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COLLEGE OF LAW AND MANAGEMENT STUDIES

SCHOOL OF LAW

SEAMAN'S LIEN:

**A SOUTH AFRICAN PERSPECTIVE ON SEAMAN'S LIEN POST THE
SUPREME COURT OF APPEALS DECISION IN THE *ASPHALT
VENTURE WINDRUSH INTERCONTINENTAL SA V UACC BERGSHAV
TANKERS AS 2017 (3) SA 1 (SCA)***

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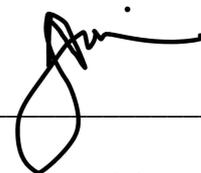
A dissertation submitted in partial fulfilment of the requirements for the Degree of Master of Laws (Maritime Law) in the School of Law, University of KwaZulu Natal (Howard College).

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ABSTRACT

The seaman's lien is a well-recognised maritime lien. The advancement of the lien may have been swayed by public policy and the need to protect the seaman. The premise of the lien is that a service was rendered to the ship rather than acknowledging the seaman's contract of employment. Affording seamen the right to approach the courts based on an action *in rem*, affords seamen the opportunity to speedily recover their claims. Of importance to us in this thesis will be the discussion around the seaman's wages lien with a focus on the case that came before the Supreme Court of Appeals namely *The Asphalt Venture Windrush Intercontinental SA and Another v UACC Bergshav Tankers AS* ("Windrush") 2017 (3) SA 1 (SCA).

In this case the second appellant, the *Asphalt Venture*, was arrested at the Durban port by the respondent for wages that had been ceded and assigned to the respondent by the seamen's families who had not had the seamen's wages paid out by the previous owners of the *Asphalt Venture*. During the employment contracts between the previous owners and the seamen, the *Asphalt Venture* and her crew were held hostage by Somali pirates which caused great financial difficulties for the previous owners. Although the employment contracts terminated whilst the crew were held hostage, the previous owners continued to pay the hostages families the wages until they could no longer afford to. The crisp issue facing the court was whether a seaman's lien existed in terms of the employment contracts between the seamen and the *Asphalt Venture*. Secondly whether a maritime lien can be ceded or assigned to another person. Further, whether the attack by the Somali pirates constituted a supervening impossibility with regards to the employment contracts.

This research paper will focus provide on maritime liens, providing the historical background on liens and the seaman's lien internationally in South Africa. Thereafter our focus will be the decision of the court a quo and the Supreme Court of Appeal in the *Windrush* decision. Finally, a discussion on piracy and the applicability of the doctrine of impossibility in contracts of employment for seamen, and the findings and recommendations of the writer.

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Chapter 1

1. Introduction

DB Toy submits that any discussions of the maritime lien will ultimately begin in the wrong place.¹ The definition of a maritime lien in the writer's view will not be an entirely wrong partition to commence a discussion on a maritime lien. Also described as an admiralty lien,² maritime liens are unique instruments that exist to guard persons and their property that have interacted with a ship and have suffered damage or incurred expenses thereby.³ A maritime lien thus acts as security for the claimant in possession of the debtor's property for the claim that is due. However, the maritime liens were not created for the sole purpose of only providing security to the materialman or other creditors.

1.1 Definition of a maritime lien

A widely accepted definition of the maritime lien was provided by Lord Tenerden who defined it as "a claim or privilege upon a maritime *res* to be carried into effect by legal process".⁴ Judge Curtis provided in *The Young Mechanic*⁵ that the maritime lien is a

real and vested interest in the thing, constituting an incumbrance placed thereon by operation of law, to be executed by judicial process against the thing to which no party is made a party save by his voluntary intervention and claim.⁶

Arthur L. Shipman further states that it does not exist as an agreement between the parties but as an operation of law and therefore the law must step in to enforce the lien.⁷

In 1852, the case of *Harmer v Bell – The Bold Buccleugh* ("The Bold Buccleugh")⁸ provided the maritime industry with what has become the popular definition of a maritime lien. In this case a Scotch steamer collided with an English vessel in the Humber. An action was instituted

¹ DB Toy, "Introduction to the Law of Maritime Liens" (1973) 47 *Tulane Law Review* 559.

² AP Trichardt *Maritime Liens and the Conflict of Laws* (2011) 7.

³ Trichardt (see note 2; 8).

⁴ Toy (see note 1; 559).

⁵ *The Young Mechanic* 2 Curtis 404.

⁶ *Ibid* at 413.

⁷ Arthur L. Shipman "The Maritime Lien" (1892) 2 *Yale Law Journal* 9 at 10.

⁸ *Harmer v Bell – The Bold Buccleugh* (1852) 7 Moo PC 267.

in the Court of Admiralty in England by the owners of the English vessel against the owners of the steamer and a warrant of arrest was issued however before she could be arrested, the steamer sailed for Scotland. A suit was then commenced by the owners of the English vessel against the owner of the steamer in the court of session in Scotland for the damage and the steamer was arrested in terms of that court's process and was then released on bail. Pending the proceedings, the steamer was sold without notice to the purchaser of this unsatisfied claim against her. The proceedings in the Court of Session in Scotland were still pending when the steamer sailed for England and was subsequently arrested there. An action for damages commenced in the English Court for the same cause of action still pending in Scotland. Instructions were sent to abandon proceedings in Scotland. The new owner of the steamer defended the action stating that firstly *lis alibi pendens*⁹ and secondly, he was unaware that such lien existed against the steamer and was a purchaser for the value of the steamer.

The court held that the *lis alibi pendens* was incorrect as the proceedings in Scotland were in the first instance in *personam* and against the owners of the vessel whilst the proceedings in England were in *rem* and against the vessel. Secondly the court held that the steamer was liable for the damage committed by her, even though she was in the hands of a purchaser without notice of the claim. The court provided that a maritime lien is "A claim or privilege upon a thing to be carried into effect by legal process"¹⁰. Additionally,

This claim or privilege travels with the thing into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding *in rem*, relates back to the period when it first attached.¹¹

⁹ *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC 2013 (6) SA 499 (SCA)* para 2 provides "As its name indicates, a plea of *lis alibi pendens* is based on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years."

¹⁰ *The Bold Buccleugh* (see note 8; 285).

¹¹ *Ibid* at 285-286.

