |