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**ADMIRALTY JURISDICTION IN THE MAGISTRATE'S COURT?**

**Research Dissertation Presented for the Approval of Senate in Fulfilment of Part  
of the Requirements for the Degree Master of Laws in Approved Courses and a  
Minor Dissertation.**

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## **ADMIRALTY JURISDICTION IN THE MAGISTRATE'S COURT?**

**“The science of legislation is like that of medicine in one respect: that it is more easy to point out what will do harm than what will do good.”<sup>1</sup>**

**“There’s no better way of exercising the imagination than the study of law. No poet ever interpreted nature as freely as a lawyer interprets truth.”<sup>2</sup>**

### **A. INTRODUCTION**

As children we are introduced to the story of the ‘Emperor and his clothes’ where the Emperor is duped by some scoundrels, much assisted by his vanity and pride, into believing that they have created for him a suit of the finest and most magnificent cloth. It takes a small innocent child to point out during the procession attended by the Emperor that in fact he is not wearing a suit of finely tailored clothes but nothing at all. The question arises is to whether a Magistrate’s Court which claims admiralty jurisdiction is in the same position as that of the Emperor in the story. Does a Magistrate’s Court have jurisdiction to hear maritime claims by consent or otherwise or is it a case of a Magistrate’s Court attempting to exercise or clothe itself with jurisdiction of this nature merely duped into believing that it has jurisdiction when in fact more exists. In other words, it is jurisdictionally naked.

Is it enough, however, merely to accept the assertion that maritime claims are the exclusive domain of the High Courts exercising their admiralty jurisdiction. Is there no scope for simple matters small in quantum to be heard in a jurisdiction other than the High Court exercising its admiralty jurisdiction. The costs threshold of the High Court is prohibitive and may in certain circumstances result in the anomaly that the legal costs are greater than the quantum being claimed. This could be sufficient to

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<sup>1</sup> Charles Caleb Colton, *Lacon* (1825), 1 529

<sup>2</sup> Jean Giradoux, *Tiger at the Gates* (1935), 2, tr Christopher Fry.

dissuade or but the most full hardy or overly principled litigator from proceeding with a claim. In this, justice and the interests thereof become cheated. In this dissertation I shall accordingly attempt to ask: whether the Magistrate's Court has jurisdiction in maritime claims; or are such matters the exclusive domain of the High Court, exercising its admiralty jurisdiction.

Admiralty jurisdiction often arises as an issue in the Magistrate's Court when Admiralty practitioners, or some slothful practitioners who are looking for a speedy way to close their file, pounce on the pleadings of an unsuspecting practitioner, not well versed in the navigation of the Admiralty Jurisdiction Regulation Act<sup>3</sup>, and raise the issue of the lack of jurisdiction of the Magistrate's Court to hear Admiralty or Maritime matters.

The importance of this issue became apparent to me upon my familiarisation with the facts in the matter between William Crawford (Pty) Ltd & Others v Gary Mills & 2 Others. The above matter involved an urgent spoliation application issued out of the Magistrate's Court for the district of Wynberg<sup>4</sup> for relief, *inter alia*, in the following terms:

“That the First, Second and Third Respondents are ordered forthwith and *ante omnia* to restore to the Applicants' possession the electric motor and all the pumps, referred to in the Founding Affidavit, or any such motors removed from the wreck of the BOS400 pending the final determination of an action to be instituted by the Applicant against the said Respondents for damages and other relief;”

The application arose as a result of a dispute between the parties concerning the rights in respect of certain items recovered and/or salvaged from a wreck, the BOS400.

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<sup>3</sup> 105 of 1983

<sup>4</sup> Case No. 17278/96

Respondents raised a point *in limine* arguing that the Court did not have jurisdiction in the matter in that it fell to be decided under Act 105 of 1983, the Admiralty Jurisdiction Regulation Act.

The Magistrate found that the value of the goods in question was approximately R90 000,00. He held that it was common cause that the BOS400 was abandoned and was accordingly a *res derelicta* or *res nullius*. The Court held further that the matter was within the geographical area of the Court and within the monetary limits of the Magistrate's Court. The Magistrate stated that the application had been running for a substantial period of time but that the point *in limine* was raised only at a relatively late stage and that such point did not appear in the answering affidavit.

The Magistrate canvassed the issue of what a maritime claim is. He referred to sub-section 1(1)(k) of the Admiralty Jurisdiction Regulation Act, which relates to salvage and also to the definition of a 'ship' in Section 1(1) of the Act and held that the BOS400 did not comply with this definition. He referred to the author Shaw<sup>5</sup>, 'The Admiralty Jurisdiction of South Africa', and stated that salvage related to the saving of a ship and that the owners thereof should reimburse the salvors for their efforts in this regard. As such, the Magistrate held that this matter did not fall within sub-section 1(1)(k) of the Act. He referred to sub-section 1(1)(s) and stated that it neither related to seamen nor to a ship, as the BOS400 was a wreck. He stated that in order for a claim to be a maritime claim it must be concerned with the subject matter of a ship. He held that as the BOS400 was a wreck and did not fall within the ambit of the definition of a ship, in that it was not used or capable of being used for navigation, the matter did not relate to a maritime claim. He further referred to sub-section 1(1)(ee) of the Act and again held that the claim was not a maritime claim for the same reasons.

The Court referred to the matter of *Reck v Mills*<sup>6</sup> in which a *mandament van spolie* was dealt with. This case concerned a wreck and the stripping off of pieces from it. The Courts *a quo* and on appeal did not refer to the claim as a maritime claim and it

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<sup>55</sup> Shaw *The Admiralty Jurisdiction of South Africa* 1<sup>st</sup> Ed

<sup>6</sup> 1990 (1) SA 751 (A)

was not heard as an admiralty matter. The Magistrate's Court held that the matter fell within Section 29 of the Magistrate's Court Act and accordingly that the Magistrate's Court had jurisdiction to hear the matter.

Decisions such as the one above appear to be arrived at as a result of contrived and convoluted arguments in order to try and fit maritime claims and consequently admiralty matters into the ordinary municipal jurisdiction of the courts. This is in essence like trying to fit a square peg into a round hole. I shall more fully refer to this case below.

## **B. JURISDICTION**

### **Definition Of Jurisdiction**

In order to consider this issue of admiralty jurisdiction I have attempted to set out below an abbreviation of the definitions and approaches to jurisdiction.

“Jurisdiction in the present context means the power vested in a Court by law to adjudicate upon, determine and dispose of the matter”.<sup>7</sup>

The Roman Dutch lawyer, Voet, writes of:

“The public power of deciding cases, both civil and criminal and putting the decisions into execution.”<sup>8</sup>

The Romans described jurisdiction as:

“A lawful power to decide something in a case or to adjudicate upon a case, and to give effective judgment, that is, to have the power to compel the person condemned to make a satisfaction.”<sup>9</sup>

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<sup>7</sup> Ewing McDonald & Co Ltd v M&M Products 1991 (1) SA 252 (A) at 256 G

<sup>8</sup> 2.1.1. (Gane I at 203)

<sup>9</sup> Pollak on Jurisdiction, p 1 (2nd ed)

Both of the writers Voet and Froman include in their definitions reference to the power of the Court to enforce its judgment.

Thus the Provincial and Local Divisions of the High Court of South Africa have authority to entertain actions and other legal proceedings within the respective areas over which they have been accorded jurisdiction and to enforce their orders.<sup>10</sup> Straud's judicial dictionary of words and phrases, fourth definition, defines jurisdiction as follows:

“(a) In its narrow and strict sense, the jurisdiction of a validly constituted Court denotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject matter of the issue or (2) to the persons between whom the issues joined or (3) to the kind of relief sought, or to any combination of these factors. In its wider sense it embraces also the settled practice of the Court as to the way in which it will exercise its power to hear and determine issues which fall within its jurisdiction (in the strict sense) or as the circumstances in which it will grant a particular kind of relief which it has jurisdiction (in the strict sense) to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances. (*Garthwaite v Garthwaite* [1964] p356)”

The word “jurisdiction” is capable of a number of meanings. In *Herbstein & Van Winsen* the civil practice of the Supreme Court of South Africa it is used to denote the power or competence that a particular South African Superior Court has to hear and determine an issue brought before it.<sup>11</sup>

The Superior Courts have an inherent jurisdiction to make orders, unlimited to amount, in respect of matters that come before them, subject to certain limitations imposed in some instances by the common law but more often by statute. Inferior

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<sup>10</sup> See Second Schedule to the Supreme Court Act 59 of 1959

<sup>11</sup> *Graaff Reinet Municipality v Van Reyneveld Pass Irrigation Board* 1950 (2) SA 420 (A) at 424; *Herbstein & Van Winsen: The Civil Practice of the Supreme Court of SA* at 37

Courts may do nothing if the law does not permit whereas Superior Courts may do anything if the law does not forbid.

### C. HISTORICAL COMMENT

The High Court of South Africa derives its admiralty jurisdiction from the Admiralty Jurisdiction Regulation Act, No 105 of 1983, which repealed and replaced the Colonial Courts of Admiralty Act of 1890<sup>12</sup>. The 1983 Act is silent upon the extent of the admiralty jurisdiction of, and law applied by the colonial court of admiralty, yet knowledge of this is assumed or expected in light of the provisions of section 6 of the Act.

When the Cape of Good Hope and subsequently Natal became British colonies, English Admiralty law became a part of South African Admiralty law because the Vice-Admiralty Courts which were created in the colonies applied English admiralty law.<sup>13</sup> The jurisdiction of the Vice-Admiralty Courts was similar, but not identical to that of the admiralty court in England. The jurisdiction of the ordinary courts applying Roman Dutch Law was not ousted by the Vice-Admiralty Courts and there was thus a concurrent jurisdiction applicable between the two courts. In 1891 the Vice-Admiralty Courts were abolished by means of the Colonial Courts of Admiralty Act 90.<sup>14</sup>

The Vice-Admiralty Court upon the abolition thereof was succeeded by Colonial Court of Admiralty. The latter Court was established by the Colonial Courts of Admiralty Act of 1890, which became operative on 1 July 1891 in British possessions.<sup>15</sup> In terms of the Act every court in a British possession which had “unlimited civil jurisdiction” was constituted a colonial court of admiralty.

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<sup>12</sup> (53 & 54 Vict c 27)

<sup>13</sup> (see: Bamford 177 -197); 1979 BML 213; 1983 BML 84; Booyen 1973 THRHR 241; 1975 THRHR 387; Bamford 1973 THRHR 450; Hofmeyr Acta Juridica 30; Forsyth 1982 SALJ 255)

<sup>14</sup> supra

<sup>15</sup> s 16

As a consequence of the fact that the South African Supreme Court exercised “unlimited jurisdiction” it was also constituted as a colonial court of admiralty. This situation was left undisturbed by the South Africa Act of 1909<sup>16</sup> and by the Republic of South Africa Constitution Act<sup>17</sup>

The jurisdiction of the Colonial Court of Admiralty was the same as that of the English Admiralty Court as it existed in 1890.<sup>18</sup> The passing of the Admiralty Court Acts of 1840<sup>19</sup> and 1861<sup>20</sup> restored to the Courts of Admiralty a very considerable jurisdiction. The Supreme Court Judicature Act of 1873<sup>21</sup> consolidated the High Court Chancery, the Court of Queens Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court of Divorce and Matrimonial Causes and the London Court of Bankruptcy as the Supreme Court of Judicature. The Act transferred the new High Court all the jurisdiction which had previously been exercised by the different Courts so that each Judge of the High Court could exercise every kind of jurisdiction possessed by it.

Lord Knudsford, the Secretary of State for the colonies, and introduced in the second reading of the Colonial Courts of Admiralty Bill in the House of Lords on 4 March 1890, said that the object of the Bill was: **“to make a more satisfactory arrangement as regards the Constitution of Vice-Admiralty Courts in the colonies and to confer upon the Chief Courts of the Colonies the admiralty jurisdiction”**. In his speech he stated that it was unsatisfactory that they were in a colony two Courts side by side, the Colonial Court and the Vice-Admiralty Court, and that the two Courts very often had concurrent jurisdiction. The object of the Bill was therefore: **“to do away with the Imperial Vice-Admiralty Courts in the Colonies and to transfer the admiralty jurisdiction of the High Court of Justice in England to the Colonial Courts and also to allow inferior Courts in the colonies,**

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<sup>16</sup> (9 Edw 7 c 9)

The Act provided that “all laws in force in the several colonies at the establishment of the Union shall continue in force in the respective provinces until repealed or amended by parliament.”

