MV MSC Susanna:
Owners and Underwriters, MV Msc Susanna and Another v Transnet SOC Ltd and Others
2022 (2) SA 85 (SCA)

Citation	2022 (2) SA 85 (SCA)
Case No	1039/20 [2021] ZASCA 135
Court	Supreme Court of Appeal
Judge	Navsa JA, Wallis JA, Schippers JA, Mbatha JA and Gorven JA
Heard	September 1, 2021
Judgment	September 1, 2021
Counsel	*SR Mullins SC* (with *PJ Wallis SC*) for the appellants. *CJ Pammenter SC* (with *D Cooke*) for the respondents.

Flynote : Sleutelwoorde

Shipping — General maritime law — Ship — Owner — Limitation of liability — Collision in local port between merchant ship and foreign warship — Application of tonnage limitation in s 261(1) of Merchant Shipping Act 57 of 1951 — Whether limitation may be invoked by owner of merchant ship against foreign defence ministry as owner of warship — Merchant Shipping Act 57 of 1951, s 3(6) and s 261(1)*(b)*.

Headnote : Kopnota

It is an ancient principle of maritime law that shipowners have the right to limit their liability for damages arising from the operation of the ship to the value of the ship. In South Africa this limitation is embodied in ch V part 4 s 261(1)*(b)* of the Merchant Shipping Act 57 of 1951: 'Collisions, Accidents at Sea, and Limitation of Liability — (w)hen owner [of harm-causing vessel] not liable for whole damage'. The present case dealt with the interpretation of s 261(1)*(b)* in the light of s 3(6) of the Act, which states that the Act 'shall not apply to ships belonging to the defence forces of the Republic or of any other country'.

The facts were that, during a severe storm in October 2017, *MSC Susanna* broke its moorings in the port of Durban and collided with the frigate *Floreal* of the French Navy (represented by the second respondent — the Ministère des Armées), as well as with port infrastructure belonging to Transnet (the first respondent in the guise of the National Ports Authority of South Africa (the NPA)). The NPA sued the appellants — the owners and underwriters, and the demise charterer of *Susanna* — for damages of R23 million. The appellants applied for a declaration of non-liability in relation to the damages to *Floreal*, for which the Ministère had lodged a counterclaim for €10 million.

In November 2019 the appellants, invoking s 261(1)*(b)*, instituted a limitation action against the NPA in the Durban High Court, seeking to join the Ministère to the action. The Ministère resisted, arguing that the limitation in s 261(1)*(b)* did not apply to warships like *Floreal* by virtue of s 3(6) of the Act.

The appellants on the other hand argued the limitation *did* apply against the Ministère, as the party making the claim against them, as opposed to *Floreal* itself. They submitted that s 261(1)*(b)* conferred a wide right that could not be restricted in the way the Ministère wanted, that is, by inserting after the words 'any property of any kind' in s 261(1)*(b)* the words 'save a naval vessel owned by the defence force of any nation'. The Durban High Court refused to join the Ministère.

In an appeal to the Supreme Court of Appeal the parties agreed that the issue was 'whether the owners and demise charterers of a merchant ship may, in circumstances where a merchant ship causes damage to a ship belonging to a defence force as contemplated in s 3(6) . . . seek a limitation of liability in terms of s 261 . . . in respect of the claim of that defence force'. It was common cause that if the answer favoured the appellants, the High Court should have ordered the joinder of the Ministère.

Held

The terms of s 261(1)*(b)* were clear and comprehensive: the right to limit was given to the owner of the ship in respect of all loss or damage to any property or rights of any kind, without qualification, and would include the loss or damage embodied in the Ministère's claim. The focus, therefore, had to be on the effect of s 3(6), which excluded the bulk of the provisions of the Act from application to both South African and foreign vessels forming part of their country's defence forces. But ch V part 4 (where s 261 was located) differed from the rest of these provisions since it was focused on the legal liability of owners and its limitation. This was important because s 3(6) did not say that the Act did not apply to owners of ships. It would, moreover, be linguistically inapt to exclude the invocation of limitation by the owners of *Susanna.* (See [7] – [8], [10] – [12], [14].)

The Ministère's argument that the Act was not concerned with warships (naval vessels) had to fail: *Susanna* was a merchant ship that was engaged in merchant shipping at the time of the incident giving rise to the claims against the appellants; the appellants were invoking a provision they were plainly entitled to invoke; and allowing them to limit their liability was clearly incidental to merchant shipping. (See [17.)

