



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Windrush Intercontinental SA v UACC Bergshav Tankers AS (556/2015) [2016] ZASCA 199 (6 December 2016)

MEDIA STATEMENT

The Supreme Court of Appeal today upheld an appeal against a judgment of the KwaZulu-Natal Local Division of the High Court, Durban (Exercising Admiralty Jurisdiction) which refused to set aside the deemed arrest of the vessel, the MT *Asphalt Venture*, and order the return of the security paid on behalf of its owner, Windrush Intercontinental SA, for its release.

The issue was whether at the time of the arrest of the second appellant, *Asphalt Venture*, at the Durban port, there existed a maritime lien for unpaid crew's wages entitling its arrest by way of an *in rem* arrest in terms of s 3(4)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983.

The unpaid wages relate to crew members of Indian nationality, who were employed on board the *Asphalt Venture*, a vessel owned by Bitumen Invest AS. Windrush is *Asphalt Venture's* bareboat charterer in terms of a bareboat charterparty it concluded with Bitumen. Windrush also concluded a sub-bareboat charterparty with Concord Worldwide Inc (Concord), which through its technical manager and crewing agent, OMCI Shipmanagement (Pvt) Ltd, concluded employment contracts with the crew between April and August 2010, for a duration of nine months.

The *Asphalt Venture* and her crew were hijacked by Somali pirates on 23 September 2010 about 100 nautical miles east of Mombasa. On 15 April 2011, a ransom of USD 3.4 million was delivered to the pirates in exchange for the release of the vessel and her crew but the pirates nonetheless refused to release some the crew. The remaining hostages were held captive, apparently to be used in negotiations for the release of 120 Somali pirates arrested by the Indian navy who awaited trial in India. On 22 December 2011 the Indian government, in line with its policy, formally refused to

negotiate with the pirates for their release. It was only some years later, between August and December 2014, and after payment of a further ransom, that the pirates finally released the hostages.

Subsequently, Windrush withdrew *Asphalt Venture* from the sub-bareboat charterparty with Concord, thereby terminating the sub-bareboat charterparty. Concord nevertheless continued to pay to the hostages' families amounts equivalent to the hostages' wages until the end of October 2011. It also paid for the repatriation costs of the released crew members, and continued to pay their wages even after they were discharged from the vessel. But it ceased to make payments when it ran into financial difficulties. On 17 January 2012, the MT "*UACC Eagle*" owned by the respondent, UACC Bergshav Tankers AS, a Norwegian company, was arrested in Mumbai by the hostages' families, representing the hostages, as security for their cumulative claim of USD 6 787 440 on the erroneous belief that the *UACC Eagle* was *Asphalt Venture*'s sister ship.

This incident culminated in the conclusion of a settlement agreement the basis of which was that the hostages were employed on *Asphalt Venture* over which there was a maritime lien for unpaid crew wages recognised in Indian law. The *Eagle* was released on conditions and with the respondent making several undertakings, and the families renouncing any claim and/or maritime lien they have or may have. Resulting from this assignment, Bergshav commenced an action *in rem* action against *Asphalt Venture* in the KwaZulu-Natal Local Division of the High Court, Durban. It sued as cessionary of the hostages' claims based on an alleged maritime lien and demanded payment of the amounts it had paid to their families. It also sought an order declaring its entitlement against *Asphalt Venture* for the amounts it still had to pay in terms of the settlement agreement.

The summons and particulars of claim alleged that the hostages were employees of Bitumen, *Asphalt Venture*'s owners, alternatively employees of Concord as *Asphalt Venture*'s sub-bareboat charterer or further alternatively employees of Windrush, the bareboat charterer. Thus, it was alleged that they were and remained entitled to be paid the wages reflected in their contracts of employment during the currency thereof and following any valid termination thereof, until such time as each of them was repatriated. It was further alleged that their claims for unpaid wages were maritime claims as defined in the Admiralty Act and gave rise to a maritime lien which was enforceable *in rem* against *Asphalt Venture* in terms of s 3(4)(a) of the Admiralty Act.

The high court dismissed the appellants' application to set aside *Asphalt Venture*'s deemed arrest and an order for the return of the security which had been furnished to secure its release. It found that Bergshav had established a prima facie case for the proposition that Concord was liable at all material times since October 2011 to pay wages to the hostages and that this maritime lien afforded to the hostages in respect of their claim for wages, was ceded or assigned to Bergshav.

The SCA stated that the question whether there was an enforceable claim based upon a maritime lien at the time of *Asphalt Venture's* arrest was two-pronged. First, it had to determine, on a prima facie basis, whether Bergshav has established the existence and nature of the claims sought to be enforced *in rem* against *Asphalt Venture*. Secondly, it had to determine whether as a matter of South African law Bergshav has prima facie established claims which, by reason of their nature and character, are protected by maritime lien in South African law.

The SCA held that the Somali pirates' conduct of renegeing on their agreement to release all the crew upon payment of the ransom and the negotiations to release the hostages in exchange for the pirates incarcerated by the Republic of India, which were beyond the appellants' control, constituted a supervening event rendering the fulfilment of the hostages' employment contracts impossible. The hostages' employment and entitlement to wages were accordingly terminated by supervening impossibility or frustration of the performance of their employment contracts which made clear that their employment had terminated by 15 April 2011 when the vessel was released. Accordingly, there was no claim for unpaid wages giving rise to a maritime lien enforceable by an action *in rem*.

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