<sup>17</sup> 32 of 1961

<sup>18</sup> Colonial Courts of Admiralty Act of 1890 s 2(2)

<sup>19</sup> 3 and 4 Vict c 65

<sup>20</sup> 28 Vict c 10

**if the colony is so desiring, to exercise the partial and limited admiralty jurisdiction which the County Courts in England exercise”.** The intention behind Lord Knudsford’s words seem to be that the Colonial Court should have exclusive jurisdiction over admiralty matters and that the confusion caused by the concurrent jurisdiction shall be done away with.

This attempt failed because it was held<sup>22</sup> that the Colonial Court by virtue of Section 2(2) of the Colonial Courts of the Admiralty Act 1890<sup>23</sup> had the jurisdiction of but also applied the law which would have been applied by the English High Court in exercising its admiralty jurisdiction.

The notion that the Colonial Court of Admiralty should have exclusive jurisdiction in admiralty matters was not expressed in the Act itself. As a result thereof the South African Courts in exercising their ordinary jurisdiction entertained matters which presumably would have been intended to be heard by Court exercising admiralty jurisdiction as Colonial Courts of Admiralty. This thus resulted in a parallel Court system where the ordinary Court or the Admiralty Court could hear admiralty matters and apply different systems of law (Roman Dutch law or English admiralty law respectively). This could result in a different result and the ranking of claims in competition with other claims could be completely different. In **Beaver Marine (Pty) Ltd v Wuest**<sup>24</sup> it was held that every Court of law in the Republic of South Africa became a Court of admiralty with the jurisdiction of the English High Court as it existed on 1 July 1891.

A further fact important to the development of the admiralty law was the training and qualifications of the practitioners who appeared in and the Judges who preside over the Admiralty Court.<sup>25</sup>

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<sup>21</sup> 36 and 37 Vict c 66

<sup>22</sup> Crookes & Co v Agricultural Co-operative Union Ltd 1922 AD 423

<sup>23</sup> 53 and 54 Vict cap 27

<sup>24</sup> 1978 (4) SA 263 (A) at 274

<sup>25</sup> Gys Hofmeyr 1982 Acta Juridica 30 at 35

The civil lawyers with the descendants of the medieval canon lawyers and exercised a monopoly over Ecclesiastical and Admiralty Practice. Their number was small but their expertise was formidable.<sup>26</sup> These practitioners founded a college, which became known as the College of Civilians or Doctors Commons.

In 1859 the College was disbanded and the common law lawyers became entitled to appear in the Admiralty Court. By this time, however, the civilian lawyers had already exerted an influence on admiralty jurisprudence and the subsequent influence of the common lawyers was not marked.

### **The Vice-Admiralty Courts**

For obvious reasons it was impractical for admiralty claims in the colonies to be heard in the English Admiralty Court and accordingly Vice-Admiralty Courts were established in the colonies.<sup>27</sup> Vice-Admiralty Courts sat in the Cape and Natal.<sup>28</sup>

The law applied in the Vice-Admiralty Courts was English admiralty law and these Courts and ordinary Courts exercised concurrent jurisdiction. The litigant could accordingly select his Court and the same question could potentially be answered differently in the Vice-Admiralty Court (applying English admiralty law) and in the ordinary Courts (applying Roman Dutch law principles).

This position was rectified to some extent in the Cape by Section 1 of Act of 1879 which provided that all questions relating to maritime and shipping law, in respect of which the Supreme Court had concurrent jurisdiction with the Vice-Admiralty Court, English law was to be applied insofar as it was not repugnant to or inconsistent with the legislation of the colony.

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<sup>26</sup> Hofmeyer at 35

<sup>27</sup> Vice-Admiralty Courts Act 1863 (26 Vict c 24)

<sup>28</sup> Hofmeyer (*supra*) at 43

### The Colonial Courts Of Admiralty Act 1890

This Act came into operation on 1 July 1891 and abolished the Vice-Admiralty Courts<sup>29</sup> and established the Colonial Courts of Admiralty.

The relevant portions of Section 2 of the Act provides as follows:

- “(1) Every Court of law in the British possession, which is for the time-being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purposes of that jurisdiction exercise all the powers which possesses for the purpose of its other civil jurisdiction, and such Court in reference in jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the governor is the sole judicial authority, the expression ‘Court of law’ for the purpose of this section includes such governor.**
- (2) This jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law on the committee of nations.”**

Hofmeyr notes as follows<sup>30</sup>:

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<sup>29</sup> Section 17

<sup>30</sup> Hofmeyr *supra* at 44

“That no Court of law either prior to the colonies becoming the Union of South Africa or subsequent thereto had been declared to be a Colonial Court of Admiralty in terms of Section 2(1) read with Section 3(a) of the 1890 Act.”

The four British colonies which became the Union of South Africa in 1910 were British possessions within the meaning of Section 2(1) of the 1890 Act and every Court of law in those colonies which had unlimited civil jurisdiction became a Colonial Court of Admiralty.

The effect of the 1890 Act was not merely to confer upon the Colonial Courts of Admiralty the same jurisdiction as that exercised by the English High Court of Admiralty but also prescribe the substantive law to be applied.<sup>31</sup>

The effect of the Act was to perpetuate the situation where there existed in South Africa two separate and distinct jurisdictions. The Supreme Court on the one hand exercising its ordinary jurisdiction administering Roman Dutch Law and on the other hand the Supreme Court sitting as a Court of Admiralty applied English Admiralty Law. In form there was thus only one Court but in substance there were two.

The ordinary jurisdiction of the Supreme Court was distinct from the jurisdiction of the Colonial Court of Admiralty. In terms of the ordinary jurisdiction of the Supreme Court an attachment *ad fundandam iurisdictionem* of a ship belonging to a respondent peregrinus could not be ordered by the Court at the instance of a peregrinus if the cause of action did not arise within the Republic. Nor could a peregrine plaintiff sue peregrine defendant in the Supreme Court solely on the basis that the property of the latter had been attached to foreign jurisdiction. A peregrinus plaintiff could not enforce its claim against a peregrinus defendant where the cause of action arose solely outside the jurisdiction.

The jurisdiction of the Colonial Court of Admiralty was wider than that of the ordinary jurisdiction of the Supreme Court. The jurisdiction of the former Court is

such that it has jurisdiction where both the Plaintiff and Defendant were foreigners and the subject matter of the claim had no connection with South Africa if the vessel was arrested within the Republic's waters.<sup>32</sup> Traditionally wide bounds of admiralty jurisdiction exist for the following reasons:

- (a) A ship belonging to a peregrinus defendant presents a moving asset within the territorial jurisdiction of the Court, which may be used to satisfy a claim.
- (b) The chances of satisfying a claim may accordingly be infrequent and of short duration.
- (c) A maritime claim frequently contained international elements.
  - (I) The parties may be foreigners;
  - (ii) The vessel may be registered in the foreign registry;
  - (iii) The cause of action may have arisen outside the territorial waters of South Africa.

The jurisdiction of the Colonial Court of Admiralty, which was created by statute, could not have been extended by the acquiescence or by the express consent of the parties.<sup>33</sup>

Similarly it would appear that the jurisdiction of the current admiralty Court cannot be extended by acquiescence or consent.<sup>34</sup>

#### **D. ADMIRALTY JURISDICTION REGULATION ACT No 105 OF 1983**

The long title of the act reads as follows:

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<sup>31</sup> Beaver Marine (Pty) Ltd v Wueft 1978 (4) SA 263 (A)

<sup>32</sup> MAGAT v MV "HOUDA PEARL" 1982 (2) SA 37 (N)

<sup>33</sup> Galahaji Mai Deribe & Sons v The Ship "Golden Togo" 1986 (1) SA 505 (N) at 508

<sup>34</sup> LAWSA (Vol 25) para 170

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

Section 2(1) provides for the courts which are to have jurisdiction in maritime matters and reads as follows:

**“Subject to the provisions of this Act each provincial and local division, including a circuit local division, of the Supreme Court of South Africa shall have jurisdiction (hereinafter referred to as admiralty jurisdiction) to hear and determine any maritime claim (including, in the case of salvage, claims in respect of ships, cargo or goods found on land), irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.”**

Section 4 providing for the rules of court to be applied reads as follows:

**“Procedure and rules of court- (1) Subject to the provisions of this Act the provisions of the Supreme Court Act, 199 (act No 59 of 1959), and the rules made under section 43 of that Act shall *mutatis mutandis* apply in relation to proceedings in terms of this Act except in so far as those rules are inconsistent with the rule referred to in subsection (2).”**

Section 7(2), which provides for the forum in which maritime claims are to be heard if classified as such reads as follows:

**“When in any proceedings before a provincial or local division, including a circuit local division, of the Supreme Court of South Africa the question arises as to whether a matter pending or proceeding before that court is**

**one relating to a maritime claim, the court shall forthwith decide that question, and if the court decides that-**

**(a) the matter is one relating to a maritime claim, it shall be proceeded with in a court competent to exercise its admiralty jurisdiction, and any property attached to found jurisdiction shall be deemed to have been attached in terms of this Act:”**

Section 14, which reserves the jurisdiction of the Magistrate’s Court in certain instances, reads as follows:

**“Jurisdiction of magistrate’s courts not affected. - This Act shall not derogate from the jurisdiction which a magistrate’s court has under section 131, 136 and 151 of the Merchant Shipping Act, 1951.”**

It is against this backdrop of these provisions of the Act and the Act as a whole that we must look to in order to find the answer to the question posed: “Admiralty jurisdiction in the Magistrate’s Court?”

## **E. INTERNATIONAL COMPARISONS**

### **England And Wales**

#### **The High Court**

In general jurisdiction in admiralty is exercised by the High Court. For administrative purposes the High Court consists of three divisions. As part of the Queens Bench Division there is an Admiralty Court and a Commercial Court.<sup>35</sup> The judges of the Admiralty Court are nominated from the judges of the High Court by the Lord Chancellor.<sup>36</sup> In practice a single admiralty judge has been sufficient to deal with all the business of the High Court ensuring to some extent a high degree of expertise.

<sup>35</sup> Supreme Court Act 1981 (UK) s 51(1), 6(1)

<sup>36</sup> id, s 6(2).

The judge nominated for this position invariably has practised as a member of the admiralty bar.<sup>37</sup> Since approximately 1977 admiralty matters have taken up between a half and the whole time of the admiralty judge and other judges occasionally hear cases also.<sup>38</sup> The Admiralty Court has its own registrar and an Admiralty Marshall. All arrests of a ship or other property are made by the Marshall or in ports distant from London by customs and excise officers acting under directions. There is no centralisation of admiralty proceedings either *in personam* or *in rem*. Appeals from the Admiralty Court follow the ordinary channels to the Court of Appeal and the House of Lords.

### County Courts

County Courts have exercised a limited jurisdiction in admiralty for over a century.<sup>39</sup> Certain County Courts have been nominated by the Lord Chancellor (over 40) to exercise admiralty jurisdiction. This jurisdiction covers actions *in personam* and *in rem* but has a limitation based on monetary limits. General admiralty claims are limited to 5 000 pounds sterling and claims in respect of salvage are limited to cases where the value of the property sold does exceed 15 000 pounds sterling.<sup>40</sup> In the first category the value of the claim as opposed to that of the *res* is the relevant factor and in practice this can result in a very large vessel being arrested in County Court proceedings as long as the claim against it is small.

The parties may also confer jurisdiction outside these limits by means of a signed memorandum of agreement.<sup>41</sup> The jurisdiction of the County Court is further limited by the exclusion of claims or disputes concerning ownership, possession or mortgages of vessels or disputes between co-owners (proprietary maritime claims). County Courts can also not deal with bottomry claims, claims for droits of admiralty, claims for the forfeiture or condemnation of a ship or cargo or claims of a restoration of a

<sup>37</sup> Australian Law Commission Report 33 par 220

<sup>38</sup> In the five years from 1977 to 1981 about 1000 admiralty actions were commenced each year with about 170 warrants of arrest issued annually. Judicial sales of ships during this period totalled 54. About 99% of actions are settled before trial. Source: Judicial Statistics, England and Wales, prepared annually by the Lord Chancellor's department, HMSO, London.

<sup>39</sup> County Court Jurisdiction Act 1868 (UK); County Court Admiralty Jurisdiction Amendment Act 1869 (UK).