No discernible reason of policy supported a different construction of s 261(1)*(b)*. Limitation of liability existed as a matter of policy and none of the international conventions on limitation excluded its invocation in respect of claims arising from damage done to or by naval vessels. An exemption from the right to invoke limitation in respect of claims by naval vessels would also be inconsistent with international practice. (See [25].)

There were also incongruities arising from the Ministère's argument: s 261 dealt with three situations, an occurrence causing loss of life or personal injury; an occurrence causing loss or damage to property or rights; and an occurrence causing both loss of life or personal injury and loss or damage to property or rights. Had the incident giving rise to this case resulted in loss of life or injury to naval personnel on board *Floreal*, they and the dependants of any who were killed could have brought actions against the appellants to recover damages. Any such claims would have been subject to

limitation, and nothing in s 3(6) suggested that the officers and crew of *Floreal* would

enjoy some special exemption from the application of limitation. It would be incongruous in such circumstances for the Ministère to escape the application of limitation. (See [26].)

Appeal upheld and the Ministère joined as defendant in the action instituted by the appellants. (See [28].)

Cases cited

Southern Africa

Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GmbH of Bremen 1986 (4) SA 865 (C): referred to

Nagos Shipping Ltd v Owners, Cargo Lately Laden on Board the MV Nagos, and Another 1996 (2) SA 261 (D): referred to

South African Railways and Harbours v Smith's Coasters (Prop) Ltd 1931 AD 113: referred to.

Canada

The Queen v Nisbet Shipping Co Ltd 1953 CanLII 77 (SCC) ([1953] 1 SCR 480): referred to.

England

Boucher v Lawson 95 ER 116: referred to

Dampskibs Aktieselskabet 'Mineral' of Narvik v Owners of Steamship 'Myrtlegrove' and Others [1919] 1 Lloyd's Rep 289 (Adm Div): referred to

Nisbet Shipping Co Ltd v Reginam [1955] 3 All ER 161 (PC): discussed.

Legislation cited

The Merchant Shipping Act 57 of 1951, s 3(6) and s 261(1)*(b)*: see *Juta's Statutes of South Africa 2020/21* vol 4 at 2-584 and 1-621.

Case Information

SR Mullins SC (with *PJ Wallis SC*) for the appellants.

CJ Pammenter SC (with *D Cooke*) for the respondents.

An appeal against a decision in the Durban High Court.

Order

1. The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.
2. The order of the High Court is set aside and replaced by the following order:

'The rule nisi is confirmed in the following terms:

1. The Ministère des Armées is joined as a defendant in the action instituted by the appellants under case No A4/2019.
2. The appellants are granted leave to amend the pleadings in the said action so as to plead their cause of action against the Ministère des Armées.
3. The Ministère des Armées is ordered to pay the costs occasioned by its opposition to the application, such costs to include those consequent upon the employment of two counsel.'

Judgment

Wallis JA (Navsa, Schippers, Mbatha and Gorven JJA concurring):

[1] On 10 October 2017, during a substantial storm in the port of Durban, the *MSC Susanna* broke her moorings and, while drifting in the

port, collided with several vessels, including the *FNS Floreal*. The *Floreal* was a French naval vessel under the control of the second respondent, the Ministère des Armées (the Ministry) of the French Republic. The *MSC Susanna* also collided with cranes and other infrastructure owned by the first respondent, Transnet SOC Ltd — the National Ports Authority of South Africa (the NPA). The NPA sued the appellants, respectively the owners and underwriters on the one hand, and the demise charterer on the other, of the *MSC Susanna*, for damages in an amount of some R23 million arising out of this incident. The Ministry's response to the appellants' action for a declaration of non-liability in relation to the damages to the *Floreal* was to lodge a counterclaim for damages amounting, together with interest and costs, to nearly €10 million.

[2] Given the value of the actual and potential claims against the appellants, on 7 November 2019 they issued a writ of summons in a limitation action against the NPA, contending that their total liability for damages arising out of the events of 10 October 2017 should be limited in terms of the provisions of s 261(1)*(b)* of the Merchant Shipping Act 57 of 1951 (the MSA). On the same day they launched the present proceedings seeking the joinder of the Ministry to the limitation action. The application was resisted by the Ministry on the grounds that, as the owner of a foreign naval vessel, the right to limit was excluded as against it by the provisions of s 3(6) of the MSA. That point was upheld by Mngadi J in the KwaZulu-Natal Division of the High Court, Pietermaritzburg, sitting in the exercise of its admiralty jurisdiction. The present appeal is with his leave.