The case of *The Halcyon Isle*¹² provides the lien is “devoid of any legal consequences unless and until it is carried into effect by legal process”.¹³ Gorell Barnes J provided in *The Ripon City*¹⁴ that

Such a lien is a privileged claim upon a vessel in respect of service done to it or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another- a *jus in re aliena*. It is so to speak, a subtraction from the absolute property of the owner in the thing.¹⁵

The English statutes and the International Conventions on Maritime Liens and Mortgages of 1926, 1967 and 1993 have not defined what a maritime lien is and merely provide which maritime claims are classified as maritime liens.¹⁶ The essential elements of the maritime lien are said to be that it is a privileged charge upon a maritime *res* which comes into existence immediately after the facts occur and travels with the *res* secretly and unconditionally, and remaining undeveloped until enforced by an action *in rem*.¹⁷ The charge is described as privileged because of the property.¹⁸ It is the nature of the lien which decides whether or not a lien arises.¹⁹

1.2 The origin of the maritime lien

There seems to be no clear voice on the exact origin of the maritime lien. D.J. Shaw provides that the term is derived from English Law and American Law.²⁰ Shaw further provides that it is a phrase in line with the Roman-Dutch law and particularly the Civil Law.²¹ Quite contrarily, others have stated that the concept may be originating from Rhodian law, even possibly Greek

¹² [1980] 2 Lloyd’s Rep 325.

¹³ Ibid at 329.

¹⁴ *The Ripon City* [1987] P 226.

¹⁵ Ibid at 242.

¹⁶ Gys Hofmeyr *Admiralty Jurisdiction: Law and Practice in South Africa* 2nd ed (2012) at 253.

¹⁷ Ibid.

¹⁸ *The Halcyon Isle* (see note 12, 328).

¹⁹ Ibid.

²⁰ DJ Shaw *Admiralty Jurisdiction and Practice in South Africa* (1987) 86.

²¹ Ibid.

law.²² However, it appears that the widely recognised origin of the maritime lien is Roman Law.²³

Roots of the maritime lien are said to be found in Roman law judging from the use of the Latin terms used when discussing maritime liens such as *ius personam*.²⁴ Anton Trichardt provides an in-depth look at the development of the Roman maritime law.²⁵ However, the maritime lien is said to owe its existence to the Roman law doctrine of hypothecation.²⁶

The concept of hypothecation begun in contracts for the lease of land where the lessor and lessee agreed that the things belonging to the farm would serve as security for payment of the rental.²⁷ The *hypotheca*, as also known, can be defined as an

...agreement between the debtor and the creditor that certain specific property of the former should be liable in full for his debt to the latter; who should be entitled to sell in default of payment within a prescribed time.²⁸

However the personification theory is what perfectly characterises the origin of the concept of actions *in rem* which are actions against the ship directly and recognises the ship as an entity, a legal person capable of being sued personally.²⁹ Gys Hofmeyr provided that the personification theory is a concept based on the “fiction that a ship is a juridical entity separate from her owner and liable for her torts and on her contracts”.³⁰ Although the maritime lien is said to derive from Roman Dutch law, Trichardt states that the personification theory was non-existent in Roman Dutch Law.³¹

²² AP Trichardt *Maritime Liens and the Conflict of Laws* (2011) 40 – 44.

²³ As stated by DJ Shaw (see note 20), Trichardt (see note 22) and W. Tetley *International Maritime and Admiralty Law* (2002) 473 – 474.

²⁴ Trichardt (see note 22; 46 – 47).

²⁵ Trichardt (see note 22).

²⁶ *Ibid*; 63.

²⁷ Trichardt (see note 22; 64).

²⁸ Trichardt (see note 22; 69).

²⁹ *Harmer v Bell – Bold Buccleugh* (1852) 7 Moo PC 267.

³⁰ Hofmyer (see note 16; 251).

³¹ Trichardt (see note 22; 80).

Hofmeyr further states that there are three main theories that have been advanced regarding the maritime lien.³² First would be the personification theory which has already been discussed. The second would be the procedural theory which positions a maritime lien and the arrest of the ship as a procedural tool for receiving security for the claim and compelling the owner to enter an appearance to defend.³³ The third theory is the historical or conflict theory developed by Edward Roscoe where he suggests that because historically it was prohibited to pursue a claim against persons but rather the ship or cargo; the industry was forced to accept the arrest of ships or cargo as the principal method of gaining jurisdiction justifying the arrest of the ship.³⁴

1.3 South African legal position on maritime liens

Today, the admiralty jurisdiction of South Africa is regulated by the Admiralty Jurisdiction Regulation Act 105 of 1983 (hereon referred to as AJRA), which formed an amalgamation of the procedures and substantive law that were being exercised in the Colonial Courts of Admiralty and the ordinary courts.³⁵ AJRA provides for two actions through which a claimant can approach the South African courts, namely the action *in rem* and the action *in personam*.

The action *in rem* is a remedy made available to a claimant seeking to claim for a loss incurred in relation to a ship.³⁶ The core nature however of the action *in rem* is that it is instituted against the maritime property and the ship is therefore recognised and listed as the defendant.³⁷ An action *in personam* is an action instituted against a person rather than against the vessel or maritime property.³⁸ In an action *in rem* the vessel or maritime property is arrested by the claimant on the basis either that the claimant has a maritime lien over the property or the owner

³² Hofmeyr (see note 16; 251).

³³ Ibid.

³⁴ Ibid.

³⁵ Both the action *in rem* and the action *in personam* are provided for under AJRA. These two actions are to be discussed.

³⁶ Gys Hofmeyr “Admiralty Jurisdiction in South Africa” (1982) *ActaJuridica*, 30 at 38.

³⁷ Christopher Hill, *Maritime Law* 2ed (1985) 93.

³⁸ Joseph Herbstein et al. *The Civil Practice of the High Courts & Supreme Court of Appeal of South Africa*, at 102.

of the property to be arrested would be liable to the claimant in an action *in personam*.³⁹ This in turn allows South African courts to exercise their jurisdiction over the defendant and where the defendant and the plaintiff are peregrine, one of the core elements to establish jurisdiction must have arisen within the court's jurisdiction, namely the cause of action of the contract in dispute had been concluded within the courts territorial jurisdiction.⁴⁰

The law applicable to the South African admiralty matters is catered for under section 6 of AJRA which provides

(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall-

(a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;

(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.

Therefore, anything which the Colonial Courts of Admiralty Act, 1890 had jurisdiction over immediately prior to the promulgation of AJRA would be governed by the law applied by the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction as at 1 November 1983.