<sup>40</sup> 63 County Courts Act 1984 (UK) s27(2)

<sup>41</sup> 64 *id.*, s27(b)

ship or cargo after seizure. Not a great deal of use is made of the admiralty jurisdiction of the County Court where the number of actions commenced fluctuates between 4.5% and 8.5% of the number of actions in the High Court.<sup>42</sup>

Warrants of arrest are infrequent and Court sales rarely occur.<sup>43</sup> The arrests normally involve pleasure craft and may be effected independently of the High Court and the admiralty marshal may be ordered to effect such an arrest.

Comparing the types of matters brought in the County Courts and the High Courts the number of collision claims roughly reflects the general distribution of business between them. Cargo claims are never brought in the County Court. Between a quarter and two fifths of all goods applied/repaired claims are brought in the County Court.

Provision is made for the transfer of cases in both directions between High Court and County Court.<sup>44</sup> There are also provisions allowing only limited costs to be recovered in the High Court if the action could have conveniently been brought in the County Court.<sup>45</sup> The County Court Rules also contain provisions dealing with many of the special features of admiralty proceedings.<sup>46</sup>

The English system allows for certain admiralty matters to be heard in the lower County Courts but this happens in a controlled manner and is as a result of a directive of the Lord Chancellor. This has not occurred as a result of an assertion of these courts of such a right or by merely ignoring the jurisdiction of the superior courts but as a result of the express conferral of such jurisdiction. The English legislation, it must be noted, does allow for the parties to consent to jurisdiction. There is no such provision in the South African Act.

## **New Zealand**

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<sup>42</sup> Australian Law Reform Commission 33 para 222

<sup>43</sup> *supra* at para 222

<sup>44</sup> County Courts Act 1984 (UK) s40-2

<sup>45</sup> *ibid* s29

<sup>46</sup> Hallsbury Laws of England volume 1(1)

The High Court has general jurisdiction in admiralty.<sup>47</sup> District Courts (until 1980 called Magistrate's Courts) have jurisdiction over the full range of admiralty subject matter, but can only exercise jurisdiction *in personam*, not *in rem*.<sup>48</sup> The size of the claim must be within monetary jurisdiction of the District Court unless the parties have agreed otherwise in writing.<sup>49</sup> The District Court Rules provide that all actions are to commence as ordinary actions but do make provision for some of the special features of admiralty procedure such as preliminary acts.<sup>50</sup> There is also a comprehensive provision for the transfer of cases in both directions between High Courts and District Courts.

### **The United States of America**

Federal District Courts have exclusive jurisdiction over admiralty and maritime proceedings *in rem* but have concurrent jurisdiction with State Courts in respect of proceedings *in personam*.<sup>51</sup> In practice the number of admiralty cases brought in State Courts is minimal.<sup>52</sup> Before 1966 the admiralty jurisdiction of District Courts was carried on under a set of procedural rules distinct from those governing its ordinary civil business. It was thus common to speak of Federal Courts on a civil side and an admiralty side.<sup>53</sup> There has never been a system of streaming cases within the Federal Courts in order to allow the development of specialist admiralty Judges.<sup>54</sup> In 1966 the Admiralty Rules were merged with the ordinary Federal Rules of civil procedure reducing the esoteric features of admiralty procedure and thus making admiralty litigation more accessible to the general legal practitioner. There is an ongoing argument that this process did not go far enough and traps for the unwary still exist

<sup>47</sup> Admiralty Act 1973 (NZ) s3(1)(a); Judicature Amendment Act 1979 (NZ) s12

<sup>48</sup> Admiralty Act 1973 (NZ) s3(1)(b); District Courts Amendment Act 1979 (NZ) s2

<sup>49</sup> District Courts Amendment Act 1975 (NZ) s2; Districts Courts Act 1947 (NZ) s37. The arrest limit is \$12 000: District Courts Amendment Act (NZ) s9(1)(a).

<sup>50</sup> District Court Rules 1948 (NZ) r 6, 11, 17

<sup>51</sup> 28 USC 1333 (T).

<sup>52</sup> See the statistics cited by Brennan J in *Romero v International Terminal Operating Co* 358 US 354, 409 (1959) (about 150 cases in state courts in the years 1953 - 1953).

<sup>53</sup> DW Robertson, 'Admiralty Procedure and Jurisdiction after the 1966 Unification' (1976) 74 *Mitch LR Rev* 1627, 1631.

<sup>54</sup> *Op cit* at 80

particularly within the area of ancillary and pendent jurisdiction.<sup>55</sup> Before 1966 admiralty procedure allowed for the broad joinder of related claims and parties as long as the claims were all maritime. However, if the joint claim was not maritime the Court would deny jurisdiction.<sup>56</sup> The reasons for this were as follows:

- (a) To allow a broad joinder would infringe upon the constitutional limitation for the grant of admiralty jurisdiction;
- (b) It could also deprive third parties of their right to retrial, as this does not form part of admiralty action.<sup>57</sup>

### Canada

Admiralty jurisdiction is exercised by the Trial Division of the Federal Court of Canada exclusively *in rem* and concurrently *in personam* with the Provincial Supreme Courts except in New Foundland.<sup>58</sup> In British Columbia, the Provincial County Courts also have admiralty jurisdiction limited both by subject matter and size of claim. In practice almost all admiralty claims are brought in the Federal Court. This special admiralty bar in Canada is very small and tends to favour the Federal Court jurisdiction. The Federal Court may sit anywhere in Canada and is a Court which provides a far more speedy trial than that in Provincial Supreme Courts.<sup>59</sup> The remedies available in the Federal Court but to some extent more effective and rules such as service are more liberal than in some of the provinces and the process of execution is simplified.<sup>60</sup> It appears as if only in British Columbia are admiralty actions brought to any extent to the Supreme Court. The weight of opinion in the legal profession appears to be against conferring *in rem* jurisdiction in the Provincial Court.

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<sup>55</sup> Robertson 1976 1631 and 1646.

<sup>56</sup> Br Bentley, "Third Party Practice in Admiralty: Ancillary Jurisdiction" 1974 28 South Western Law Journal 1021, 1027-8

<sup>57</sup> *supra*.

<sup>58</sup> Federal Court Act 1970 (Can) s22(1)

<sup>59</sup> Australian Law Reform Commission 33, para 240

## **The Federal Court of Canada**

There is no separate admiralty division of the Federal Court. Admiralty rules have been integrated with the ordinary rules of the Federal Court. The elements which are unique to admiralty have been grouped in a separate division within the rules, however, in most respects the general laws apply. The registry of the Court has a separate section which specialises in admiralty matters. Only a Federal Court marshal may arrest a ship.

There is a formal provision in the Federal Court for specialist Judges in admiralty. In practice a degree of *de facto* specialisation has occurred with the bulk of admiralty cases being dealt with by 3 or 4 of the 11 Federal Court Judges.<sup>61</sup>

## **Australia**

In terms of the Colonial Courts of Admiralty Act 190 (UK), which is still applicable in Australia, the High Court and Supreme Court of each State and Territory qualify as Colonial Courts of Admiralty under the Act. It remains an open question whether other superior courts established by statute with original unlimited civil jurisdiction in particular matter (for example the Federal Court) also qualify as Colonial Courts of Admiralty. It is also possible that certain intermediate courts with unlimited civil jurisdiction in particular matters (for example the District Court of Western Australia) so qualify.<sup>62</sup>

Although we in South Africa, to a large extent must find our own way, it does appear that courts in other jurisdictions also favour some form of Admiralty specialisation. Although there is no general practice, there is recognition that Admiralty or maritime law is a complex jurisprudential area due, in part to the international issues that are often involved.

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<sup>60</sup> Canadian Bar Association, Federal Court Report, Ottawa 1983, 29. In 1976, 825 admiralty court actions were filed but only 22 came to trial: Canadian bar Association, 28.

<sup>61</sup> *supra*

<sup>62</sup> Australina Law Reform Commission Report paragraph 218

**F ADMIRALTY CASE MANAGEMENT IN THE HIGH COURT OF SOUTH AFRICA (CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

I spoke to the Judge President of the Cape of Good Hope Provincial Division on 19 January 1999 in order to ascertain whether there was any policy with respect to the allocation of admiralty trials and opposed applications to Judges with admiralty experience. The Judge President, the Honourable Mr Justice King, stated that the general principle and approach was to ascertain which Judges were available to hear admiralty matters and if a Judge with admiralty experience was available the matter would in the normal course be assigned to them. He stated, however, that if such a Judge were not available the matter would not be held back in order to wait for such availability. In this situation the matter would be allocated to a Judge in the normal course.

**Case Study**

In the course of doing research for this dissertation I examined the Archives of the Registrar of the High Court of the Cape Provincial Division in order to get a perspective of a typical cross-section of admiralty matters launched in the High Court. For the year 1998, 155 admiralty Court case numbers were assigned. Many of the files were not complete and I am unable therefore to give a statistically accurate analysis of the details of those 155 matters. Save to say that many of them were arrests *in rem*, security arrests and maritime claims representing a broad cross-section of those contained within Section 1(1) of the Admiralty Jurisdiction Regulation Act. Many of the matters originated in the Third Division (that is a Motion Court) and is therefore the reason for the broad cross-section of Judges that are reflected in the files. The quantum of the claims range from claims in the amount of R7 890,00 to matters dealing with claims quantified in millions of US Dollars. Several claims were within the monetary jurisdiction of the Magistrate's Court (that is no greater than R100 000,00). One claim was in respect of seamen's wages and I make note of this specifically for the reason that in terms of Section 14 of the Admiralty Jurisdiction Regulation Act such jurisdiction is specifically reserved for the Magistrate's Court in

terms of the Merchant Shipping Act. A particular case<sup>63</sup> involved an application in the High Court inviting the Court to refuse to exercise its admiralty jurisdiction and to refer the matter to the Magistrate's Court for hearing in terms of Section 7(1)(a) of the AJRA. The Court was referred to the case of the *Wave Dancer*<sup>64</sup>. Most of these matters have come to the end of their lifespan in that the arrests with which they were concerned have produced the desired result, that is security has been paid for proceedings which are occurring elsewhere outside the jurisdiction of the High Court of the Cape Provincial Division. Most of them are not yet ripe for full trial.

### **Contemporary Admiralty Jurisdiction In South Africa**

The High Court in each provincial and local division including the circuit local division is vested with admiralty jurisdiction. The area of jurisdiction of an Admiralty Court is deemed to include a portion of the territorial waters of the Republic adjacent to the coastline of its area of jurisdiction.<sup>65</sup> Unlike the Colonial Court of Admiralty, the Admiralty Court has exclusive jurisdiction to hear and determine any maritime claim. Section 7(2) to (4) of the Admiralty Jurisdiction Regulation Act 105 of 1983 provides as follows:

- “(2) When in any proceedings before provincial or local division, including the circuit local division, of the Supreme Court of South Africa the question arises to whether a matter pending or proceeding before the Court is one relating to a maritime claim, the Court shall forthwith decide that question, and therefore if the Court decides that -**
- (a) the matter is one relating to a maritime claim, it shall be preceded with in the Court competent to exercise its admiralty jurisdiction, and any property attached to find jurisdiction shall be deemed to have been attached in terms of this Act;**

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<sup>63</sup> 47/98 AC 437/98

<sup>64</sup> *Nel v Toron Screen Corporation (Pty) Ltd & Another* 1996 (4) SA 1167 (A) at 1176 H-J

<sup>65</sup> Admiralty Jurisdiction Regulation Act 105 of 1983, Section 2(2)

- (b) **the matter is not one relating to a maritime claim, the action shall proceed in the division having jurisdiction in respect of the matter: provided that if jurisdiction was conferred by the attachment of property by a person other than an *incola* of the Court, the Court may order the action to proceed as if the property had been attached by an *incola*, or may make such order, including an order dismissing the action for want of jurisdiction, as it appears just.**
- (3) **The provisions of sub-section (2) shall not effect any other objection to the jurisdiction of any Court.**
- (4) **No appeal shall lie against any decision or order made under sub-section (2).”**