[3] In terms of the provisions of SCA rule 8(8) the parties have sensibly agreed on the following statement on the issue in this appeal:

'The parties agree that the appeal turns on whether the owners and demise charterers of a merchant ship may, in circumstances where a merchant ship causes damage to a ship belonging to a defence force as contemplated in s 3(6) of the Merchant Shipping Act, 1951 . . . seek a limitation of liability in terms of s 261 of the Act in respect of the claim of that defence force.'

That admirably encapsulates the issue in this case. It is common cause that, if the answer favours the appellants, the High Court should have ordered the joinder of the Ministry. If it is against them, then the High Court judgment was correct. [1] While it is expressed in these succinct terms, it is 'a question of very great difficulty', as Viscount Simonds LC said in *Nisbet Shipping Co Ltd v Reginam*, [2] a case to which I will revert.

Tonnage limitation

[4] The right of shipowners and certain other parties to limit their liability for damages arising from the operation of the vessel is an ancient one. Legislation providing for shipowners to limit their liability to the

value of the vessel is to be found in statutes dating from the 1600s in various parts of Europe, particularly the Netherlands. [3] It was introduced in England in 1733 by legislation enacted in response to the decision in *Boucher v Lawson*, [4] in which a cargo of gold bullion was entrusted to the master of a vessel, who proved unable to resist temptation and absconded with it. The owners of the vessel were held liable to the full extent of the value of the gold, which vastly exceeded the value of the vessel. Parliament intervened by passing the Responsibility of Shipowners Act, [5] limiting the liability of shipowners to the value of the ship, its equipment and any freight due for the voyage. Similar legislation was introduced in the United States of America in 1851. Three international conventions on limitation of liability by shipowners were concluded in the last century, although complete uniformity has not been achieved. [6] It has been described as 'a time honoured and internationally endorsed practice' which is now embodied in our domestic legislation. [7]

[5] For our purposes it is sufficient to note that until the passage of the MSA, South Africa did not have domestic legislation dealing with limitation. The English Merchant Shipping Act, 1894, remained of application in South Africa [8] and made provision for limitation of liability calculated on the gross registered tonnage (GRT) of the vessel. [9] This changed with the passage of the MSA in 1951. Section 261 of the MSA is headed 'When owner not liable for whole damage' and s 261(1)*(b)*, which is the provision relied upon by the appellants, reads:

> 'The owner of a ship, whether registered in the Republic or not, shall not, if . . . any loss or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity —
>
> . . .
>
> *(b)* if no claim for damages in respect of loss of life or personal injury arises be liable for damages in respect of loss of or damage to property or rights to aggregate amount exceeding 66,67 special drawing rights for each ton of the ship's tonnage; . . . .'

[6] The basis for the Ministry's contention that the appellants may not invoke this provision in respect of its claim is to be found in s 3 of the MSA. Section 3(3) provides that the Act binds the state, subject to the entitlement of the Minister of Transport to exempt vessels owned by the Government of South Africa or Transnet from a range of provisions dealing with crew and the recovery of wages. Section 3(6), on which the Ministry relied, reads:

> 'The provisions of this Act shall not apply to ships belonging to the defence forces of the Republic or of any other country.'

The Ministry contended that, as the *Floreal* was part of the French navy and therefore part of the French defence force, the provisions of s 261 did not apply in relation to its claim against the appellants.

[7] The appellants' contention was that s 261(1)*(b)* conferred an internationally recognised right upon them as the owners [10] of the *MSC Susanna* to limit their liability and that they were invoking limitation against the Ministry, as the party making a claim against them, and not against the *Floreal*. They submitted that the right to limit is conferred in relation to claims for loss of life or personal injury, or any loss of or damage to any property of any kind, whether movable or immovable. The effect of the Ministry's contention is to introduce an unwarranted qualification to the broad and unqualified words 'any property of any kind' by adding 'save a naval vessel owned by the defence force of any nation'.

