

PROPOSED AMENDMENT TO SECTION 6 OF ACT 105 OF 1983

MEMORANDUM I

Introduction

- 1 Any amendment of s 6 of the Act will have far-reaching effects on the practice and development of admiralty law in the Republic. For that reason, and for the benefit of those who have not yet focussed on this aspect, we have thought it right to deal with this question in some detail and to set out our views.

The history of the section prior to the Act

- 2 Prior to the promulgation of the Act draft bills were circulated and commented on in January and October 1980 and in February 1981, and a draft was gazetted in April 1982. This draft elicited further comment, and there was a final redraft with only minor amendments by the South African Law Commission which is annexed to that body's report.
- 3 The original suggestion in regard to the law to be applied was to give the court as wide as possible a discretion - Roman Dutch law or the law of any Maritime state. This was not well received and there followed a number of different proposals.
- 4 The problem that had to be faced was that it was appreciated that English admiralty law could not simply be jettisoned and be replaced by a fragmented and relatively undeveloped Roman Dutch law. (cf Dillon and van Niekerk, SA Maritime Law and Maritime Insurance, Selected Topics 28). There would, however, have been a strong lobby in favour of the view that Roman Dutch law should not be jettisoned and a foreign legal system incorporated into our law. Political and patriotic sentiment at the time was expected to be strongly supportive of this view.
- 5 In order to deal with this sentiment and to justify the retention of English Admiralty law, it was emphasised that English Admiralty law prior to 1890 (the law applicable in this country prior to the 1983 Act) had very little to do with the English common law. On the contrary it was a separate jurisdiction with separate practitioners applying, *inter alia*, civil law principles in respect of admiralty and ecclesiastical matters. This position

obtained until 1859 when common law lawyers became entitled to practice in the Admiralty Court (see 1982 Acta Juridica 35-6). The admission of those lawyers did not, prior to 1890, result in any pronounced common law influence. It was thus possible to argue - in defence of the retention of the principles of English Admiralty law prior to 1890 - that to the extent that English Admiralty law as it existed prior to the Act was to be adopted, this was a civil law system compatible with Roman Dutch law, and indeed, foreign to the English common law. There was, however, a need for some flexibility in respect of developments after 1890.

- 6 This approach clearly found favour with the South African Law Commission. In para 3.2 of the Law Commission's Report there is specific reference to the fact that the admiralty law prior to 1890 was distinct from the English common law and, importantly, it is stated in para 6.4 that ~~the~~ existing admiralty law should be the basis of reform. That law was, of course, the English admiralty law prior to 1890. The section, which followed upon various memoranda submitted to the Commission and which is referred to in its Report and incorporated in the draft bill, reads as follows:

- § (1) (a) Subject to the provisions of this Act and any other law an Admiralty Court shall apply the law as set forth in sub-paragraph 1 and 2 namely,
- (1) With regard to matters in respect of which the Courts of Admiralty in the Republic had jurisdiction immediately prior to the commencement of this Act, the law as applied in the said courts;
 - (2) With regard to any other matter the relevant rules of Roman Dutch law as applicable in the Republic.
- (b) An Admiralty court shall take cognisance of any modifications since the coming into force of the Colonial Courts of Admiralty Act 1890 and may take account of and apply to such extent as appears expedient:
- (i) any such modifications;
 - (ii) the laws past or present; and decisions of courts of maritime states and the views of writers;
 - (iii) the provisions of any international convention.

- 7 What this proposed section did was to preserve ~~the~~ the law as applied in the said courts which, according to the Appellate Division, was not the English common law but the English admiralty law prior to 1890. Insofar as it was necessary to have regard to developments subsequent to 1890, the proposed section did not simply provide for recourse to the English Admiralty law subsequent to 1890, but directed the court to have regard to

the decisions of courts of other maritime states and the views of writers and international conventions. In regard to matters in respect of which our courts did not have jurisdiction prior to the commencement of the Act, Roman Dutch law was to be applied. In a nutshell, Roman Dutch law was given a place, the existing law was preserved, and provision was made for the updating of that law.

8. It is not clear what happened between the promulgation of this bill and the formulation adopted in the section in the form in which it appeared in the Act. The section which appeared in the Act achieved what previous drafts had for good reason avoided, namely, the compulsory application of the developed English admiralty law after 1890 and, in terms of its interpretation in our courts, not simply English admiralty law, but English law as a whole. Whether, in formulating the section, the draftsman had in mind the incorporation of English law as a whole as distinct from English admiralty law is not known. There is reason to doubt that this was the case. Finally the flexibility sought was not incorporated in the section and our law was pegged to English law as at 1983.
9. In short, the section which found its way into the Act was a marked deviation from the section which was the result of much careful thought and which the South African Law Commission was persuaded to adopt. While we do not suggest that there should be a reversion to this draft, we do support the notion, adopted by the Law Commission in 1982, that the English admiralty law which existed at the date of the commencement of the Act should be the springboard for the development of our admiralty law. Our support is based both on jurisprudential and practical considerations.