In the light of the foregoing provision of the Act, the Court must determine whether the claim before it is classified as a maritime claim. If it is determined that the matter relates to a maritime claim it must be proceeded with in a Court competent to exercise admiralty jurisdiction. If it is found that the matter before the Court does not relate to a maritime claim the action shall be preceded with in the division having jurisdiction in respect of the matter. The Act does not make provision for a matter in these circumstances to be transferred to the Magistrate’s Court. However, once the matter is before a High Court division with ordinary jurisdiction an application may be brought in the normal course for the matter to be transferred to the Magistrate’s Court.<sup>6667</sup>

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<sup>66</sup> Uniform Rules of Court, Rule 39(22)

<sup>67</sup> This approach was followed in *Peros v Rose* 1991 (4) SA 20 (N) at 424 D

### The Magistrate's Court Jurisdiction

The Magistrate's Court has been called a "creature of statute".<sup>68</sup> The Magistrate's Courts were established by legislation and they possess only such powers as have been granted to them by relevant legislation. They have no inherent jurisdiction but only such powers as fall within the four corners of the Act.<sup>69</sup>

The Magistrate's Court may thus deal only with the case with which it is expressly or by necessary implication authorised to deal with by the Magistrate's Court Act.<sup>70</sup>

This does not mean that such a Court has no powers or authority which are not stated in so many words in the Act or that it is necessary to give those powers. Such a restrictive interpretation as to practically, in many cases, lead to a miscarriage of justice.<sup>71</sup> Authority may be implied as well as expressed. It must be remembered that the doctrine of implied jurisdiction can only arise where the Act is silent. Apart from jurisdiction conferred upon the Magistrate's Court by the Magistrate's Court Act 32 of 1944 there are several other Acts conferring jurisdiction upon the Magistrate's Court.<sup>72</sup>

It is generally speaking the case that the High Court retains concurrent jurisdiction with the Magistrate's Court. A Plaintiff is *dominus litis* and is accordingly entitled to choose his or her remedy and the forum in which the matter is to be heard. If a lower Court has jurisdiction in the matter then it can be dealt with in that Court, usually, at less expense to the litigants, the High Court can discourage the approach to it by an appropriate costs order.<sup>73</sup>

<sup>68</sup> *Riversdale Divisional Council v Pienaar* (1885) (3) SC 252

<sup>69</sup> Magistrate's Court Act 32 of 1944

<sup>70</sup> *Van der Merwe v De Villiers & Ano* 1953 (4) SA 670 (T) at 672-3

<sup>71</sup> *R v Boon* 1913 TPD 12 at 14

<sup>72</sup> The Child Care Act 74 of 1983; The Maintenance Act 23 of 1963; The Close Corporations Act 69 of 1984; Section 136 of the Merchant Shipping Act 57 of 1951; Sections 10 and 17 of the Waterbeespoort Irrigation Scheme (Crocodile River) Act 32 of 1914; Section 30 of the Fencing Act 31 of 1963; Sections 9 and 20 of the Forest Act 72 of 1968; Section 95(3) of the Customs and Excise Act 91 of 1964; Section 24 of the Alienation of Land Act 68 of 1981; Section 57 of the Powers and Privileges of Parliament Act 91 of 1963; Section 52 of the South African Citizens in Antarctica Act 55 of 1962; Section 29 of Ordinance 11 of 1977(T); Section 170 and Section 17 of Schedule 6 of the Constitution of the Republic of South Africa, Act 108 of 1996

<sup>73</sup> *Standard Credit Corporation Ltd v Bester* 1987 (1) SA 812 (W) at 819

Prior to 1917 it was held in a number of cases that when it appears that the matter before the Court was outside the jurisdiction of that Court, the Court should refuse to proceed *mero motu*.<sup>74</sup> With reference to Act 32 of 1917 it was held that the Court was bound to refuse jurisdiction only in respect of matters expressly excluded by Section 44 (section 44 now corresponds with section 46 of the Act). It has been held that Section 43 (now Section 45) required a written agreement to confer jurisdiction in respect of causes of action or amount.<sup>75</sup>

Where, however, the defendant was not in his or her person subject to the jurisdiction of the Court of the particular district sued in, the absence of jurisdiction is a mere personal privilege that can be waived. A failure to take objection thereto timeously, conferred jurisdiction in terms of Section 28(1)(f).<sup>76</sup>

Where the matter falls under Section 46 the Court must *mero motu* decline jurisdiction.<sup>77</sup> Section 46 deals with the following:

- (a) The dissolution of marriage or separation from bed and board or goods of married persons subject to the provisions of the Indian Immigration Law No. 25 of 1891 of Natal;
- (b) The validity or interpretation of a will or other testamentary document;
- (c) Any matter in which the status of a person in respect of mental capacity is sought to be effected;
- (d) Any matter in which specific performance is sought without an alternative payment of damages (excluding certain matters);
- (e) Any matter in which a decree of perpetual silence is sought.

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<sup>74</sup> *Garda v Bonato* 1913 TPD 810

<sup>75</sup> *Fineberg v Frieman* 1936 TPD 133

<sup>76</sup> *Fineberg v Frieman (supra)*; *Carlitz v Lyle* 1928 CPD 544

<sup>77</sup> *Jones & Buckle: Civil Practice of the Magistrate's Courts in South Africa* (9th ed) Act 36

In these circumstances the court must decline jurisdiction even where the Defendant fails to make an objection.

The objection that the Court has no jurisdiction is ordinarily raised by means of a special plea.

## **G THE ARGUMENTS RAISED FOR AND AGAINST ADMIRALTY JURISDICTION IN THE MAGISTRATE'S COURTS**

### **(i) Admiralty Jurisdiction by Means of the Consent of the Parties**

One of the issues that has been raised in this debate is whether the parties can merely ignore the constraints of exclusive jurisdiction and consent thereto. This debate is set out below.

The Magistrate's Court jurisdiction in respect of amount may be increased by consent but subject to the limitations as set out in Section 46 of the Magistrate's Court Act. The consent must be in writing, but may also be given in advance and may be a general consent to cover proceedings not contemplated at the time of the giving of the consent. Where the parties contemplate conferring jurisdiction upon a Court which would not normally have jurisdiction over the person of the defendant under Section 28 they may do this by consent, but the consent must refer specifically to the proceedings already instituted or about to be instituted in the Court contemplated.<sup>78</sup> The consent need not be in writing for it is sufficient if the defendant merely appears and makes no objection to the jurisdiction of the Court.<sup>79</sup>

A consent under Section 45 cannot purport to give a Magistrate's Court jurisdiction where special tribunals or Courts had been established by statute.<sup>80</sup> Such special

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<sup>78</sup> Van Heerden v Muir 1955 (2) SA 376 (A)

<sup>79</sup> Muller v Möller 1965 (1) SA 872 (C)

<sup>80</sup> See Jones & Buckle (*supra*) at 186

tribunals include the special Court for hearing income tax appeals (Section 83 of the Income Tax Act 58 of 1962), the Court of the Commission of Patents (Sections 16 to 19 of the Patents Act 57 of 1978), the Copyright Tribunal (Sections 29 to 30 of the Copyright Act 98 of 1978), the Court of the Workmen's Compensation Commissioner (Compensation for Occupational Injuries and Diseases Act 130 of 1993), the Special Court for hearing appeals under the Promotion of Competition Act 96 of 1979, and the Compensation Courts established under Section 16 of the Expropriation Act 63 of 1975. Arguably the Admiralty Court as established by the Act would also be one of these tribunals.

There are divergent opinions on the issue of whether consent should be express or tacit. It has been held that the provision that the Court may not hear a matter without the written consent of the parties is a provision put in for the benefit of the parties and the consent may be inferred from their conduct which amounts to a waiver of their right to object to the jurisdiction of the Court.<sup>81</sup> There is no authority that a defendant may waive his or her rights to object to the jurisdiction. This conclusion was arrived at, however, on the basis that the Learned Judge in the *Hydromar* matter<sup>82</sup> assumed that waiver is possible upon the concession thereto by counsel for the defendant.<sup>83</sup> On the other hand it has been held that consent by silence is in direct conflict with Section 45 and that consent to an extension of jurisdiction is not prohibited but can only be given in writing. The learned authors Jones & Buckle preferred the latter view and state that: "the express requirement of the section of a written consent cannot be overwritten by mere acquiescence or waiver".<sup>84</sup>

Section 2 of the Admiralty Jurisdiction Regulation Act, Act 10 of 1983 (the Act) provides that each Provincial and local Division of the Supreme Court shall have jurisdiction to hear and determine any maritime claim. A maritime claim is defined in section 1(1) of the Act as meaning a claim arising out of and relating to a number of categories.

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<sup>81</sup> *Hydromar (Pty) Ltd v Pearl Oyster Shell Industries (Pty) Ltd* 1976 (2) SA 384 (C)

<sup>82</sup> *supra*

<sup>83</sup> At 388 A-B

<sup>84</sup> Jones & Buckle (*supra*) at 187

Section 2 of the Act specifies that the jurisdiction to hear a maritime claim vests in the Supreme Court.

In Peros v Rose 1990 (1) SA 420 (NPD), Page J said the following:

“In the light of this background it seems clear that it was the intention of the Legislature, insofar as the matters falling within s 6(1)(a) of the Act are concerned, to confer upon the Supreme Court, exercising its admiralty jurisdiction, exclusive jurisdiction to adjudicate upon such claims in accordance with maritime law because these were, by their nature, peculiarly suited to be determined according to that law. It follows further that the legislature intended this jurisdiction to be limited to such claims since it is only in the case of such claims that there exists any justification for not deciding them in accordance with the common law. This jurisdiction will be referred to as the old jurisdiction.”

The foregoing *obiter dictum* has not been dissented from in any reported case.

The meagre authority that there is seems to suggest and support the view that the Supreme/High Court, exercising its admiralty jurisdiction, has exclusive jurisdiction in respect of maritime claims.

This would *prima facie* deprive a Magistrate’s Court of jurisdiction to hear such claims.

However, the position is not necessarily that simple. Section 45 of the Magistrate’s Court Act regulates the Magistrate’s Court jurisdiction as follows:

**“Subject to the provisions of section 46, the Court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto: provided that no Court other than a Court having jurisdiction under section 28 shall, except where such consent is given specifically with reference to particular proceedings**

already instituted or about to be instituted in such Court shall, have jurisdiction in any such matter.”

A cogent argument can be put forward that in the light of this provision it is open to the parties to consent to the adjudication by a Magistrate’s Court of a maritime claim.

There is a lack of uniformity in the reported cases in respect of what would constitute such consent. In the following cases the Courts have favoured the view that the consent must be expressly given:

**Dyter & Tiran v Foster 1922 OPD 218**

**Calitz v Lyle 1928 CPD 544**

**Hall v Jackson 1930 CPD 183**

**Fineburg v Frienman 1936 TPD 133**

**Licences and General Insurance Co v Bassano 1936 CPD 179 at 188**

**Sebastian v Malelane Irrigation Board 1953 (2) SA 55 (T)**

Contrary to the previous authorities it has been held in a number of cases that the provisions that a Court may not hear a matter without the written consent of the parties may be waived by such parties.

*See:* **Trust Bank of Africa Bpk v Voges 1963 (3) SA 841 (SWA)**

**Truter v Raubenheimer 1929 CPD 510**

**Union Government v Van der Vlies 193 OPD 79 at 83**

**Van Blerk v Volkskas Ko-op Bpk 1942 TPD 229 at 236**

Even if the latter view is the correct one it must be borne in mind that waiver is notoriously difficult to prove. In order to prove waiver one has to show that with the full knowledge of a particular right the party acted in a manner inconsistent with an intention to enforce that right.<sup>85</sup>

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<sup>85</sup> *Lords v Rutherford* 1924 AD 261

The case of **Truter v Raubenheimer**<sup>86</sup> can be of much assistance to those attempting to advance a proposition that parties can consent to the jurisdiction of the Magistrate's Court in admiralty matters after the claim arose. In this particular case the Court had considered a provision which provided that a Magistrate's Court was precluded from adjudicating disputes concerning water rights in the absence of a written consent by the parties. **Waterman AJ** said the following at page 513:

“In the case of *Carlitz v Lyle* 1928 CPD 588 it was decided that the consent required to give the Magistrate jurisdiction is a written consent, but it seems to me that this case stands in quite a different footing from the case of *Carlitz v Lyle*. In that case the objection was taken to the Magistrate trying the case before the pleadings were closed and before the case was heard in the Magistrate's Court. In the present case no objection was taken to the Magistrate hearing the case and, in addition to that, the defendant himself put in a counterclaim dealing with these water rights. It seems to me that this provision that no Magistrate's Court shall try a question involving water rights except with the consent of the parties the provision put for the benefit of the parties; they can come to the Magistrate's Court if they consent and, in my opinion, the circumstances make it perfectly plain that the parties actually consent to this case being tried in the Magistrate's Court. They did not put the consent in the form required by the Act, but, if at the time the case came into Court, attention was drawn to the fact that the consent was not in writing, they could then and there have drawn up a written consent. In my opinion, therefore, it is too late now for the defendant to attempt to take the point that the Magistrate had no jurisdiction. His conduct in not taking any objection to the case being heard and in filing a counterclaim, and thereafter in appealing from the Magistrate's decision amounts, in my opinion, to a waiver of his right to take the objection, even though there was no written consent before the Magistrate when this case came into Court.”