Discussion

[8] The issue is one of the proper interpretation of ss 261(1)*(b)* and 3(6) of the MSA. It is, so far as the argument and the authorities to which we have been referred go, entirely novel. As always, one starts with the words of s 261(1)*(b)*. [11] Its terms are clear and comprehensive. The right to limit is given to the owner of a vessel, an expression given an extended meaning in s 263(2), in respect of all loss or damage to any property or rights of any kind, whether movable or immovable. That language

encompasses all types of property, without qualification. It is clearly wide enough to include the loss or damage embodied in the claim by the Ministry. Counsel rightly conceded that if this section and the others that are contained in part IV of ch 5 of the MSA were contained in a separate statute without s 3(6), the right to limit would be available on this language in respect of the Ministry's claim. That means that the focus must necessarily fall on the effect of s 3(6).

[9] It is indisputable that s 3(6) excludes the bulk of the provisions of the MSA from application to both South African and foreign vessels forming part of their country's defence forces. These vessels can conveniently be referred to as naval vessels, although it is conceivable that there might be vessels forming part of branches of the defence force other than the navy. The MSA's provisions, dealing with the administration of the MSA (ch I); matters concerning the registration of vessels in the South African registry (ch II); certificates of competency and service of crew (ch III); engagement, discharge, repatriation, payment, discipline and general treatment of seafarers (ch IV); safety of ships and life at sea (ch V, parts I, II and III); shipping enquiries and courts of marine enquiry (ch VI); carriage of goods by sea (ch VIII, now repealed in its entirety); and offences, penal provisions and legal procedures (ch IX), cannot be effectively applied to naval vessels. The regimes under which the armed forces of most, if not all, countries operate are so different in these areas from the manner in which other vessels operate, even those owned by sovereign governments, that the reasons for an exclusionary provision such as s 3(6) are apparent.

[10] Other areas of the MSA are more problematic. In its original form it included in ch VII (ss 293 – 306 of the MSA)

provisions in respect of wreck and salvage, that have now been repealed by the Wreck and Salvage Act 94 of 1996, which incorporates the provisions of the International Convention on Salvage, 1989, into domestic law. [12] The Wreck and Salvage Act is binding on the state, but article 4(1) of the Convention excludes warships and all non-commercial vessels owned or operated by states and entitled at the time of salvage operations to sovereign immunity, unless the state decides otherwise. The effect is that a salvor in relation to such a vessel does not enjoy the protection of the Convention. That does not, however, mean that a salvor may not provide salvage services or receive a salvage reward. It merely means that they must deal with the state concerned in relation to such services.

[11] Chapter 5 part IV of the MSA differs from these other provisions, in that, save in respect of two matters of no relevance to vessels other than South African-registered vessels, [13] it is not concerned with the operation of vessels, the treatment of crew or issues of safety. Its primary focus is on two areas of the liability of owners of vessels. First, it deals with the

division of loss between shipowners in the event of a collision under s 255; liability for personal injury under s 256; and claims for contribution against joint wrongdoers in relation to the latter claims under s 257. Second, under s 261 it provides for the right of a shipowner and certain other parties to limit the extent of their liability arising out of an incident causing loss of life or physical injury to persons, or loss of or damage to property, or a combination of both, where these were caused without the actual fault or privity of the shipowner. These two areas of liability are not concerned with regulating the operation of the vessel or vessels involved in that incident. In the case of a collision the question is who, and if more than one vessel is involved, in what proportions, those responsible for the collision shall bear the loss. Where personal injury has been caused it is the liability for damages and rights of contribution between joint wrongdoers that are regulated. In the case of limitation the concern is with the extent of the liability of the owner of the harm-causing vessel.

[12] It is noteworthy that each of these is concerned with the liability of owners of ships to third parties, and claims against and between owners of ships. That the claims arise out of the operation of the ships is incidental. The focus is on the legal liability of the owners and, in the case of limitation claims, other parties such as charterers, managers and operators of ships. [14] These are purely commercial matters concerning the rights and obligations of owners of ships. This is important in the light of the wording of s 3(6), because it says that the provisions of the MSA shall not apply 'to ships'. It does not say that its provisions will not apply to the owners of ships. Much less does it say that the Act does not apply to defence forces, so as to preclude owners of merchant ships from invoking its provisions by, for example, seeking an order for the division of loss after a collision, or a contribution to the damages arising from jointly caused personal injury, or an order limiting their liability.

[13] Linguistically s 3(6) is not apt to exclude the invocation of limitation by the owners of the *MSC Susanna*. That straightforward view is the same as that of Kerwin J and Estey J of the Supreme Court of Canada in construing a similarly worded provision in the Canada Shipping Act, 1934, in *The Queen v Nisbet Shipping Co Ltd*. [15] They said:

> 'The final point raised by the appellant is that in any event it is entitled to a limitation of liability under s 649 of the *Canada Shipping Act*. As the owner of the *Orkney*, the Crown would ordinarily be entitled to take advantage of this provision but it is said that s 712 of the *Act* prevents this result. That section provides:
>
> > "This Act shall not except where specifically provided apply to ships belonging to His Majesty."
>
> In my opinion this section has no reference to a claim for limitation of liability under s 649, which can only be put forward by an owner.'