AJRA does not define a maritime lien, hence one must look at the law as at 1 November 1983 for what defines a maritime lien. AJRA lists a maritime lien as a maritime claim under section 1(1)(y).⁴¹ Maritime liens are also referred to under section 11 of AJRA which relates to the ranking of claims where a fund in a Court is established because of a sale of arrested property

³⁹ Section 3(4) as read with section 3(5)(a) of AJRA.

⁴⁰ Herbstein (see note 38).

⁴¹ Section 1(1)(y) of AJRA "any maritime lien, whether or not falling under any of the preceding paragraphs."

in terms of section 9 or regarding security given in respect of proceeds of property sold pursuant to an order or in the execution of a judgment of a Court in terms of the Act.

In summary, the maritime lien is a type of maritime claim and its importance lies in its constituting one of the bases upon which a claimant may institute an action *in rem*.⁴² Further, it creates a preference in the ranking of claims in terms of section 11 of AJRA.⁴³

Due to section 6 of AJRA, the law as at 1 November 1983, in the *Halcyon Isle* which lists the English Admiralty as recognising six maritime liens which are bottomry, salvage, collision damage, seaman's wages, master's wages and master's disbursements; is what defines the list of recognised liens.⁴⁴ This remains the position as reiterated in the *Transol Bunker BV v MV Andrico Unity and Others; Grecian-Mar SRL v MV Andrico Unity and others* ("Andrico Unity").⁴⁵ For purposes relevant to this paper, the writer will focus on the enforceability of the maritime lien of the seaman's wages.

1.4 Doctrine of supervening impossibility and seaman's liens

A seaman has been described as ignorant and illiterate which has led to the courts being warned to be aware of any encroachments on the rights of the seaman to his wages and any other claim brought before the court.⁴⁶ This has led to courts stating that the seaman's lien is a sacred lien which must retain its priority over other claims so long as a plank of the ship still exists.⁴⁷ However, it appears one of the threats to the sanctity of the seaman's lien is the doctrine of impossibility.

The doctrine of impossibility is a concept in the law of contracts used to grant relief to a promisor whose contractual performance becomes significantly different from what had

⁴² Section 3(4)(a) of AJRA.

⁴³ *Transol Bunker BV v MV Andrico Unity and Others; Grecian-Mar SRL v MV Andrico Unity and others* 1989 (4) SA 325 (A) 331D

⁴⁴ *Ibid*; 331F and 334F.

⁴⁵ *Andrico Unity* (see note 43)

⁴⁶ Michael Ng "The Protection of Seafarer's Wages in Admiralty: A Critical Analysis in the Context of Modern Shipping" (2008) 22 *Australian and New Zealand Maritime Law Journal* 133 at 134.

⁴⁷ *Ibid*.

reasonably been expected of him due to the occurrence of a supervening event.⁴⁸ A contractual obligation must be possible to perform for it to be valid.⁴⁹ Where a contract becomes impossible to perform, there can be no creation of obligations.⁵⁰ The defense, which seems to have originated from Roman law⁵¹, finds itself in most aspects related to the law of contract. Application of the defense is not new to maritime contracts. The application however found itself being utilised under a different term, namely “frustration of adventure” and “frustration of purpose”.⁵² The frustration of purpose has been defined as an event that may excuse non-performance of a contract because it defeats or nullifies the objective of the parties under which they entered into the contract.⁵³

The modern development in American law of the doctrine of impossibility of performance is referred to as impracticability.⁵⁴ This refers to situations where performance will be extremely expensive, unreasonably time-consuming thus rendering it impracticable for the one who must render performance.⁵⁵ The party alleging impracticability as a defence needs to show that the burden of performance would be extreme.⁵⁶

An early case to define the impossibility of performance is the English case *Taylor v Caldwell*⁵⁷. In this case an owner of a music hall was relieved of his liability to pay damages for failing to have a hall available under the terms of the lease when prior to the time of performance, the hall was accidentally destroyed in a fire. The court granted relief on the principle that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.⁵⁸

⁴⁸ Charles G. Brown “The Doctrine of Impossibility of Performance and the Foreseeability Test” (1975) 6 *Loyola University Chicago Law Journal* 575.

⁴⁹ D. Hutchison and CJ Pretorius *The Law of Contract* (2013).

⁵⁰ *Wilson v Smith* 1956 (1) SA 393 (W) at 396.

⁵¹ William Arthur Ramsden *Supervening Impossibility of performance in the SA Law of Contract* (1985) 5.

⁵² Pamela R. Pepper “The Law of Contracts and the Uniform Commercial Code” 3 ed (2014) 244.

⁵³ *Ibid.*

⁵⁴ Brown (See above note 48).

⁵⁵ Pamela R. Pepper *The Law of Contracts and the Uniform Commercial Code* 3 ed (2014) 244.

⁵⁶ *Ibid.*

⁵⁷ 122 Eng Rep 309 (1863).

⁵⁸ *Ibid* at 314.

In terms of the South African law, the test for impossibility of performance was established in the case of *Wilson v Smith*⁵⁹ as follows: -

The test is really whether, when the parties entered into the contract the possibility was contemplated by them that the event which rendered performance impossible might occur, for if the possibility was contemplated and no provision made in the contract against the event the implication could be made that the claimant should not be relieved because the event did not occur.⁶⁰

As early as 1916, English law in the House of Lords provided that the doctrine of impossibility of performance in a seaman's contract was applicable. The case of *Horlock v Beal*⁶¹ was regarding a seaman's wife who approached the courts seeking her husband's wages for the duration of his employment contract. The husband had been detained in a German port because of the war. The court held the wife's claim failed as the capture and holding of the ship by the Germans amounted to a frustration of the contract which rendered the performance of the contract impossible. Therefore, the contract could no longer be binding on the parties.⁶²

In South Africa however, the doctrine had not been applied to the seaman's lien until recently in *Windrush Intercontinental SA v UACC Bershav Tankers AS*⁶³. The argument advanced by the appellant in this case is what ultimately led to the court's conclusion. The appellant argued that the contracts of employment of the hostages had terminated due to piracy being the supervening event frustrating the performance of the employment contract. The SCA held that there was no maritime lien established based on the doctrine of impossibility of performance.

⁵⁹ 1956 (1) SA 393 (W).

⁶⁰ Ibid at 396C-D.

⁶¹ [1916] UKHL 795.

⁶² Ibid at 796 by Earl Loreburn.

⁶³ 2017 (3) SA 1 (SCA).