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<sup>86</sup> *supra*

Similar considerations could apply in a situation where the parties consented to the jurisdiction of the Magistrate's Court in an admiralty matter whether expressly or tacitly.

The position of this approach would seem to be based on the following premises:

- (a) The High Court has exclusive jurisdiction in respect of maritime claims;
- (b) The parties can, however, under Section 45 of the Magistrate's Court Act, vest a Magistrate's Court with jurisdiction in respect of matters otherwise beyond this jurisdiction.

Such vesting may be inferred from the fact that a defendant took no objection to the jurisdiction, filed a counterclaim in respect of the *res* at issue which the Magistrate's Court would otherwise be precluded from dealing with, and thereafter took certain steps in the prosecution of the trial.

This raises the issue of whether Admiralty Jurisdiction can merely be conferred upon a court which otherwise would not have such jurisdiction with the mere consent of the parties. It also raises the question of whether the legislature has specifically granted such jurisdiction to the Admiralty Courts and that the individuals concerned can't of their own accord alter and redirect the intention of the Legislature.

In order to obtain a clearer perspective of exclusive jurisdiction I have looked at 2 Acts which appear to reserve exclusive jurisdiction for specific tribunals.

### **Income Tax Act No 58 Of 1962**

Section 83(1) of the Income Tax Act provides as follows:

**“Any person entitled to make an objection who is dissatisfied with any decision of the Commissioner as notified to him in terms of sub-section (4)**

**of Section 81 may appeal therefrom to a special Court for hearing income tax appeals, constituted in accordance with the provisions of this section.”**

Sub-section (4) states as follows:

**“Any appeal lodged under the provisions of the Income Tax Act, 1941, may be heard and determined by any Court constituted or deemed to be constituted in terms of the provisions of this Act.”**

It must be noted that the Income Tax Act in its language does not emphatically reserve the jurisdiction of tax disputes between a taxpayer and the Commissioner for the Special Tax Court. However, in spite of this non-emphatic language the Magistrates Court would not have jurisdiction to hear such a matter. It is submitted that this situation is analogous to that of maritime claims being heard in the High Court exercising admiralty jurisdiction. Although there may be no emphatic language in the Admiralty jurisdiction regulation Act and although Section 46 makes no provision for the exclusion of jurisdiction in tax matters it does not have such jurisdiction. Similarly it can be argued that neither does the Magistrate’s Court have jurisdiction in respect of Admiralty matters.

#### **The Water Act, No 54 Of 1956**

#### **Truter v Raubenheimer 1929 CPD 510**

This matter essentially involved a dispute concerning water rights. Plaintiff claimed damages in the Magistrate’s Court. The Defendant did not object to the jurisdiction of the Court but filed a counterclaim. After an adverse judgment, Defendant applied for a review of the proceedings on the ground that the Court had no jurisdiction. The Court held that the conduct of the Defendant amounted to a waiver of the benefits of the provisions of Act No. 8, 1912 Section 34 thereof requiring the consent of the parties to the jurisdiction to be lodged in writing and accordingly refused the application for review.

In terms of Section 34 of Act No. 8 of 1912, a Magistrate's Court had jurisdiction to decide a matter of water rights if the parties consented thereto. A specific provision is made in the Act for such consent. The Learned Judge, his Lordship Mr Justice Watermeyer J, distinguished the matter from the case of **Calitz v Lyle 1928 CPD page 544** in which it was held that the consent had to be in writing. The case was distinguished on the basis that objection was taken after the close of pleadings but prior to the case being heard. In **Truter v Raubenheimer** no objection was taken to the jurisdiction of the Magistrate until a determination of the rights had been made. The Court accordingly held that the provision that no Magistrate's Court shall try a question involving water rights except with the consent of the parties is a provision legislated for the benefit of the parties. The Court held that the conduct of the Defendant in not taking any objection to the case being heard and in filing a counterclaim amounts to a waiver of his right to object to the jurisdiction of the Court.

Reliance on **Truter v Raubenheimer** is problematic as it deals with provisions relating to the Water Courts. Section 43 of the Water Act provides as follows:

**“Original jurisdiction as to water disputes. -Except as provided in this Act or with the written consent of all the parties concerned, no court other than a water court shall have jurisdiction in the first instance to hear and determine any dispute or claim arising out of or in connection with any matter referred to in section forty, and no process shall issue out of any other court.”**

The Water Act makes express provision for parties to consent in writing to a court or forum other than the Water Court. There is, in contrast, no such provision in the Admiralty Jurisdiction Regulation Act.

There are good reasons for recognising admiralty as a distinct jurisdiction. The long history of admiralty as a distinct jurisdiction has created international business expectations, arrangements and practices that rely on the fact that jurisdiction will be asserted over ships and ship owners in recognised conventional ways. For these reasons it is desirable to accept the broad contours of what is traditionally and internationally accepted as falling within admiralty jurisdiction.

(ii) **Principles to be Applied in the Interpretation of the Admiralty Jurisdiction Regulation Act**

**The preamble and the long title**

The preamble to an act sets forth the objects of that act in a solemn and often in a non-technical way. It is trite law that a preamble to an act may be consulted in order to shed light upon the meaning of a particular provision of the said Act. The long title of an Act is less solemn and more directly to the point and concise than the preamble. The long title forms the structural part of an Act summarising fairly fully the subjects with which the Act deals as well as the general aims and objectives of the Act.

To determine the purpose of the legislature, it is necessary to have regard to the Act as a whole and not to focus attention on a single provision to the exclusion of all others. **“To treat a single provision as decisive ... might obviously result in a wholly wrong conclusion”**.<sup>87</sup>

Each enactment has its own history which sheds light upon the historically definable place it holds within a particular order of law. Accordingly the historical context within which an enactment obtains is an important part of the overall context which must be accounted for in construing that enactment. In this regard the Report of the South African Law Commission, as set out hereunder, becomes important.

*Iudices est ius dicere sed non dare/facere* is a well-known and widely recognised precept in South African case law. It has been applied in the field of interpretation under the banner of the rule that the interpreter is not allowed to part with, go beyond or read anything into the clear words of an enactment. It is submitted that in finding that the Magistrate’s Court has jurisdiction to hear maritime claims goes beyond the clear words of the Admiralty Jurisdiction Regulation Act.

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<sup>87</sup> S v Looij 1975 (4) SA 703 (RA) at 705

The legislature does not intend to alter the existing law more than is necessary. This is a seminal presumption which has been applied in numerous cases.<sup>88</sup>

It is an all pervasive presumption that the interpretation of the provision of a statute should always be contextual in regard to the statute as a whole and also in regard to other cognate statutes and finally in regard to the common law. The application of this presumption facilitates legal certainty and the effect of administration of justice.<sup>89</sup>

The Admiralty Jurisdiction Regulation Act is very clear in section 7 thereof as to the exclusivity of the High Court exercising its admiralty jurisdiction, if the claim is a maritime claim and is found to be such. A high Court, exercising ordinary municipal jurisdiction, does not have jurisdiction to hear maritime claims and even less so a Magistrate's Court, for it would be absurd for one and not the other to have jurisdiction. It also seems absurd that a Magistrate's Court can exercise the procedures and principles of admiralty jurisdiction when a High Court exercising ordinary municipal jurisdiction cannot.

### **The Legislature does not intend absurd or anomalous results**

This presumption relates to the reasonable and the logical thought processes of the legislature. It is a presumption that the Courts endeavour to uphold it consistently.<sup>90</sup> *Venter v R*<sup>91</sup> is a *locus classicus* in regard to the question of absurdity and was held by the Court that it was permissible to depart from an ordinary meaning of words where such meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature.<sup>92</sup>

It is submitted that the Legislature did not intend there to be two courts existing side by side to hear Admiralty matters, the one applying ordinary Roman Dutch Law or South African Law and the other Admiralty Law.

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<sup>88</sup> *Grgin v Grgin* 1960 (1) SA 824 (W) at 827

<sup>89</sup> Du Plessis: Interpretation of Statutes 69

<sup>90</sup> *Venter v R* 1907 TS 910

<sup>91</sup> 1907 TS 910

<sup>92</sup> *Supra* at 915

**The Legislature does not intend to make any provision which is futile, nugatory, unnecessary or meaningless**

This presumption has its origin in Roman law. In the judgments of the Courts it often finds expression in a familiar maxim *verba ita sunt intellegenda ut magis veleat quam pereat*, which means that such a statute should be interpreted to render it effective rather than inoperative. This has to be done by considering the objects which the Act was intended to effect.<sup>93</sup>

A statute must therefore be construed to render it effective, intelligible and valid, rather than in a manner that would defeat its purpose. Thus, if two or more interpretations of the provisions are possible, the one rendering the provision valid or effective should be preferred over the competing interpretation that results in ineffectiveness, invalidity or confusion.<sup>94</sup>

It would be absurd to have a legal system where there is concurrent jurisdiction in the Magistrate's Court and High Court, exercising its admiralty jurisdiction, which would have different results dependent on the forum chosen and more significantly where the rights of third parties could be affected with disparate results depending on the jurisdiction. The fact that the Legislature specifically reserved the jurisdiction of the Magistrate's Court in certain matter and would not have done so if it was merely a nugatory, unnecessary or meaningless provision.

**The presumption against a *casus omissus***

Where a statute has two possible interpretations, one of which leads to a *casus omissus*, the other one should be applied.<sup>95</sup>

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<sup>93</sup> Devenish: Interpretation of Statutes (1st ed) p 207

<sup>94</sup> Kenean v Minister of Labour 1945 AD 400 at 403; R v Levy 1953 (3) SA 466 (A); Port Elizabeth Municipality v Uitenhage Municipality 1971 (1) SA 724 (A) at 738

<sup>95</sup> Dhanabakium v Subramamian & Ano 1943 AD 160 at 170; Meiring NO & Olivier NO v Kismeran NO v Van Schoor 1958 (3) SA 511 (C)

The same meaning is implied by the use of the same word or expression in every part of the statute. Intelligibility of language requires a measure of consistency.<sup>96</sup>

### Peremptory provisions

A distinction is drawn between peremptory, imperative, mandatory and directory provisions in the interpretation of statutes. It is generally accepted that non-compliance with a peremptory provision results in a nullity.<sup>97</sup> Language of a predominantly imperative nature is taken to be indicative of peremptoriness, e.g. the verb “shall”.<sup>98</sup> The use of words importing an alternative, e.g. the verb “may”, indicates that nullity is not to result in the case of non-compliance.

Courts also look at purpose and purport in deciding whether a provision is peremptory or directory. Should insistence on the strict compliance with the terms of the provision cause great inconvenience or result in greater improprieties than non or defective compliance the validity would generally be accepted.<sup>99</sup>

Court procedures are regarded as being predominantly peremptory.<sup>100</sup> Peremptoriness is, as a general rule, favoured.<sup>101</sup>

If a word or words are used, which have an affirmative or imperative character this is an indication that the legislature intends the provision to be peremptory. Thus for instance the word “shall” has such a connotation.<sup>102</sup>

In the light of these interpretative tools it is submitted that it would be a nonsense to construe that the Legislature intended the Magistrate’s Courts to exercise jurisdiction over Admiralty matters otherwise in limited circumstances. If this were not the case one would expect the Legislature to have phrased the Act in such a way that a litigant

<sup>96</sup> Minister of the Interior v Machado Dorp Investments (Pty) Ltd & Ano 1957 (2) SA 395 (A)

<sup>97</sup> Schierhout v Minister of Justice 1926 AD 99 at 110

<sup>98</sup> Fineberg v Pietermaritzburg Liquor Licensing Board 1953 (4) SA 415 (A) at 419

<sup>99</sup> Palm 15 (Pty) Ltd v Cotton Tail Homes (Pty) Ltd 1978 (2) SA 872 (A) at 885

<sup>100</sup> Jockey Club of South Africa v Feldman 1942 AD 340 at 359

<sup>101</sup> Standard Bank v Estate Van Rhyn 1925 AD 266 at 274

<sup>102</sup> Messenger of the Magistrate’s Court, Durban v Pillay 1952 (3) SA 678 (A) at 683 C-D

would chose whichever court, Magistrate's, High or Admiralty to exercise jurisdiction the only difference being the procedure that would be adopted in addition the law that would be applied.