The Attempted Amendment

10. During 1987 and 1988 the Association reviewed section 6. There were different proposals resulting in what was essentially a compromise.
11. That compromise led to the following proposed new section 6:
 - (a) A court in the exercise of its admiralty jurisdiction shall apply the law applicable in the Republic and, where appropriate, any general principle of maritime law prevailing in any maritime state.
 - (b) In applying (a) above the court shall have due regard to the recognition by this Act of the action *in rem* and the maritime lien and their origins.
 - (c) The Court shall take judicial notice of English law and when any question of English law arises it shall decide that question without the hearing of expert evidence.+

12. The section did not meet with approval. We are not aware of the extent of the opposition but a Parliamentary sub-committee of the Cape Bar consisting of Farlam SC, Brusser and Wragge prepared a memorandum in which they expressed their opposition to the proposed amendment. We think the Bench was similarly not in favour of the amendment, and the matter was dropped.
13. The question of the amendment of the section was thereafter not actively pursued until Exco decided to review the Act as a whole.

Whether or not to again attempt an amendment

14. The section can legitimately be criticised on a number of counts. The most serious criticism is that the section, as interpreted by the courts, serves to incorporate English domestic law. This may never have been contemplated, but even if it was, the result is untenable. If, for example, necessaries are supplied by a South African supplier to a South African ship pursuant to a South African contract in regard to a voyage from Cape Town to Port Elizabeth, admiralty law would determine whether the claim was one for necessaries and, if so, that proceedings could be brought *in rem*. But why should questions relating to the underlying contract, such as its validity, be determined not by South African law but by English domestic law, a consequence which the parties would hardly have intended.
15. Even if the courts could be persuaded that the section in the Act should be interpreted to import into our law only English admiralty law the section would, in our view, remain highly unsatisfactory. The basic principles of admiralty law needed to supplement the inadequacies of the Roman-Dutch law were established under the law applicable in the Republic prior to 1983 i.e. the English admiralty law prior to 1890. We are clear that we should not embrace the modern English admiralty law. It would certainly be unsatisfactory for our law to be tied to a foreign system of law thus precluding the development of our own indigenous law, particularly where a compatible springboard for such development exists. Moreover, Admiralty Rule 8 has served to re-establish the pure form of the action *in rem* prior to 1890 (compare *The Lady Rose* 1991 (3) SA 711 (C) at 715 F-G) and has driven our law in a different direction to that taken by English law in decisions such as *The Dictator* [1892] P 304 and *The Indian Grace* (No 2) [1998] 1 Lloyds Rep 1 (HL).
16. For the above reasons alone it is our view that an attempt should be made to amend the section.

The form of the amendment

17. We are conscious of the fact that before attempting a draft it is essential to be clear in regard to what is considered to be wrong with the existing section, and what an amended section should attempt to achieve.
18. There are, in our view, two main problems with the existing section. First, as at present interpreted, it obliges our courts to apply English domestic and private international law and totally excludes our indigenous Roman-Dutch law in relation to certain maritime claims. Second, the law is pegged to the developed English law as at 1983 which stultifies development. There is a third feature . certain claims are governed by our law, other claims are governed by a different law.
19. It has been pointed out that the form this section should take was the subject of consideration and debate in 1982-3, and thereafter in 1987-8 when the Maritime Law Association sought to amend the existing section, and that the thinking which emerged from these debates and gave rise to the proposals in question should not be ignored. As is apparent from the two proposals (paras. 6 and 11 above) they are characterised by the following:
 - 19.1. In neither draft was there any attempt to marry our law to English admiralty law (let alone English domestic law) as at 1983 or at any other time.
 - 19.2. Both drafts envisage a developing system of law in the Republic to be achieved by the exercise of the courts' discretion rather than making any other system compulsorily applicable.
 - 19.3. In addition, the Maritime Law Association's proposals, culminating in the draft contained in the Law Commission's report, made the law immediately prior to 1983 the springboard for future development, leaving the court a discretion to update that law.

We are not in favour of abandoning the central themes of this thinking and are convinced that we should not make English admiralty law compulsorily applicable, but should provide for the development of our own law, a development which will follow English law closely, but not be bound by it. We have, however, not included the reference to other maritime states, a reference, we think, which was one of the reasons for the rejection of our attempted amendment in 1988.
20. We include as Annexure A our proposal.

21. This proposal provides for the following:
 - 21.1. The application of the general principles of admiralty law applicable in the Republic immediately prior to the commencement of the Act (i.e. English admiralty law as at 1890) to serve as a springboard for the development of our law.
 - 21.2. The preservation of case law since 1983 which has applied these principles.
 - 21.3. The discretion of the court to develop, supplement or modify the law.
 - 21.4. The limitation of the court's aforesaid discretion to the extent set out in sub-paragraph (c) of the draft.
 - 21.5. The application of these principles to all and not merely to some of the maritime claims listed in the Act.
 - 21.6. Save as above, the application of the modern Roman-Dutch law applicable in the Republic.