[14] Some reinforcement for the view that this is the ordinary meaning of the words of the section is to be found in the dissenting judgment of Locke J, [16] where he said, after a consideration of the history of this legislation in both England and Canada:

> 'In my opinion, s 712 should be construed as applying to or in respect of ships belonging to Her Majesty and that, accordingly, the limitation of the liability of His Majesty *qua* owner is excluded by s 712. To construe the section otherwise would be, in my judgment, to fail to interpret the section in such manner as will best ensure the attainment of the object of the enactment . . . .'

In other words, while on its language s 712 applied to owners and not ships, considerations of the historical context, and in particular a significant difference between the wording of the 1927 Act and the 1934 Act, led to a construction that the entire Act was excluded in respect of Crown-owned ships.

[15] The Ministry's heads of argument advanced an interpretation of s 261(1)*(b)* on the basis that it attributed to the appellants' argument the premise that s 261 only applied to one ship. They contended that this was faulty, because in the circumstances of a collision there would be two ships. One it described as 'the offending ship' and the other as 'the damaged ship'. It submitted that s 261(1) applied not only to the offending ship but also to the damaged ship. In my view the suggested premise did not underpin the appellants' argument and the conclusion sought to be drawn was faulty. Section 261 is concerned with the liability of an owner of a ship, not the ship itself. Whatever the precise nature of an action in rem, the underlying liability will be borne by the owner of the ship. Where the action is in personam the position is even clearer. As to the damaged ship, the claim arising from that damage is the claim of that ship's owner. Ships do not bring claims.

[16] Before the MSA was enacted our law in regard to limitation was to be found in s 503 of the English Merchant Shipping Act, 1894. [17] In *Smith's Coasters* this court held that a shipowner facing a claim by the South African Railways & Harbours, an agency of the state, could not raise a defence of limitation under s 503. However, it reached that conclusion on the basis that, as a matter of royal prerogative, the Crown could not be bound by a statute unless the statute expressly or by necessary implication bound the Crown. The implication of permitting reliance on limitation was that a claim vested in the Crown would be reduced and that could not occur unless the Crown was bound by the provisions of s 503. There was no general language in the statute justifying the conclusion that the Crown was bound, and no basis for implying that it was. Accordingly an exception to a plea based on limitation under

s 503 was upheld. [18] That was a narrow conclusion relating only to the South African state and not to foreign states or their vessels, whether military or otherwise.

[17] The case is unhelpful. We are not concerned with a claim against the South African state, but if we were, s 3(3) of the MSA expressly provides that it binds the state. Nor are we concerned with a claim against a foreign state. In any event, the principle invoked there does not apply in relation to foreign states. Nor can there be any question of sovereign immunity arising because it is the Ministry making a claim against the appellants, not them making a claim against the Ministry. The grounds upon which *Smith's Coasters* was decided are inapplicable here.

[18] The Ministry also argued that the title of the MSA — the Merchant Shipping Act — and the long title, 'To provide for the control of merchant shipping and matters incidental thereto', indicated that it was not concerned with naval vessels. It said that this purpose was manifested in s 3(6) of the MSA. The difficulty with the submission is that it overlooked the words 'and matters incidental thereto'. One matter of great concern to owners of merchant ships is the possibility of claims arising against them in the course of the operation of their ships. Chapter 5, part IV deals with that issue in a manner that is consistent with international practice in maritime matters. The *MSC Susanna* is a merchant ship and was engaged in merchant shipping at the time of the incident giving rise to the claims against the appellants. Its owners invoked a provision of the MSA that in terms they are entitled to invoke. Allowing the appellants to limit their liability in relation to the claims in this case is clearly something incidental to merchant shipping.

[19] The Ministry relied on the judgment of the Privy Council in *Nisbet PC*. [19] The claim in that case arose from a collision between a foreign merchant vessel and a Canadian warship. As a result of the collision the merchant vessel and her cargo were a total loss. The claim — effectively against the Canadian government — was to recover the damages suffered in consequence of the loss of the ship and its cargo. By a majority of six to one the Canadian court held that it was open to the Crown to invoke limitation against the shipowner's claim. [20] On appeal from the judgment of the Supreme Court of Canada, the Privy Council reversed this decision.