(iii) **Section 7(1)(A) of the Admiralty Jurisdiction Regulation Act**

I have referred to an unreported case earlier heard in the Cape Provincial Division of the High Court exercising Admiralty Jurisdiction in terms of which the honourable judge refused to exercise jurisdiction and referred the matter to the Magistrate's court. In this particular matter there was not an extensive judgement but merely an in tempore judgement in terms of which the judge justified the decision on the provisions of section 7(1) (a) of the Act. Accordingly it is necessary to consider these provisions.

The Admiralty Court is granted a discretion by the Legislature in terms of Section 7(1)(a) of the Act whether or not to exercise its jurisdiction. The aforesaid Section provides as follows:

- “(a) A Court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that the action can more appropriately be adjudicated upon by another Court in the Republic or by any other Court, tribunal or body elsewhere.**
  
- (b) A Court may stay in the proceedings in terms of this Act if it is agreed by the parties concerned that the matter in dispute be referred to arbitration in the Republic or elsewhere or if for any other sufficient reason the Court is of the opinion that the proceedings should be stayed.”**

This provision was introduced into South African admiralty jurisdiction from Scottish Law where the principle was established that a Court can decline to exercise jurisdiction on the grounds of *forum non conveniens*. This principle is not accepted in

English law. The provisions in the above Sections of the Act were in part introduced in order to prevent “forum shopping”. If Section 7(1) is interpreted in such a way that the Admiralty Court may refuse to exercise its jurisdiction over a maritime claim because it is of the view that it is more appropriately to be determined in the Magistrate’s Court the question arises whether the Magistrate’s Court must exercise admiralty jurisdiction. Section 7(1) was introduced into the Act, as has already been stated, to provide for a mechanism where an Admiralty Court held that it was a *forum non conveniens*.<sup>103</sup>

**Great River Shipping v Sunnyface Marine**<sup>104</sup> was the first case in South Africa to deal in detail with *forum non conveniens* doctrine in the light of the provisions of Section 7(1)(a) and the decision in the *Spiliada*.<sup>105</sup> The Court accepted that section 7(1) embodied the *forum non conveniens* doctrine which had been applied in Scotland and had become accepted in England through the series of cases starting with the *Atlantic Star* and culminating in the *Spiliada*.

Section 7(1)(a) provides not only for proceedings already instituted but also proceedings to be instituted, with regards to which the Court can, so to speak, decline jurisdiction in advance. The provisions also apply with regard to another Court in the Republic, but also to Courts elsewhere and also to any tribunal or body.

The use of the word “appropriately” gives a reasonably clear indication that the origin of this section is to be found in the Scottish rules as to *forum non conveniens* where it is clear that the word “conveniens” is properly translated as appropriate.<sup>106</sup> It has been repeatedly stressed in Scotland that it is necessary to look at the whole of the circumstances of the case to see which forum is more appropriate.<sup>107</sup> Among the elements which had been held to be relevant are:

- (a) That the question raised is one of foreign law;

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<sup>103</sup> See *Katagum Wholesale Commodities Co Ltd v The MV “PAZ”* 1984 (3) SA 261 (N)

<sup>104</sup> 1992 (4) SA 313 (C)

<sup>105</sup> [1987] Vol 1 Lloyds Rep 1 (HL)

<sup>106</sup> *Robbinson v Robbinsons Trustees* 1930 SCH (HL) (20) at 24

<sup>107</sup> *Argyllshire Weavers Ltd v A MacCaulay (Tweeds) Ltd* 1962 SC 388, 391 and 400

- (b) That the proof must be by foreign witnesses;
- (c) That neither party is resident within the jurisdiction;
- (d) That *litis contestatio* occurred earlier in another country.<sup>108</sup>

Questions of costs, of effectiveness and of any difficulty of obtaining a proper hearing and proper decision would be regarded as relevant factors.<sup>109</sup>

Section 7(1)(b) deals with question of arbitration and inferentially it would therefore appear that the “Court, tribunal or body”, referred to in Section 7(1)(a) is not an arbitration tribunal.

In this matter which was heard on appeal no reference had been made in the pleadings or during the trial to the Admiralty Jurisdiction Regulation Act 105 of 1983 and the Court *a quo* had simply exercised its ordinary civil jurisdiction. In the majority judgment regard was had to Section 7 of the Admiralty Jurisdiction Regulation Act and it was found that two principles emerged from that provision:

- (i) That an Admiralty Court was empowered by Section 7(1)(a) to decline to exercise its admiralty jurisdiction if it was of the opinion that another Court or body could more appropriately hear the matter, and that it was thus not peremptory that maritime actions be heard by admiralty Court; and
- (ii) That if the question of jurisdiction was raised and proceedings be put before a Provincial Local Division of the Supreme Court, such Court had to determine the issue, and if it were to decide that the matter related to a maritime claim, it had to order that the matter be proceeded with in a maritime Court.

The Court held that if the question of jurisdiction was not raised before such Court, and it therefore failed to make a decision, it was not precluded from exercising its

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<sup>108</sup> Shaw Admiralty Jurisdiction and Practice in South Africa 1987

<sup>109</sup> The Eleftheria {1969} 2 All ER 641 at 645

ordinary jurisdiction. (Minority came to the same conclusion)<sup>110</sup> Scott JA held at 1175 C that in terms of the provisions of Section 3(3) an acting *in personam* for the enforcement of a maritime claim contemplated in paragraph (i) or (r) of the definition of a maritime claim (now paragraphs (j) and (u)) may not be instituted in the Transvaal Provincial Division in the exercise of its admiralty jurisdiction unless the claim arises out of an agreement which was concluded with the area of jurisdiction of that Court. He held further that the provisions are clearly peremptory and the parties to such an action may not by submission confer jurisdiction on the Court. He stated further that it follows that once the Court decides in terms of Section 7(2) that the above matter proceeding before it is a maritime claim with the kind referred to above which does not arise out of the agreement concluded within the area of jurisdiction, the Court would not be competent to continue to hear the matter and it would have to be proceeded with in a Court competent to exercise admiralty jurisdiction.

The relevant provisions in respect of Section 3(1) and 3(3)(a) are as follows:

- “3(1) Subject to the provisions of this Act any maritime claim may be enforced by an action *in personam*.**
- (3) An action in *personam* may not be instituted in a quarter which the area of jurisdiction is not adjacent to the territorial waters of the Republic unless -**
- (a) in the case of a claim contemplated in paragraph (a), (b), (i), or (r) of the definition of maritime claims, the claim arises out of an agreement concluded within the area of jurisdiction of that Court.”**

In terms of Section 3(3) of the Act, an action *in personam* for the enforcement of a maritime claim and contemplated in paragraph (i) or (r) of the definition section of maritime claim (now paragraphs (j) and (u)) may not be instituted in the Transvaal

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<sup>110</sup> At 1188 H - 1189 C

Provincial Division in the exercise of its admiralty jurisdiction unless the claim arises out of an agreement which was concluded within the area of jurisdiction of that Court. The provisions are clearly peremptory and the parties to such an action may not by submission confer jurisdiction on the Court. The Court held that, once the Court decides in terms of Section 7(2) that the matter proceeding before it is a maritime claim of the kind referred to above which does not arise out of an agreement concluded within the area of jurisdiction, the Court would not be competent to continue to hear the matter and it would have to be proceeded within a Court competent to exercise admiralty jurisdiction. (In terms of the facts of the case the agreement was concluded in Durban and not within the jurisdiction of the Transvaal Provincial Division.)

The Court further held that had the question of jurisdiction been raised in the Court *a quo*, whether *mero motu* by the parties<sup>111</sup>, it would have decided that the claim was a maritime claim and that the matter accordingly would not have been able to proceed in that Court for want of jurisdiction. Accordingly the Court considered the question what the consequence of the Court *a quo* in the exercise of its ordinary civil jurisdiction having adjudicated it upon a claim which is a maritime claim in terms of the Act? Scott JA summarised admiralty jurisdiction prior to the commencement of the Admiralty Jurisdiction Regulation Act on the consequences of the promulgation of the aforesaid Act.<sup>112</sup> The position was summarised as follows:

- (a) Prior to the commencement of the Act on 1 November 1983 the Divisions of the Supreme Court, sitting as Colonial Courts of Admiralty, exercise their admiralty jurisdiction of the English High Court as that jurisdiction existed in 1891 when the Colonial Courts of Admiralty Act 1890 came into operation. The ordinary jurisdiction of the Supreme Court and the jurisdiction of the Colonial Court of Admiralty overlapped to a certain extent. The result was that the law in terms of which the dispute between the parties was determined, that is Roman Dutch or English law, depended upon the Court in which the

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<sup>111</sup> Waived answer at 1175

<sup>112</sup> Waive Dancer at 1176

plaintiff proceeded with his action. One of the objects of Section 7(2) was to remove this undesirable state of affairs.

- (b) The Act increased the jurisdiction of the Admiralty Court. In terms of Section 6(1) Roman Dutch law is to be applied with regard to what he called “the new maritime claims” by English admiralty law, as it was on 1 November 1983, is to be applied to any matter in respect of which pre-1983 South African Court of Admiralty had jurisdiction prior to that date.
- (c) Section 7(2) does not seek to draw a distinction between the old and the new maritime claims although in the case of the latter Roman Dutch law would be applied regardless of whether the action was brought in a Court exercising its admiralty jurisdiction or exercising its ordinary civil jurisdiction.
  - (i) The Admiralty Court, however, has different rules and procedures as well as special powers conferred in terms of the Act (i.e. the admissibility of hearsay evidence) and the existence of current jurisdictions even in relation to the new maritime claims could have unsatisfactory consequences.

Scott JA held that the Act does not expressly exclude maritime claims from the ordinary civil jurisdiction of the Supreme Court. However, if a maritime claim is instituted in a Local Provincial Division (including the Circuit Local Division) exercising its ordinary civil jurisdiction the question will ordinarily arise at the outset whether the claim in question is a maritime claim. This question may be determined *mero motu* or as a result of one of the party’s raising it.

Once the Court determines that it is a maritime claim, Section 7(2) requires that the matter “shall be proceeded with in a Court competent to exercise its admiralty jurisdiction”. The underlying intention of Section 7(2) of the Act is undoubtedly that maritime claims are to be heard by the Court exercising admiralty jurisdiction and by no other Court. The Court, however, in terms of Section 7(1)(a) still is able to exercise a discretion to decline to exercise its jurisdiction.

It has been suggested that because of the peremptory nature of Section 7(2) the Admiralty Court has exclusive jurisdiction to hear maritime claims.<sup>113</sup>

Scott JA stated:

**“But the peremptory provisions of Section 7(2) become applicable only once the Court decides that the claim is a maritime claim. It is the decision which has the effect of depriving the Court of its ordinary civil jurisdiction to hear the matter. I can see no justification for construing the section otherwise.**

**It is apparent from the provisions of Section 7(2) that the legislature sought to avoid protracted disputes as to whether a claim was properly one for adjudication by a Court exercising its ordinary or admiralty jurisdiction. Once the question is raised and the matter decided, the decision is final.”<sup>114</sup>**

In *Peros v Rose*<sup>115</sup> Page J stated as follows:

**“Although the existence of a specialised Court to adjudicate upon maritime claims ceased with the passing of the Colonial Courts Admiralty Act 1890, which abolished the separate and distinct Vice-Admiralty Courts and conferred upon local Colonial Courts and admiralty jurisdiction, the Court adjudicating upon such claims will still require to apply the law which would have been applied by the English High Court in exercising its admiralty jurisdiction (Section 2(2) of the year 1898).”**

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<sup>113</sup> Staniland *“Admiralty Jurisdiction of Arrest”* (1991) 108 SALR 594 at 596; Annual Survey of South African Law 1993 at 723; Joubert (ed) *The Law of South Africa* (Vol 25) para 172; Pistorius Pollak on Jurisdiction (2nd ed) (1993) at 15; *Peros v Rose* 1990 (1) SA 420 (N) at 424 D

<sup>114</sup> *“Waive Dancer”* 1176 J - 1177 B

<sup>115</sup> 1990 (1) SA 420

**“... The English maritime law, that special body of legal principles and practice (as it was described in *Crookes & Co v Agricultural Co-operative Union Ltd* 1922 AD 423 at 428), differs substantially from the common law of this country; but was, in my view, nonetheless retained as the law applicable in the Colonial Court of Admiralty because it is peculiarly adapted to the resolution of maritime claims.”<sup>116</sup>**

The Learned Judge then went on to describe the anomalous situation that was created by the Colonial Courts of Admiralty Act which resulted in the Supreme Court retaining concurrent jurisdiction with the Supreme Court sitting as a Colonial Court of Admiralty. The anomaly was the law applicable to the claim before the respective court depended upon the choice of forum by the *dominus litis* which could well effect the result.<sup>117</sup> The Learned Judge stated:

**“This anomaly has, however, now been removed by a Section 7 of the present Act, the effect of which is to confer exclusive jurisdiction to determine maritime claims upon the Supreme Court exercising its admiralty jurisdiction.”**

The Admiralty Jurisdiction Regulation Act endeavours to remove the difficulties which arose from the previous conflicts of jurisdiction of law.