22. While the phrase ~~the~~ general principles of admiralty law may be said to lack precision, we think that it is sufficiently clear and gives the court the flexibility which we think is essential to enable the court to ignore minor English statutory provisions or other minor parochial rules. The MLA's proposal in 1988 included the phrase ~~any~~ general principles of maritime law.

23. Once it is decided that English admiralty law should not be made compulsorily applicable, it is not possible to avoid vesting the court with a discretion. The discretion in the draft is, however, circumscribed. The court must first find a reason why it is ~~appropriate~~ to depart from the existing law and in departing from that law must do so consistently with the Act, the Rules and the origins and development of the law in the Republic.

24. We have considered a further draft which differs from Annexure ~~A~~ in that the starting point in that draft is the general principles of the modern English law applicable in 1983.

25. It is clear that English admiralty law, which is a highly developed system of law will, when appropriate, always have persuasive influence on our admiralty law. We are, however, against making modern developed English law the exclusive source of the development of our law which is the result of this draft. It is true that provision is made that the court may develop, supplement or modify that law. While this power is clearly appropriate in Annexure Aq it is less so in this draft. The scope for developing a developed system of law must be minimal. The practical effect of this draft may be that our courts will simply as a matter of course apply the modern principles of English admiralty law except where the Act and Rules provide otherwise.
26. We are totally against adopting the modern English law as a starting point. We draw attention to the following:
- (a) This was not recommended by the MLA in 1983 of 1988.
 - (b) This was not recommended by the SA Law Commission. On the contrary that body recommended, as pointed out above, that the existing admiralty law, that is the English law prior to 1890, should be the basis for reformq
 - (c) The adoption of the modern English law would to a large extent stultify the development of our own indigenous admiralty law. The desirability of developing our own law was endorsed by the MLA in 1983 and 1988 and is clearly implicit in the SA Law Commission's Report.
 - (d) English law and our law have already deviated in a crucial respect as pointed out in paragraph 15 above and the ramifications of this difference may be far-reaching.
27. There are those who see difficulties in establishing the law applicable in the Republic immediately prior to the commencement of the Act (the pre-1890 principles of English law) and who consider that an amendment along the lines of Annexure Aq would constitute a retrograde step. In regard to the former, these general principles are well known and accessible to admiralty practitioners and hardly more difficult to ascertain and, indeed, perhaps easier to delimit than the general principles of modern English law. In regard to the latter, Annexure Aq includes the application of the principles in question in the Republic since 1983 thus preserving our existing case law and, in so far as there are new developments or other aspects of English admiralty law which it would be appropriate for us to adopt, the court is empowered to do so. This does not seem to us to represent a retrograde step.

28. Influenced to some extent by the view held by some (mistakenly, we believe) that recourse to the law in existence immediately prior to the Act represents a retrograde step, we considered yet another possible draft. This draft would simply vest the court with the discretion to apply, where appropriate, the admiralty law ~~at~~ any time applicable in England. We considered that this discretion was too general and would leave the court without a defined starting point. It would also leave the status of our existing case law in some doubt. By contrast the draft in Annexure ~~A~~ gives the court a firm base to start from, namely the general principles of admiralty law immediately prior to the Act and their application in our case law thereafter. We would, from a practical point of view, continue much as we have done to date without being inexorably tied to a foreign system of law.

Recommendation

29. For the above reasons we favour the draft set out in Annexure ~~A~~. Andrew Pike and Andrew Robinson also agree with this draft. James Mackenzie was unfortunately not available when we finalised our views.
30. In coming to the above conclusion we have considered a number of drafts and versions. Given the difficulties, almost any draft can be subjected to some criticism - the task is to produce the most satisfactory draft in the circumstances. Thus while we welcome criticisms of Annexure ~~A~~ it would be more useful if these could be accompanied by the draft which you prefer.

CAPE COMMITTEE

Gys Hofmeyr SC
Peter Hazell SC
Michael Wragge SC

12 July 2010

ANNEXURE Aq

6(1) Notwithstanding anything to the contrary provided in any law or the common law a court, in the exercise of its admiralty jurisdiction, shall:

- (a) apply the general principles of admiralty law applicable in the Republic immediately prior to the commencement of this Act together with the application of these principles in the Republic since such commencement and, where appropriate, may develop, supplement or modify the said principles as it deems fit;
 - (b) save as set out above, apply the law applied by the courts in the exercise of their ordinary jurisdiction.
 - (c) in exercising its powers in terms of sub-paragraph (a) above, the court shall have due regard to the provisions of this Act, the Admiralty Rules and the origins and development of admiralty law in the Republic.
- (2) The provisions of subsection 1 shall not derogate from the provisions of any law of the Republic.+