1.5 Pre-Windrush and post Windrush position

Seaman's wages are considered a sacred lien and seaman are viewed as favoured litigants.⁶⁴ The case of *Windrush Intercontinental SA v UACC Bergshav Tankers AS* ("Windrush")⁶⁵ introduced the principle of impossibility of performance in South African seaman's lien cases.

Before this case, the doctrine of impossibility in South Africa had not been discussed in South African maritime law other than in the case of *New Market, MV; Taxfield Shipping Ltd v Cargo Currently Laden on board the MV New Market and Others*⁶⁶ where the applicant sought to rely on the doctrine of impossibility to set aside an arrest of cargo which the applicant believed they had a lien over. The court however did not deal at all with the doctrine but chose to set aside the arrest based on other grounds argued by the applicant.

The *Windrush* case came before the Supreme Court of Appeal, South Africa ("SCA") on appeal from the KwaZulu Natal Local Division of the High Court, Durban. This appeal was against the court a quo decision to not set aside the deemed arrest of the second appellant, the *MT Asphalt Venture* ("Asphalt Venture") owned by Bitumen Invest AS ("Bitumen"). The first appellant, Windrush Intercontinental SA ("Windrush") is a company registered in Panama and carrying on business in Sharjah in the United Arab Emirates. The respondent is UACC Bergshav Tankers AS ("Bergshav"), a company duly incorporated and registered in Norway and carrying on business as the registered owner of the *MT UACC Eagle* in Dubai in the United Arab Emirates.

Windrush entered into a bareboat charterparty with Bitumen from 7 May 2008 until 7 November 2015. The bareboat charterparty was part of a sale and leaseback arrangement between Concord Worldwide Inc ("Concord"), Bitumen and Windrush. Concord became the owners, sold the *Asphalt Venture* to Bitumen who then leased it to Windrush. After 7 years, Windrush would be obliged to purchase the vessel. The ship was then sub-chartered by

⁶⁴ *Master & Crew of the MT Argun v MT Argun* 2003 (3) SA 149 at 155. See also *Quick & Louw & Moore (Pty) Ltd and Another v SS Almoural and Others* 1982 (3) SA 406 (C) where the person who at the request of the owner of the vessel paid the crew's wages and was to be viewed as a necessities man and could not be recognised as a seaman and therefore gain protection of the seaman lien. The court held that the seaman was a favoured litigant of the law. See also *Kandagasabapathy and Others v MV Melina Tsiris; Hethumuni and Others v MV Antigonitsiris* 1981 (3) SA 950 (N) at 956B-F.

⁶⁵ 2017 (3) SA 1 (SCA).

⁶⁶ 2006 (5) SA 114 (C).

Windrush back to Concord for the 7 years. During April 2010 until August 2010, Concord through its crew agent and technical manager; OMCI ship management (Pvt) Ltd (“OMCI”) entered into employment contracts with 15 crew members, citizens of the Republic of India to crew the *Asphalt Venture*.⁶⁷

On September 2010, Somali pirates hijacked and held for ransom, the *Asphalt Venture* about 100 nautical miles east of Mombasa, Kenya. Concord then informed their insurers of the hijacking and acquired assistance to begin negotiations with the pirates and appointed a negotiator. Seven months later, USD 3.4 million was delivered to secure the release of the vessel and her crew members. However, after the ransom was paid, only eight crew members were released, seven were further held captive to be used in negotiations for the release of 120 Somali pirates arrested by the Indian government. The Indian government though refused to negotiate with the pirates. It was only during August and December 2014 after payment of a further ransom that the pirates finally released the remaining crew members.⁶⁸

During this troublesome period, Windrush withdrew the *Asphalt Venture* from the sub-bareboat charterparty with Concord, thereby terminating the sub-bareboat charterparty. The termination was due to Concord not being able to meet their financial obligations in terms of the charterparty as the vessel was held for ransom. Concord, despite the piracy, continued to pay the hostages’ families amounts which were equivalent to the hostages’ wages until the end of October 2011, six months after the first eight had been released.

Before any of the crew members were released, Concord had continued to make payment to the crew in terms of the crew’s employment contracts. After the first eight were released, Concord paid for their repatriation costs and were accordingly released from the vessel. This was paid on a voluntary basis, in sympathy. The payments by Concord to the families ceased when Concord began experiencing financial difficulties.

Due to Concord’s financial difficulties, the Indian government and Norwegian Maritime Officers’ Association demanded that Bitumen as the vessels owner; continue paying the hostages (the remaining seven). In response to this, Windrush argued that neither it or Bitumen

⁶⁷ *Windrush* (see note 65; para 2).

⁶⁸ *Windrush* (see note 65; para 3).

were liable for the crew wages as the contracts of employment were entered between the crew and Concord as sub-bareboat charterer.⁶⁹

On 17 January 2012, the *UACC Eagle* was arrested in Mumbai India by the hostages' families representing the hostages as security for their cumulative claim of USD 6 787 440 they sought payment for the wages they would have received from November 2011 until they turned 70 years of age. It was alleged that the *UACC Eagle* was arrested because it was in the same beneficial ownership, basically a sister ship in terms of Indian Law as the *Asphalt Venture*. Bergshav successfully contested this allegation. Despite this, Bergshav entered into a settlement agreement with the hostages' families which was approved by the Bombay High Court on 10 February 2012. This was to obtain the speedy release of the *UACC Eagle* and avoid further litigation. The terms of the settlement were that the hostages held a maritime lien for unpaid crew wages recognised in Indian Law. Bergshav undertook to pay into an escrow account the claims of the crew wages, the future wages until the end of December 2012, and crew's wages for 2013; subject to its right to call for arbitration on whether the hostages' employment contracts entitled them to crew wages pending repatriation. Due to this undertaking, the hostages' families ceded unconditionally and irrevocably assigned "any claim and/or maritime lien they have or may have in the same priority against the *Asphalt Venture*...".⁷⁰

Based on this cession, Bergshav commenced an action *in rem* against the *Asphalt Venture* in KwaZulu Natal. The *Asphalt Venture* was released by the provision of security by Windrush's Protection and Indemnity Club without an admission of liability and without prejudice to the rights and contentions of the owners of the bareboat charterers of the *Asphalt Venture*.⁷¹

Bergshav alleged that the hostages were employees of the Bitumen, alternatively of Concord as the sub-bareboat charterer. They further alleged that they remained in the employment and therefore were entitled to be paid wages reflected in their contracts of employment during the necessary periods and following any valid termination thereof. The main argument was that the unpaid wages were maritime claims as defined in AJRA.⁷²

⁶⁹ *Windrush* (see note 65; para 6).