**“If a claim is a maritime claim, it appears from Section 7(2) of the Act that the intention is that it shall be heard by the Court exercising admiralty jurisdiction and by no other Court.”<sup>118</sup>**

The case of *Mills v Reck & Others* 1988 (3) SA 92 (C) was first decided by Burg J in the Cape Provincial Division. It went to the Appellate Division where the decision was reversed. The case involved a dispute between the parties in respect of the possession and/or ownership of certain items being salvaged from a wreck.

<sup>116</sup> *Peros v Rose* 1990 (1) SA 420 at 423 G - 424 C

<sup>117</sup> See *PECA Enterprises (Pty) Ltd & Ano v Registrar of the Supreme Court, Natal NO & Others* 1977 (1) SA 76 (N) at 81

<sup>118</sup> Shaw: Admiralty Jurisdiction and Practice in South Africa, p2

In the Court *a quo* and the Appellate Division the application was decided on the basis of Roman Dutch law and the ordinary civil jurisdiction of the Supreme Court. In neither forum was the issue of admiralty jurisdiction raised. It appears that the issue of admiralty jurisdiction was completely ignored.<sup>119</sup> That English law should have been applied and that the matter should have been heard by the Supreme Court exercising its admiralty jurisdiction was also completely overlooked.

“Where a claim can be defined as a maritime claim in terms of section 1(1)(ii) of the Admiralty Jurisdiction Regulation Act 105 of 1983, it ‘shall’, according to section 7(2)(a) of the Act, ‘be proceeded with in a court competent to exercise its admiralty jurisdiction’. The wording of section 7(2)(a) is clearly peremptory. So in respect of a maritime claim the Admiralty Court has exclusive jurisdiction.<sup>120</sup>”

The reason that the matter not accorded the status of a maritime claim was not because it was an application for an interdict as opposed to a maritime claim as such. Section 5(2)(a) of the Act provides that an Admiralty Court has jurisdiction to “consider and decide any matter arising in connection with any maritime claim, notwithstanding that any such matter may not be one which would give rise to a maritime claim”.

Although the Judge in the Court *a quo* described the matter before him as dealing with salvage the claim does not strictly fall within the ambit of salvage in that the owners had abandoned the vessel in question and there was no lien to be exercised.

The best classification of the claim would be that in terms of Section 1(1)(ii)(a) of the Act.<sup>121</sup> This particular section deals with “any claim relating to the ownership or possession of a ship”. The interdict thus would arise in respect of ownership of part of the ship. As was argued and found by the Magistrate in the *Crawford v Mills*<sup>122</sup> matter the vessel was a wreck and that claim was not a claim for the ownership of a “ship” in terms of Section 1(1)(ii)(a) of the Act. The definition of a ship is provided

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<sup>119</sup> See Staniland: Admiralty Jurisdiction Over Wreck (1991) 108 SALJ 594

<sup>120</sup> Staniland *supra* at 595

<sup>121</sup> Staniland (*supra*) at 597

<sup>122</sup> *supra*

for in Section 1(1)(v) of the Act and makes no reference to a wreck thus excluding admiralty jurisdiction.

This argument is flawed<sup>123</sup> for it is artificial to distinguish between the claim for a ship on the one hand and a claim for a wreck on the other. “Every ship is a potential wreck”<sup>124</sup> and mini-wrecks can be repaired and thus be made navigational. It would result in a nonsense if one could argue that an Admiralty Court has no jurisdiction over a wreck but once the wreck is repaired and navigational it would then have jurisdiction. Similarly if during the course of the hearing of a claim the vessel in question became a wreck the Admiralty Court on the above argument would have no jurisdiction. This will also mean that any vessel which for a technical reason or due to it not being operative (other than on the basis of it being a wreck) would also result in any claim involving it being excluded from the jurisdiction of the Admiralty Court.

The word “ship” has been used in several instances in Section 1(1) of the Act and if one wants to draw the above argument to its logical conclusion if any of the vessels in question are a wreck. These claims would not be maritime claims. For example Section 1(1)(z) provides for “pollution of the sea of the seashore by oil or any other substance or emanating from a ship”. If the ship became a wreck and oil began to emanate from it polluting the sea of the seashore, in terms of the argument, this would not be a maritime claim in that a wreck is not a ship. Clearly this is an untenable argument. It is submitted that the legislature did not intend there to be a difference in the determination of the jurisdiction of the Admiralty Court in respect of a vessel being a ship or a wreck.

The above matter<sup>125</sup> is an indication of the interpretative gymnastics that a Court might be prepared to indulge in in order to assume jurisdiction in a particular matter.

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<sup>123</sup> Stanniland (*supra*) at 597

<sup>124</sup> Stanniland (*supra*) at 597

<sup>125</sup> Crawford v Mills

(iii) **The South African Law Commission**

In 1977 representations were made to the Department of Justice by the Maritime Law Association of South Africa for the amendment of the Admiralty Jurisdiction Regulation Act, 1972<sup>126</sup>. This Act repealed the Colonial Courts of Admiralty Act, 1890, and conferred upon the Provincial and Local Divisions of the Supreme Court of South Africa the powers and jurisdiction that the Courts of Admiralty of South Africa arise from the Colonial Courts of Admiralty Act. The Admiralty Jurisdiction Regulation Act 1972, has never been brought into force.

A report was accordingly compiled in accordance with Section 7(1) of the South African Law Commission Act<sup>127</sup>.

The Law Commission in its report<sup>128</sup> highlighted the unsatisfactory situation which existed during the period of Vice-Admiralty Courts when these Courts did not supersede or exclude the jurisdiction of the ordinary Courts administering Roman Dutch law. This resulted in situations where a litigant could bring an action either in the Vice-Admiralty Court, which administered English admiralty law, or in the ordinary Courts which administered Roman Dutch law.

Act 8 of 1879 introduced by the legislature of the Cape Colony provided that the majority of shipping matters, the English law was to apply that the jurisdiction and procedure of the Courts were to remain the same.<sup>129</sup> The Vice-Admiralty Court and the Supreme Court continue to exist side by side.

At the time of drawing up the report, Act 8 of 1879 had been repealed in 1977 and the situation was such that the Admiralty Court had the jurisdiction of the English Admiralty Court as was in 1891 and applied English law as it stood at that date. In

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<sup>126</sup> Act 50 of 1972

<sup>127</sup> Act 19 of 1973

<sup>128</sup> Paragraph 3.3

<sup>129</sup> South African Law Commission Report, page 5

form there was only one Court, namely the Supreme Court of South Africa, but in substance there were two.

The Commission expressed the position where you had one Court at times administering one system of law and at times another as being “self-evidently and satisfactory”.<sup>130</sup>

A very important aspect of the exercise of admiralty jurisdiction was and still is today the maritime lien. Admiralty law recognises that in certain cases a liability which arises is so closely connected to the vessel itself that it gives rise to an obligation attaching to the vessel similar to that of a tacit hypothec attaching itself to property in Roman Dutch law. The maritime lien, however, prevails against a *bona fide* purchaser. It furthermore does not depend on the possession of the property by the person in whose favour the lien arises.

The Admiralty Court recognised a form of procedure against a vessel which arose to some extent due to the existence of a maritime lien. This procedure is known as an action *in rem*.

Admiralty proceedings also usually give rise to the existence of the fund to be held by the Admiralty Court and distributed in accordance with the admiralty law.

Not only the rights of the parties involved in litigation itself depend upon whether the action is instituted in the Admiralty Court or when the Courts exercising ordinary civil jurisdiction, but the rights of persons who are not parties to the action may depend upon which Court determines the matter.

The Commission gave the following explanation<sup>131</sup>. **“If there is a collision between vessel A and vessel B, and X holds a mortgage bond over A which is registered at A’s port of registry which is outside South Africa, X’s mortgage bond will be**

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<sup>130</sup> Page 7  
<sup>131</sup> Page 10

**preferent to B sues A in the Admiralty Court but will have little or no preference if B sues A in the common law Court”.**

The Law Commission decided against enacting a complete code of admiralty law, which although it would be the best method of reform, it would take a considerable period of time to prepare.<sup>132</sup>

It is interesting to note in the Bill annexed to the report the following:

(a) Section 2(1) thereof states as follows:

**“Each provincial and local division of the Supreme Court of South Africa (including the circuit local division) is hereby constituted an admiralty court.”**

(b) Section 4(a) of the Bill states as follows:

**“An admiralty court shall decline to exercise jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that the action can more appropriately be adjudicated upon by another admiralty court in the Republic or by any other Court, tribunal or body elsewhere.”**

If one has reference to the wording of the Bill as opposed to that of the Act it appears that the Bill had in mind a Court separate from the Supreme Court known as the Admiralty Court.

(iv) **Court Structure**

It would accordingly appear that today there is no separate Court of admiralty in the South African Court structure as there has been in the past. The High Court has

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<sup>132</sup> Page 11

admiralty jurisdiction to hear and determine any maritime claim.<sup>133</sup> There is a distinction, however, between a Court exercising its ordinary civil jurisdiction and a Court exercising admiralty jurisdiction. If one has regard to the wording of Section 7(2)(a):

**“... and if a court decides that - (a) the matter is one relating to a maritime claim, it shall be proceeded with in a court competent to exercise its admiralty jurisdiction ...”**

If one were to assume that an admiralty Court was clearly an ordinary High Court which was able to exercise admiralty jurisdiction the wording used in this section would seem to be superfluous. It appears that a High Court while sitting as an ordinary civil Court cannot hear a matter that almost has to reconstitute itself as an admiralty Court or the matter has to be proceeded with in a separate Court which is constituted as an admiralty Court. In practice, however, when an admiralty matter is called in Third Division (Motion Court) for e.g., the Court does not rise in order to reconstitute itself as an admiralty Court but hears the matter in the normal course exercising its admiralty jurisdiction. It is in practice the same Court using the same Judges as would be used in ordinary common law proceedings. The procedures are different and are those as laid down in the Admiralty Rules<sup>134</sup> and the law that it applicable as determined by Section 6 of the Act. A judgment or order of a Court in the exercise of its admiralty jurisdiction is subject to appeal as if such judgment or order were that of a provincial or local division of the High Court of South Africa in civil proceedings.<sup>135</sup>

The preference of the view that the Magistrate’s Court is entitled to exercise jurisdiction over admiralty matters point to the wording of Section 2 of the Act which states that the High Court “shall have jurisdiction” and argue that these words do not imply that such jurisdiction is exclusive to the High Court. One would assume that the argument would be that if the legislature intended only the High Court to have

<sup>133</sup> Section 2(1) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983

<sup>134</sup> Published as GNR571 Government Gazette 17926 of 18 April 1997 (as amended by GNR655 in Government Gazette 17968 of 2 May 1997)

<sup>135</sup> Section 12 of the Admiralty Jurisdiction Regulation Act

jurisdiction over admiralty matters the word “only” would have been inserted into this section. It must be borne in mind that prior to the enactment of this Act the Supreme Court, as it then was, had concurrent jurisdiction to hear admiralty matters but would apply Roman Dutch law in the normal course. One of the purposes of this Act was to do away with the problematic situation which arose from the Supreme Court and the Colonial Court admiralty exercising concurrent jurisdiction which would result in a form of forum shopping. The intention of the Act was thus to clarify this situation by conferring jurisdiction on one Court. The word “shall” together with the intention of the legislature would imply that the High Court was to exercise admiralty jurisdiction in respect of maritime matters exclusively of any other Court. More particularly if one has regard to Section 14 of the Admiralty Jurisdiction Regulation Act it states as follows:

**“This Act shall not derogate from the jurisdiction which Magistrate’s Courts have under sections 131, 136 and 151 of the Merchant Shipping Act, 1951.”**

The aforesaid claims relate to seamen’s allotment claim, seamen’s right to sue in the Magistrate’s Court and suit for deceased seamen’s property respectively. The act that the legislature saw fit to preserve seamen’s rights to approach the Magistrate’s Court in this regard implies that the Magistrate’s Court jurisdiction in other respects has been removed. If the intention of the Legislature was that the Magistrate’s Court would have concurrent jurisdiction with the Admiralty Court, limited merely by quantum and ordinary jurisdictional requirements, there would be no need to reserve the aforesaid rights.