[20] The advice of the Board was delivered by Viscount Simonds LC. [21] He first dealt with the approach of the majority in the Supreme Court. This proceeded on the basis that under the Petition of Right Act, 1938, in Canada [22] the courts had been given jurisdiction to decide claims against the Crown. The question then was the extent of the Crown's liability in respect of such claims. Six judges [23] held that the liability imposed under the Petition of Right Act was the same liability as an ordinary citizen would attract in respect of the same claim. That liability could be limited under the relevant provision of the Canada Shipping Act and therefore the Crown could limit its liability, provided a proper case was made for limitation. [24]

[21] Viscount Simonds noted that the Canadian statute had conferred jurisdiction, without referring to the imposition of liability on the Crown but accepted that its effect was to impose liability on the Crown. He went on:

> 'The question then is, what is the measure of the liability which is not defined by the Act but is to be inferred from the creation of jurisdiction? It is not in dispute that at least those circumstances which give rise to a claim between subject and subject will support a claim by a subject against the Crown. From this, it is an easy step to say that a subject is not entitled to any greater relief against the Crown than he would be against a fellow subject, and this is supported by reference to s 8 of the Petition of Right Act . . . , which provides that the statement of defence or demurrer to a Petition of Right may raise, besides any legal or equitable defences in fact or in law available under that Act, any legal or equitable defences which would have been available if the proceedings had been a suit or action in a competent court between subject and subject. Nor can it be ignored that, though the right to limit liability for damages is not part of the common law but in England and Canada alike is the creature of statute, it is a right almost universally established in the law of nations and of considerable antiquity. It would therefore, be easily assumed that the Crown, assenting to the imposition of a new liability, would secure for itself the advantage at least limiting it in a manner so generally conceded. This view is thus cogently stated by Rand J ([1953] SCR at 488):
>
> > "Where liability, then, on the same footing as that of a subject, is established, giving a right to damages, I can think of no more appropriate enactment to which that basic rule of the

> > prerogative could be applied than to a statutory limitation of those damages."
>
> The basic rule which the learned judge refers is that under which it is said that the Sovereign may avail himself of the provisions of any Act of Parliament.'

[22] The advice continued:

> 'These are the considerations which prevailed with the learned judges of the Supreme Court, with the exception of Locke J with whose judgment their Lordships find themselves in agreement. They are weighty considerations but, as it appears to their Lordships, they do not explain why full effect should not be given to s 712. It is true that, in 1934, that section, which was itself a re-enactment of s 741 of the Merchant Shipping Act, 1894, could have no operation in regard to any liability of the Crown, for it was only in 1938 that any relevant liability was imposed on the Crown. It does not, however, follow that, when that liability is imposed, as it is by the amending Act of 1938, the provisions of s 712 can be ignored. In the United Kingdom the same problem arose as, when under the Crown Proceedings Act, 1947, the Crown was for the first time made liable for the tortious acts of its servants, and it was by that Act [s 5] specifically enacted that the sections of the Merchant Shipping Act, 1894, should apply to limit the liability of the Crown. And in Canada, similar provision is now made by the Crown Liability Act, 1953.'

[23] With all due respect, it does not seem to me that s 712 had the effect given to it by the Board. In a later passage Viscount Simonds said that no distinction could be drawn between the words 'ships belonging to His Majesty' and words such as 'His Majesty' simpliciter. I fail to see why that would be the case. In my view there is a straightforward difference between provisions dealing with a person's ships and a provision dealing with the person themself. But it may be that the decision was in large measure based on the sequence in which the Canadian statutes had been enacted. The Canada Shipping Act was passed in 1934, four years before Canadian courts were given jurisdiction to decide cases brought against the Crown. Accordingly, when the Canada Shipping Act replaced the English Merchant Shipping Act, 1894, claims for damages against the Crown based on maritime collisions could not be brought as of right and the provisions of s 503 of the Merchant Shipping Act, 1894, could not be invoked either by or against the Crown. The Board's advice may be explained on the basis that the 1938 statute conferring jurisdiction could not confer upon the Crown a statutory right not granted to it under the 1894 statute.