⁷⁰ *Windrush* (see note 65; para 7 – 8).

⁷¹ *Windrush* (see note 65; para 9).

⁷² *Windrush* (see note 65; para 10-11).

The issue before the SCA was whether a maritime lien existed against the *Asphalt Venture* at the time of its arrest for the crew's wages entitling Bergshav to arrest the *Asphalt Venture* by way of an action *in rem* in terms of section 3(4)(a) of AJRA.

The court looked at the case of *The Ever Success*⁷³ which provided that for the lien to exist, there must be a service rendered to the ship. In this case the plaintiff claimed wages in respect of an employment contract. One of the issues was the exact period of employment. The court held that the service rendered by the seaman was usually measured by reference to the seaman's contract of service, looking at the period the service was rendered.⁷⁴

The argument advanced by the appellant is what ultimately led to the court's conclusion. The appellant argued that the contracts of employment of the hostages had terminated by no later than 15 April 2011 due to a supervening event frustrating the performance of the contract. The SCA held that there was no maritime lien established due to the impossibility of performance.⁷⁵

1.6 Conclusion

The writer is of the view that the *Windrush* decision firmly establishes the application of the doctrine of impossibility in the context of maritime liens, specifically seaman's lien. It does not treat the seaman's lien as sacred. The decision also begins the conversation in South Africa around piracy as a supervening event rendering performance in a contract, impossible.

The question which also becomes a point of contention is whether piracy along the East African coast (specifically in the region which the vessel was attacked) is an unexpected event, as per the test in *Wilson v Smith*.⁷⁶ There are articles written surrounding the frequency of piracy along the East African coast during the years of 2009-2010.⁷⁷ In 2008 alone, 111 pirate attacks were reported off the Somali coastline.⁷⁸ Reports inform us that these were very common, so much so that Kenya engaged with the United States of America and the United Kingdom and signed

⁷³ [1999] 1 Lloyd's Rep 824.

⁷⁴ Ibid at 831.

⁷⁵ *Windrush* (see note 65; para 42).

⁷⁶ 1956 (1) SA 393 (W).

⁷⁷ McDonald, M "Record Number of Somali Pirate Attacks in 2009" (2009) *The New York Times* available at <https://www.nytimes.com/2009/12/30/world/africa/30piracy.html> accessed 18.06.2018; "Pirates hijack cargo ship near Seychelles" (2009) available at <http://edition.cnn.com/2009/WORLD/africa/10/22/seychelles.pirate.hijack/index.html> accessed 18.06.2018.

⁷⁸ Hinton, S "Somali Piracy: Applying Universal Jurisdiction" (2012) 3 *Malabu: Maritime Law Bulletin* 13 at 15.

a Memorandum of Understanding in 2009 to prosecute pirates captured by their navies.⁷⁹ Would then a pirate attack be an unexpected event in the region which the *Asphalt Venture* was attacked?

The next paragraph will discuss the research questions to be answered by this research, together with the research methodology that will be used by the writer. Thereafter chapter two will commence with a discussion on the development of a maritime lien.

1.7 Research Questions to be answered

The questions to be answered in this paper are:

- 1.7.1 What is the definition of maritime liens and the different types of maritime liens in South Africa and internationally.
- 1.7.2 What is a seaman's wages lien and to what extent is it protected in SA law and international law.
- 1.7.3 What were the decisions of the Court a quo and the SCA findings of the *Windrush* case?
- 1.7.4 What is the doctrine of supervening impossibility?
- 1.7.5 What is the effect of the doctrine of supervening impossibility on a seaman's wages lien?
- 1.7.6 Can piracy be considered an unexpected circumstance along the East African coast to constitute a supervening impossibility?

1.8 Methodology to be used

This dissertation will consist of a desktop review of the legal materials. The rules and arguments set out in these materials will be analysed and discussed in a coherent, concise and critical manner.

⁷⁹ Chang, D "Piracy laws and the Effective Prosecution of Pirates" (2010) 33 *Boston College International & Comparative Law Review* 273.

- 1.9 How each chapter will contribute towards answering the research questions
- 1.9.1 The first chapter will be an introduction to the concept of maritime liens and will define the maritime lien and different types of maritime liens with particular reference to a seaman's wages lien.
- 1.9.2 The second chapter will address the development of maritime liens and the action *in rem* both in South Africa and internationally.
- 1.9.3 The third chapter will discuss the development of the seaman's lien in South African law and internationally.
- 1.9.4 The fourth chapter will discuss the *Windrush* decision namely the Court a quo as well as the SCA decision.
- 1.9.5 Chapter five will discuss the doctrine of impossibility of performance and the issue of piracy along the African coast considering the *Windrush* decision.
- 1.9.6 Chapter Six will be a conclusion summarizing the effect of the *Windrush* decision in light of a maritime lien and supervening impossibility.

Chapter 2

2. The development of the maritime lien and action *in rem*

The maritime lien is a prominent feature of the maritime law claims instituted in the admiralty courts, not only internationally but in South Africa as well. As discussed, a maritime lien is a maritime claim which travels with the vessel into whosoever's possession it may happen to be in from the time it arises.⁸⁰ The lien, which attached itself to the vessel the first time it arose, is carried into effect by the procedure of an action *in rem*.⁸¹

2.1 The origin of the maritime lien

With the action *in rem* being the procedure by which the maritime lien is enforced, it is important to consider the origin of the maritime lien which has not been fully and firmly established. Paul Macarius Herbert provides:

The origin of the maritime lien is shrouded in obscurity. The probable explanation for this is the struggle in England between the admiralty and the courts of common law, with the latter emerging victorious in the last half of the seventeenth century. As a result, we have little accurate information on the history of maritime liens in English law.⁸²

There are three main theories that have been advanced regarding the origin of the maritime lien namely, the personification theory, the procedural theory and the historical (conflict) theory (also referred to as the Roscoe theory).⁸³ The writer is of the view that the conflict theory and the procedural theory are similar as their focus lies in the main purpose of the procedural aspects of the maritime lien. However, the personification theory looks to focus on the *res* itself.

⁸⁰ *Harmer v Bell – The Bold Buccleugh* (1852) 7 Moo PC 267 at 285-286.

⁸¹ *Ibid.*

⁸² Paul Macarius Hebert "Origin and Nature of Maritime Liens" (1929-1930) 4 *Tulane Law Review* 381; 382.