If one accepts the view that the Magistrate’s Court has jurisdiction in the ordinary course to hear maritime claims what law is such a Court to apply? It is submitted that such Court would have to apply the ordinary common law and would not be bound by the provisions of Section 6 of the Admiralty Jurisdiction Regulation Act in respect of choice of law for example. The provisions in relation to actions *in rem*, lien, arrest and the ranking of claims would also not be applicable. The aforesaid is submitted on the basis that these provisions are specifically created for a Court exercising its

admiralty jurisdiction, a jurisdiction which the Magistrate's Court does not have in the sense of it exercising those powers set out in the Admiralty Jurisdiction Regulation Act. As mentioned previously, this could prejudice the interests of third parties for e.g. in respect of a ranking of a claim which is determined in non-admiralty Court. The Magistrate's Court would also in terms of the ordinary Roman Dutch Law principles not recognise a lien or an action *in rem*.

In reference to Section 7(1)(a) of the Admiralty Jurisdiction Regulation Act it has been argued that if an action were brought for a relatively small claim upon an uncomplicated issue, the High Court, of its own accord, could evoke Section 7(1)(a) to refer the matter to the Magistrate's Court if it is of the opinion that it is more appropriate that the proceedings be adjudicated upon by the Magistrate's Court. In my submission this approach is incorrect in that Section 7(1)(a) was specifically enacted to provide for the principle of *forum non conveniens*.

If one has regard to the wording of Section 7(1)(a), on a clear reading thereof, it appears that the Court has to have the opinion that any other Court in the Republic ... will exercise jurisdiction in respect of the said proceedings. If the particular claim is a maritime claim and it is held to be so by "any other Court" then that Court in terms of Section 7(2)(a) must be competent to exercise admiralty jurisdiction. For the provisions of Section 7(2)(a) peremptory and it thus implies that a Court making a decision that it is a maritime claim could only take cognisance in terms of Section 7(1)(a) of any other Court competent to exercise jurisdiction in the said proceedings. In the matter of the "Wave Dancer"<sup>136</sup> and in the matter of the "Antipolis"<sup>137</sup> the matters were determined at common law applying the common law rules of Court and the common law. In the "Wave Dancer" the Court *a quo* found that the matter before it was not a maritime claim and accordingly did not apply the provisions of the Admiralty Jurisdiction Regulation Act. In terms of Section 7(4) of the Act "no appeal shall lie against any decision or order made under sub-section (2)". In terms of this therefore once determination has been made whether a claim is a maritime claim or not that specific issue cannot be redetermined on appeal. This was introduced into the

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<sup>136</sup> 1996 (4) SA 1167 (SCA)

<sup>137</sup> Mills v Reck 1988 (3) SA 92 (C) and on appeal Reck v Mills 1990 (1) SA 751 (A)

Act in order to ensure that matters were proceeded with some notion of urgency. It has been held in Weisglass v Savonnerie<sup>138</sup> That this particular section does not apply in respect of preliminary proceedings such as the application for the arrest of a vessel and that such a decision may be reversed on appeal. What this does mean, however, is that if a Court decides to hear a matter which correctly should be a maritime claim, however, does not hold it to be such or does not even consider the question such an issue is not to be revisited on appeal. In the “Antipolis” the Court *quo* did not even consider whether the matter involved a maritime claim or not nor was the issue raised by the parties. On appeal it was held that by failing to consider the issue it meant by implication that the Court held that it was not a maritime claim.

It is submitted that the correct view therefore is once a Court decides, upon the application of either party or *mero motu*, that the matter is one relating to a maritime claim the jurisdiction becomes exclusive and the matter is required in terms of Section 7(2)(a) to be heard in admiralty.

It is submitted that in the context of the intention of the provision of Section 7(1)(a) and in the light of the wording thereof it is not intended to be an overriding provision of Section 7(2)(a).

The further question that arises is whether jurisdiction is conferred upon the Magistrate’s court as a result of neither party to an action objecting thereto. In other words if a matter is finalised and judgment is given in a Magistrate’s Court in respect of an Admiralty matter without any objection thereto, is such judgment valid in spite of the apparent lack of jurisdiction. It may be argued that such judgment is valid and that the magistrate’s Court therefore does not have jurisdiction. This to a limited degree may be true, but just as any judgment is effective until such time that it is overturned on appeal or by review this in itself does not confer jurisdiction on the court making an erroneous assumption of the existence of its jurisdiction. If such judgment were to be over ruled on these grounds it ma be found to be void *ab initio*.

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<sup>138</sup> *supra*

## H CONCLUSION

Admiralty jurisdiction often appears both over-inclusive and under-inclusive. For example, a local resident drives a truck down to a local fishing port, goes fishing for the day in a trawler, returns, loads the catch in the truck and drives to the market. If the trawler collides with someone or something the very plaintiff oriented remedy of proceedings *in rem* will be available. If it is the truck which is involved in a collision, the only remedy will be to proceed *in personam*. It is not easy to defend this irrational grounds for why should locally owned ships and their owners not be subject to the same jurisdictional principles as other locally owned forms of transport. Admiralty can also be under-inclusive because it only provides remedies in respect of maritime claims. If arrest of ships is such a beneficial remedy against foreign defendants why should arrest not be available against other forms around doing in respect of transport? Should admiralty be abolished as a separate jurisdiction? One advantage has already been indicated: Abolition of admiralty would enable reform to focus on what appears to be the main area of concern, elusive foreign defendants who are unfettered by the need to remain within the framework which for historical reasons focuses on ships. Admiralty is a small and rather isoteric jurisdiction and one expects as a result problems to occur along the boundary with general jurisdiction of Courts. A possible solution to this problem is to do away with the separate jurisdiction of admiralty which to some extent exists largely as a result of historical accident. A distinct jurisdiction to deal with ships is not an essential part of a modern legal system as many civil or jurisdictions in Western Europe have no counterpart to admiralty and this unique remedy of the action *in rem*.<sup>139</sup> It is not even clear how much longer English admiralty will retain its distinct character as the United Kingdom becomes more closely linked to Europe. This is unlikely to be adopted as it would require the adopting of some basis for the assertion of jurisdiction over foreign defendants, e.g. but by means of an attachment *ad fundandam jurisdictionem* which would require a substantial adaption of civil jurisdiction in South Africa. There is no basis for such a

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<sup>139</sup> KD Kerame US Admiralty Jurisdiction in Continental Countries (1983) 8 Maritime Lawyer 329 at 334 21

change of ordinary civil jurisdiction other than in admiralty matters. There are three distinctive features which characterise admiralty.

- (a) The key distinguishing feature of admiralty jurisdiction is the ability that provides to proceed *in rem*. The first aspect is jurisdictional: the mere fact that the *res* is present within the territory confers jurisdiction of a local admiralty Court in respect where the cause of action arose.
- (b) Security: The second aspect of a proceeding *in rem* is that from the moment of arrest the Plaintiff acquires a security for the claim in the form of the *res*. The security might not have the same value of the *res* and therefore is far from perfect.

A further feature of admiralty jurisdiction is that a set of general guidelines prevails an admiralty to determine priorities where the value of the arrest *roes* is insufficient to satisfy all claims. A claim arising out of the particular subject matter will fair differently under admiralty than under the laws of insolvency.

The intention of the Admiralty Jurisdiction Regulation Act is to give the admiralty Courts exclusive jurisdiction in maritime claims and thus remove the jurisdictional conflict between the admiralty Court and the ordinary municipal Court. If a question arises before any Superior Court, whether sitting as an admiralty Court or not, as to whether a matter before it relates to a maritime claim, that question must be decided immediately. If the matter is a maritime claim, it is to proceed in the Court exercising its admiralty jurisdiction and if not, it is to proceed in the appropriate division of the Supreme Court exercising its ordinary municipal jurisdiction or alternatively in the Magistrate's Court. Once it has been decided that a matter is or is not a maritime claim, there is no appeal against the decision other than if the determination of the nature of the claim is made that at preliminary hearing, e.g. for the arrest of a vessel. This could lead to a conflict as a maritime claim is not exclusively defined and the situation could arise where one division of the High Court determines that a particular type of claim is a maritime claim whereas another division determines that it is not. This could result in a forum shopping within the country. The Act, however, does

contain a long list of matters which are maritime claims. Furthermore, a solution is provided for in Section 7(5) of the Act which permits the Minister of Justice, on the recommendation of the Judge President of any of the provincial divisions, to submit the question, as to whether or not a particular matter gives rise to a maritime claim to the Appellate Division (Supreme Court of Appeal) for a decision which will give future guidance.

No lower courts in the United States or Canada possess *in rem* jurisdiction. In New Zealand the Beattie Committee considered that “because of the very nature of the action itself and its consequences”, jurisdiction *in rem* ought not to be given to the lower courts.<sup>140</sup> In England the County Courts have long exercised *in rem* jurisdiction subject to money limits and some fairly minor restrictions on subject matter,<sup>141</sup> however suggestions for further devolution of *in rem* jurisdiction has not been accepted.

In Australia the Zelling Committee referred to the long history of English County Courts exercising admiralty jurisdiction both *in rem* and *in personam* in these terms: ‘a similar historical basis does not exist in South Africa. Here, as in Australia, admiralty jurisdiction began in, and has remained in, the Supreme Courts. In Australia there has not been any call to confer restricted, or any, admiralty jurisdiction on County or District courts.’<sup>142</sup>

Arguments based on history are never fully persuasive in determining what the law should be. The relative lack of use made of the County Courts *in rem* jurisdiction in England is not a very useful guide as to how much use would be made of such a similar facility in a country such as South Africa. There are strong arguments against any general conferral of *in rem* jurisdiction on lower courts, including the international character of the jurisdiction, the absence (in most cases) of any clear need for such a conferral, and the dilution of expertise (especially in the arrest and custody of ships and associated questions) that would be likely to result.<sup>143</sup>

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<sup>140</sup> Australian Law Reform Commission 33, para 240

<sup>141</sup> *id.*, para 240

<sup>142</sup> *id.*, para 240

<sup>143</sup> *id.*, para 240

There is little justification for requiring what may be a straight forward claim for money due to proceed on a High Court rather than lower court scale of costs just because a ship has been arrested as security. The cluttering of High Court lists with small claims is also difficult to justify. at the same time a general conferral of *in rem* jurisdiction on lower courts is undesirable, in particular because of the dilution of expertise among court officials which would result. While the hearing on the merit of actions *in rem* in lower courts may well be desirable, something more flexible than a general grant of an *in rem* jurisdiction is called for. A more effective approach would be to restrict the commencement of actions *in rem* to Superior Courts but allow remittal of the hearing on the merits to inferior courts in appropriate cases. This would allow arrest, custody and sale to remain the province of the Superior Courts and their officials, while permitting the merits to be decided in the court that would normally have tried an equivalent action *in personam*. Conferral could if necessary be restricted to particular types and sizes of claim or to particular classes of vessel. A broad power should be conferred on the Superior Courts to remit actions *in rem* for hearing on the merits in lower courts. There should also be power to proclaim specific lower courts as courts having defined *in rem* jurisdiction under the Act; courts exercising *in rem* jurisdiction by virtue of such a proclamation should have the power to transfer the proceedings to a Superior Court where appropriate.