[24] It is as well at this point to highlight a significant difference between the issue in that case and the present case. There it was the Crown, as defendant in the action, seeking to limit its liability by invoking the relevant provisions of the Canada Shipping Act, and the owner of the ship that was lost resisting limitation. Here it is the reverse. The owner of the *MSC*

Susanna invokes a right to limit clearly given under s 261(1)*(b)* and its entitlement to do so is resisted under s 3(6). The equivalent of the question before the Board in *Nisbet PC* would be to ask whether, if the roles between the *MSC Susanna* and the *Floreal* had been

reversed, the Ministry as the owner of the *Floreal* would have been able to limit its liability. No doubt in that situation, had the appellants questioned the Ministry's right to invoke limitation, the arguments for each party would have been reversed.

[25] We do not have to decide that issue in this appeal. It is interesting that in Canada, following the example of the United Kingdom, legislation was passed to reverse the effect of the decision in *Nisbet PC*. That is a pointer to the restriction held to exist in that case not being desirable. But it is a question that could easily arise in the event of a collision between a South African naval vessel and a merchant ship and we have not heard sufficiently full argument to determine it now. It might also arise in cases dealing with ss 255, 256 and 257 of the MSA on which no argument was addressed. The appellants were content to advance their case on the basis that this might be the situation. The submission that the appellants' contentions would not give a sensible meaning to s 261 might be an argument in favour of national defence forces being entitled, along with all other vessels, to invoke limitation where their operations cause loss of life or personal injury, or loss of or damage to property and rights. It is not an argument against the proposition that limitation may be invoked in relation to claims by a national defence force against a shipowner.

[26] No discernible reason of policy supports a different construction of s 261(1)*(b)*. Limitation of liability exists as a matter of policy. None of the conventions on limitation exclude its invocation in respect of claims arising from damage done to or by naval vessels. We were not referred to any provisions in the laws of any other maritime state that would preclude a claim in respect of damage done to a naval vessel from being required to participate along with other creditors in the distribution of a limitation fund. France was an original signatory to the 1976 Limitation Convention, which contains no exemption from the invocation of limitation for naval vessels. [25] Sixty-three other states, including virtually all major maritime nations, with the exception of the United States of America, [26] were either signatories to, or have ratified, the Convention. An exemption from the right to invoke limitation in respect of claims by naval vessels would therefore be inconsistent with international practice.

[27] There are also incongruities arising from the Ministry's argument. Section 261 deals with three situations, namely, an occurrence causing loss of life or personal injury; an occurrence causing loss or damage to property or rights; and an occurrence that causes both loss of life or personal injury and loss or damage to property or rights. Had the

incident giving rise to this case resulted in loss of life or injury to naval personnel on board the *Floreal*, they and the dependants of any who were killed could have brought actions against the appellants to recover damages. Any such claims would have been subject to limitation. Nothing in s 3(6) suggests that the officers and crew of the *Floreal* would enjoy some special exemption from the application of limitation. It seems incongruous to say that the Ministry, as the owner of the *Floreal*, can do what its officers and crew cannot and escape the application of limitation.

[28] A second incongruity is that the effect of the Ministry's construction would be that vessels belonging to the defence force of South Africa or another state would be able to resist any limitation of their claims under s 261, but other vessels owned by the South African state or any foreign state would not. Thus if the polar supply and research ship, the *SA Agulhas II*, was involved in a collision caused entirely by another vessel, whilst en route to Marion Island and Prince Edward Island, limitation could be invoked in regard to any claims by its owner, the Department of Environmental Affairs, arising from the collision. However, if it was being accompanied at the time by the *SAS Protea*, a marine survey vessel, and that vessel was likewise involved in the collision without fault on its part, limitation would not apply, because the *SAS Protea* is part of the South African navy and the SANDF.

Result

[29] In the result I hold that the appellants are entitled to a claim to limit their liability, if any, arising from the events in Durban Harbour on 10 October 2017 in respect of the claim by the Ministry under s 261(1)*(b)* of the MSA. Their entitlement to do so is not excluded by s 3(6) of the MSA. Accordingly, the following order is made:

1. The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.
2. The order of the High Court is set aside and replaced with the following order:

> 'The rule nisi is confirmed in the following terms:
> 1. The Ministère des Armées is joined as a defendant in the action instituted by the appellants under case No A4/2019.
> 2. The appellants are granted leave to amend the pleadings in the said action so as to plead their cause of action against the Ministère des Armées.
> 3. The Ministère des Armées is ordered to pay the costs occasioned by its opposition to the application, such costs to include those consequent upon the employment of two counsel.'