⁸³ Gys Hofmeyr *Admiralty Jurisdiction, Law and Practice in South Africa* 2ed (2012) 251.

a. The historical theory

The historical theory is also referred to as the Roscoe Theory.⁸⁴ It provides that the arrest of the *res* was a procedural device to obtain personal jurisdiction and was developed to assume jurisdiction in *personam*, which was prohibited by the common law courts.⁸⁵ As a result of the conflict between the common law courts and the courts of admiralty, maritime liens and the action *in rem* were developed.⁸⁶ Alongside the common law countries and admiralty courts during Medieval England existed the merchant courts.⁸⁷ According to Roscoe, the courts of admiralty were governed by the civil law and the laws of Oléron and the codified customs of the Admiralty.⁸⁸

Issues surrounding jurisdiction ensued between the courts for years.⁸⁹ However, in the late 16th Century, the admiralty courts struggled for existence as the common law courts were dominating.⁹⁰ The taking of bail instead of keeping the property under arrest became a vital part of admiralty law.⁹¹ The admiralty courts accepted bail and released the property. The amount received as bail became the subject of the action *in rem*.⁹²

Admiralty law became more interesting when the lawyers begun claiming that the money provided to secure the release of the arrested ship was not “bail” but rather a stipulation.⁹³ The stipulation is a form of an express hypothecation with the stipulation being a solemn promise to repay the money loaned on the terms agreed.⁹⁴ The stipulation found in Roman law was

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ William Tetley *Maritime Liens and Claims* (1985) 36.

⁸⁷ These courts include Pie Powder courts of Rochester and Ipswich. Ibid, 19-20.

⁸⁸ Edward Stanley Roscoe *The Admiralty Jurisdiction and Practice of the High Court of Justice* (1931) 28.

⁸⁹ Neill Hutton “The Origin, Development, and Future of Maritime Liens and the Action in Rem” (2003) 28 *Tulane Maritime Law Journal* 81 at 102-103.

⁹⁰ Ibid, 104.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Tetley (see note 86; 227).

⁹⁴ Edward F Ryan “Admiralty Jurisdiction and the Maritime Lien: A Historical Perspective” (1968) 7 *Western Ontario Law Review* 173 at 184.

derived from Greek law where it must be written.⁹⁵ However, in Roman law it needs not be written.⁹⁶

The maritime lien is not identical to the hypothec. For example, creditors who held hypothecs are paid in the order of their accrual, with the latest being the last to be paid.⁹⁷ On the contrary, maritime liens often rank in reverse order of accrual with the most recent having the highest priority.⁹⁸

The admiralty courts triumphed over the common law courts because they emphasised form over substance and in doing so developed the foundation of modern admiralty law – proceeding on a maritime lien by way of an action *in rem*.⁹⁹ Proceeding *in rem* was a result of the conflict that existed between the admiralty courts and the common law courts.¹⁰⁰ The main aim of the *in rem* procedure was to found jurisdiction.¹⁰¹ This was supported by the Court of Appeal in *The Beldis*,¹⁰² stating that the arrest of the *res* was a mere procedure, and that its only object was to obtain security that the judgment should be satisfied.¹⁰³ It may be that this was not the only, or indeed the primary, object, and that the original object of arrest was to found jurisdiction at a time when any attempt to assume jurisdiction *in personam* was prohibited by the common law courts.

This was supported in *The Tervaete* where Lord Justice Scrutton provided that the action *in rem* is not based upon the wrongdoing of the ship personified as an offender, but is a means of bringing the owner of the ship to meet his personal liability by seizing his property.¹⁰⁴

The historical theory finds support in the case of *Justin v Ballam*¹⁰⁵ where it was provided that “in maritime law every contract of the master implies a hypothecation”. This theory was

⁹⁵ Hutton (see note 89; 105).

⁹⁶ Ibid.

⁹⁷ Paul Macarius Hebert “Origin and Nature of Maritime Liens” (1929-1930) 4 *Tulane Law Review* 381,405.

⁹⁸ Hebert (see note 18; 405-406). Seaman’s wages are an exception to this rule.

⁹⁹ Ryan (see note 94; 185).

¹⁰⁰ Roscoe (see note 88; 27-28).

¹⁰¹ Hutton (see note 89; 106-107).

¹⁰² *The Beldis* [1936] P. 51, 73-74.

¹⁰³ Ibid; 73 – 74.

¹⁰⁴ *The Tervaete* [1922] Eng CA P 259, 270 (Scrutton, LJ).

¹⁰⁵ *Justin v Ballam* 2 Lord Raymond’s King’s Bench and Common Pleas Reports 805 (1711).

strengthened by the established practice that a seaman's lien would be extinguished if the ship was destroyed.¹⁰⁶

b. The procedural theory

The procedural theory provides that the maritime lien and the consequent arrest of the ship constitute a procedural device, not only to obtain security for payment of the claim but to compel the owner to enter an appearance to defend.¹⁰⁷

Herbert provides that this theory substantiates that the right to proceed *in rem* is a matter of procedure having no connection with the substantive rights conferred by the maritime lien.¹⁰⁸

The theory provides the following consequences:

- aa) There may be a right to proceed *in rem* regardless of the existence of a maritime lien;
- bb) The proceeding *in rem* based on a maritime lien is in substance an action against the owner of the vessel and the vessel is not liable unless the owners are personally liable; and
- cc) The recovery in an action *in rem* is not limited to the value of the *res* where the defendant has appeared to defend the suit *in rem*.¹⁰⁹

According to the procedural theory, the origin of the maritime lien is born out of the arrest of a vessel to compel the appearance of its owner and it developed a way to source funds from which potential judgments could be awarded.¹¹⁰ The theory has been attributed to Reginald Marsden.¹¹¹ The theory was supported by the case of *Greenway & Barker* where it was held that "execution ought to be only for goods, for the ship is only arrested; and the libel ought to be only against the ship and goods, not against the party".¹¹²

¹⁰⁶ EC Mayers *Admiralty Law and Practice in Canada* (1916); 7.

¹⁰⁷ Gys Hofmeyr *Admiralty Jurisdiction, Law and Practice in South Africa* 2ed (2012); 251.

¹⁰⁸ Hebert (see note 18; 385).

¹⁰⁹ Ibid.

¹¹⁰ Neill Hutton "The Origin, Development, and Future of Maritime Liens and the Action in Rem" (2003) 28 *Tulane Maritime Law Journal* 81; 98.

¹¹¹ Ibid, 98.

¹¹² *Greenway & Barker* 78 Eng Rep 151 (CP 1613) at 152.

However, the theory has been heavily criticised as it was recognised as stripping “away the form and revealed that in substance the owners were parties to the action *in rem*”.¹¹³

c. The personality theory

The personality theory, however, seems to be the theory which has been adopted internationally in the maritime community and is said to be the reason actions *in rem* have continued to exist.¹¹⁴

Oliver Holmes provides:

the ship is the only security available in dealing with foreigners, and rather than send one’s own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home, leaving the foreign owners to get their indemnity as they may be able. I dare say some such thought has helped to keep the practice alive, but I believe the true historic foundation is elsewhere.¹¹⁵

Holmes traced the origin of the above theory as the basic desire for vengeance on the offending thing and not compensation.¹¹⁶ The use of the action *in rem* initially did serve the purpose of security for compensation, but these remedies soon appealed to public interest, specifically where a foreign ship was the ship in question.¹¹⁷ The ship acquired its own personality and became competent to enter into contracts and was individually liable.¹¹⁸

During the late 19th century, English courts ascribed to the personality theory to justify the action *in rem* and maritime liens but this was not particularly popular.¹¹⁹ On the other hand the American courts practised the personality theory and adhered to it, despite its shortcomings.

In the case of *The Little Charles*,¹²⁰ a vessel was charged with violating the embargo laws, in departing from a port of the United States and proceeding to Antigua. In this case the Chief Justice Marshall stated that it was not a proceeding against the owner but a proceeding against the vessel, for an offense committed by the vessel. This is not less an offence or an offence that

¹¹³ *Republic of India v Indian SS Co* [1997] 4 All ER 380 at 387.

¹¹⁴ Oliver Wendell Holmes, JR *The Common Law* 3ed (1923) 28.

¹¹⁵ *Ibid.*

¹¹⁶ Holmes (see note 114; 2)

¹¹⁷ Hutton (see note 110; 93).

¹¹⁸ *Ibid.*

¹¹⁹ Hutton (see note 110; 94).

¹²⁰ *United States v The Little Charles* 26 Fed Cas 979..

would leave her exposed to forfeiture because it was committed without authority and against the will of the owner.¹²¹

The personality theory has been perfectly described by Justice Brown who stated:

“A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron – an ordinary piece of personal property – as distinctly a land structure as a house, and subject only to mechanics’ [possessory] liens ... in the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name.”¹²²

Yet to simply look at the *res* and think rights and liabilities of persons is not affected would be incorrect.¹²³ The action *in rem* procedure which can lead to the sale of a ship will have a direct impact on the owner of the ship.¹²⁴ The writer submits that strict adherence to the personality theory is also in itself problematic as ultimately the *res* is owned by another who is financially affected by anything which occurs to the *res*.

2.2 The action *in rem* and the action *in personam*

The action *in rem* is a remedy made available to a claimant¹²⁵ seeking to claim for a loss incurred in relation to a ship.¹²⁶ The core nature, however, of the action *in rem* is that it is instituted against the maritime property and the ship is thus recognised and listed as the defendant.¹²⁷ The property is arrested and held until judgment has been satisfied.¹²⁸ Where there is judgment in favour of the plaintiff, the property is sold and the proceeds of the sale are distributed by the court, subject to any preferential rights that may exist.¹²⁹ In practice the Protection and Indemnity Club also, instead of waiting for judgment in the matter, offers

¹²¹ Ibid at 979.

¹²² *Tucker v Alexandroff* 183 US 424, 438 (1912).

¹²³ Hutton (see note 110; 96).

¹²⁴ Ibid.

¹²⁵ A person who holds a maritime claim as described under section 1 “maritime claim” (a) – (ff) of the Act.

¹²⁶ Gys Hofmeyr “Admiralty Jurisdiction in South Africa” (1982) *ActaJuridica* 30 at 38.

¹²⁷ Christopher Hill *Maritime Law* 2ed (1985) 93.

¹²⁸ Ibid.

¹²⁹ Hofmeyr (see note 126).

security for the claim in order to have the vessel or property released. The amount of security provided cannot exceed the value of the ship.¹³⁰

The alternative action to the action *in rem* is the action *in personam*. Section 3(2) of the Act reads

- (2) An action in personam may only be instituted against a person -
- (a) resident or carrying on business at any place in the Republic;
 - (b) whose property within the court's area of jurisdiction has been attached by the plaintiff or the applicant, to found or to confirm jurisdiction;
 - (c) who has consented or submitted to the jurisdiction of the court;
 - (d) in respect of whom any court in the Republic has jurisdiction in terms of Chapter IV of the Insurance Act, 1943 (Act No. 27 of 1943);
 - (e) in the case of a company, if the company has a registered office in the Republic.

This provision allows South African courts to exercise their jurisdiction over the defendant and where the defendant and the plaintiff are peregrines.¹³¹ In order to establish jurisdiction, facts such as the cause of action of the contract in dispute must have occurred within the court's territorial jurisdiction.¹³²

The action *in rem* can be instituted by a claimant who has a maritime lien over the property to be arrested or if the owner of the property to be arrested would be liable to the claimant in an action *in personam* on the cause of action instituted upon.¹³³ Whilst with an action *in personam*, it can be instituted where there is any maritime claim.¹³⁴ However, an action *in rem* can only be instituted in six instances, namely: on a claim which lies in respect of (one or more of the following) a ship with or without its equipment; furniture, equipment, stores, bunkers or a part thereof; cargo or a part of it; freight; a container; and a fund.¹³⁵

¹³⁰ Hofmeyr (see note 126).

¹³¹ Hofmeyr (see note 126).

¹³² *Malherbe v Britstown Municipality* 1949 (1) SA 281 (C) at 287 – 288.

¹³³ Section 3(4)(a) of AJRA.

¹³⁴ Section 3(1) of AJRA.

¹³⁵ Section 3(5) of AJRA.

a. The nature of the action *in rem* internationally

The nature of the action *in rem* is quite debatable and stands as a continuous litigation point due to the idea that it is purely procedural whilst other jurisdictions say that it is a result of the application of the personification theory which provides that the object is held to be liable for any human injury suffered due to the use of that object.¹³⁶ This allows claimants to directly institute proceedings against a vessel, giving it human character as though it can incur liability without theoretically involving the owner of the ship in person.¹³⁷ The United States (American) law and English law have discussed the nature of the action *in rem* and have provided the maritime industry with jurisprudence through their case law.