Appellants' Attorneys: *Shepstone & Wylie*, Durban; *Matsepes Inc*, Bloemfontein.

Respondent's Attorneys: *Clyde & Co*, Cape Town; *Lovius Block*, Bloemfontein.

---

[1] The basis for the joinder is s 5(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (AJRA).

[2] *Nisbet Shipping Co Ltd v Reginam* [1955] 3 All ER 161 (PC) (*Nisbet PC*).

[3] Wandile Zondo *Limitation of Liability for Maritime Claims: A South African Perspective*, a thesis submitted in partial fulfilment of a Master of Science degree at the World Maritime University in Malmö, Sweden, helpfully traces the history of limitation at pp 3 – 13. The thesis is available at https://commons.wmu.se/cgi/viewcontent.cgi?article=1510&context=all_dissertations.

[4] *Boucher v Lawson* 95 ER 116; Griggs 1997 *LMCLQ* 369 – 373.

[5] Responsibility of Shipowners Act, 1733 (7 Geo II. c 15).

[6] The three are the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-going Vessels (only ratified by 15 states); the International Convention Relating to the Limitation of Liability of Owners of Sea-going Vessels, Brussels 1957; and the Convention on Limitation of Liability for Maritime Claims, London 1976, read with the 1969 Tonnage

Convention and the 1996 Protocol amending the limits of liability under the Convention.

[7] *Nagos Shipping Ltd v Owners, Cargo Lately Laden on Board the MV Nagos, and Another* 1996 (2) SA 261 (D) at 271G – H.

[8] See *South African Railways and Harbours v Smith's Coasters (Prop) Ltd* 1931 AD 113.

[9] Gross registered tonnage is a potentially misleading expression in that it is not a measurement of weight or mass, but of the carrying capacity of the vessel, deriving its name from the tuns or barrels that were the common means of storing many goods for shipment on board vessels at that time. Originally it was measured by determining how many tuns could be loaded onto the vessel. It is now measured on the basis of the internal volume of the vessel subject to certain exclusions.

[10] In the extended sense given by s 263 of the MSA.

[11] Subsections *(a)* and *(c)* are similarly worded and deal first with the case where loss of life or personal injury alone is caused, and second with the case where there are both loss of life and personal injury and loss or damage to property. The limitation amount is set in special drawing rights (SDRs) and varies as between the three different cases as dealt with in s 261(1).

[12] Section 2 of Act 94 of 1996.

[13] The respects relate to the obligation to report accidents to the proper officer and the obligation to give notice to SAMSA of the loss of a vessel under ss 259 and 260, respectively. See ss 259(2) and 260.

[14] MSA s 263(2).

[15] *The Queen v Nisbet Shipping Co Ltd* 1953 CanLII 77 (SCC) ([1953] 1 SCR 480) at 492 (*Nisbet SCC*).

[16] Id at 502.

[17] Merchant Shipping Act, 1894 (57 & 58 Vict C 60). *Smith's Coasters* supra n8; *Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GmbH of Bremen* 1986 (4) SA 865 (C) at 875H – J.

[18] It appears that this would also have been the position in England at that time. *Dampskibs Aktieselskabet 'Mineral' of Narvik v Owners of Steamship 'Myrtlegrove' and Others* [1919] 1 Lloyd's Rep 289 (Adm Div) at 290.

[19] Op cit n2.

[20] *Nisbet SCC* supra n15.

[21] That was the time when no dissents were allowed in decisions of the Privy Council, because it was notionally giving advice to the monarch and therefore only a single advice could be given upon which the monarch was to act.

[22] The equivalent of the Crown Liabilities Act 1 of 1910 as explained in *Smith's Coasters* op cit n8. Prior to this enactment proceedings against the Crown were only permissible if granted by the Crown following upon the lodging of a Petition of Right.

[23] In addition to Kerwin J and Estey J, they were Rand J, concurred in by Rinfret CJ at 488, and Kellock J and Cartwright J at 496 of *Nisbet SCC*.

[24] The Supreme Court of Canada had remitted that issue to the trial court for determination.

[25] *The 'Heidberg'* Court of Cassation, Commercial Chamber, 22 September 2015.

[26] In the United States of America the subject is dealt with under US Code Title 46, Subtitle III §§ 30101 – 31343. Like the United Kingdom and Canada, there is a provision (§ 31106) providing that the United States is entitled to the exemptions and limitations of liability provided by law to an owner, charterer, operator or agent of a vessel.