The American courts supported the personification theory.¹³⁸ Evidence of this was the decision reached in *The China*¹³⁹ where a harbour pilot who had to be present on the vessel caused a collision in the New York Harbour on board the vessel. The Supreme Court held that the failure to hold the vessel liable for a fault of the compulsory pilot would be unfair and undermine the importance of the maritime code on the personification of the vessel.¹⁴⁰ The American admiralty courts are committed to the personification theory.¹⁴¹ Many decades later, Bradley Schwab¹⁴² provided that according to the Supplemental Admiralty Rules, Rule C(1)(b) states that except as otherwise provided by law, a party who may proceed *in rem* may also, or in the alternative, proceed in *personam* against any person who may be liable.¹⁴³ However, it has not been expressly confirmed that the *in rem* and in *personam* proceedings can be instituted simultaneously over the same claim.¹⁴⁴

¹³⁶ Bradley J Schwab “Equitable Personification: A review of Res Judicata’s Historical Application to Successive In *Personam* and In *Rem* Admiralty Action in the United States” (2012) 37 (1) *Tulane Maritime Law Journal* 253.

¹³⁷ *Ibid.*

¹³⁸ DM Collins “Comments on the American rule of in rem liability” (1985) 10 *The Maritime Lawyer* 71.

¹³⁹ 74 U.S. (7 Wall) 53 (1868).

¹⁴⁰ *Ibid* at 68.

¹⁴¹ Paul Macarius Hebert “Origin and Nature of Maritime Liens” (1929-1930) 4 *Tulane Law Review* 381, 383. Also see Holmes (see note 34, 26 – 27) where he provides “[I]t is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical.”.

¹⁴² JD candidate 2013, Tulane University School of Law; BS, Biological Sciences, 2009, Louisiana State University; MS, Health Care Management, 2010, University of New Orleans.

¹⁴³ Schwab (see note 136; 264).

¹⁴⁴ Schwab (see note 136; 262).

On the other hand, English law stated that *in rem* liability was dependent on the *in personam* liability of the owner. English law provides that the action *in rem* is simply procedural and is to simply secure the appearance of the defendant owner.¹⁴⁵ It was held in the English case *Republic of India and Another v Indian Steamship Co Ltd (The Indian Grace) (No 2)*¹⁴⁶ that the action *in rem* is an action against the owner from the moment the admiralty court is seized with the jurisdiction.¹⁴⁷ In the English case *The Dictator*¹⁴⁸, the court provided that once an owner enters an appearance to defend and the owner is personally liable on the claim, the action then proceeds as an action *in rem* and an action *in personam*.¹⁴⁹ Therefore, the owners assets are also subject to execution in the satisfaction of the judgment as he has submitted himself to the court's jurisdiction.¹⁵⁰

b. The nature of an action *in rem* in SA

A South African case to look at is *SA Boatyards CC v The Lady Rose (Formerly known as the Shiza)*¹⁵¹ where it was held that although the action *in rem* is a procedure against the maritime property, for purposes of a claim in reconvention, the owner of arrested property is to be recognised as being a defendant in Admiralty Rule 8 of the Admiralty Proceedings Rules.¹⁵² It has therefore been recognised that an owner is not entirely a stranger to the action *in rem* proceedings as seen in discussions under chapter 2.1 of this chapter.¹⁵³

Another South African case that arises when discussing the nature of the action *in rem* is the case *MV Alina (No 2) Transnet Ltd v Owner of MV Alina*.¹⁵⁴ The matter dealt with the issue of whether a plaintiff can commence an action *in rem* by way of arresting a vessel based on the

¹⁴⁵ DC Jackson "Current English Admiralty Jurisdiction and Practice" 5 (1982) *Acta Juridica* at 14.

¹⁴⁶ [1998] 1 Lloyd's Rep 1 (HL).

¹⁴⁷ *The Indian Grace* (see note 62; 10). Further it was held that the jurisdiction of the Admiralty Court was established by the service of a writ or where a writ is deemed to be served as a result of the acknowledgment of the issue of the writ by the defendant for service and that, from that moment, the owner is party to the proceedings *in rem*. This then disputed what was held in the *Dictator*, namely that liability was incurred by entering an appearance.

¹⁴⁸ [1892] P. 304.

¹⁴⁹ *Ibid*.

¹⁵⁰ *Ibid*.

¹⁵¹ *SA Boatyards CC v The Lady Rose (Formerly known as the Shiza)* 1991 (3) SA 711 (C).

¹⁵² *Ibid*, at 716C-716F.

¹⁵³ The personification theory.

¹⁵⁴ 2011 (6) SA 206 (SCA).

owner's personal liability for the claim sought, receive a notice of intention to defend the action, but still seek attachment of the vessel for purposes of confirming and founding jurisdiction based on the same claim but in different proceedings.¹⁵⁵ In this case, Transnet the port authority at Saldanha Bay had the *Alina II*, a bulk carrier berthed at one of the two berths at the terminal where it commenced loading cargo. Two days after loading commenced, a hull fracture was discovered, and the vessel then remained at the berth for approximately three months because her cargo had to be transhipped. Arising from these averments, Transnet claimed it had suffered damages and instituted two actions *in rem* to recover the damages claimed. The owner then entered a notice of intention to defend and Transnet delivered its particulars. The actions were based on section 3(4)(b) of AJRA.

Wallis JA (as he was then known) however provided that it has been generally accepted that a claimant who has not received satisfaction after proceeding *in rem* is entitled to pursue a claim against the owner in *personam* provided the owner is personally liable on the claim.¹⁵⁶ The main issue, however, was whether the owner of the *Alina II* had submitted itself to the jurisdiction of the South African court in respect of these claims.¹⁵⁷ It was held that the attachment cannot be maintained as the defendant under the action *in rem*, had entered an appearance to defend, which would be sufficient to say that the owner had submitted personally to the court's jurisdiction.¹⁵⁸

An advantage of the action *in personam* is clearly the security one may receive on the release of the maritime property from attachment as the plaintiff's claim may be above the value of the vessel. However, a disadvantage would be where the defendant is not domiciled within the court's territorial jurisdiction as the action *in personam* is dependent on the serving of summons properly and effectively on the defendant.¹⁵⁹ This disadvantage is what makes most litigants in the maritime industry seek to institute an action *in rem* rather than an action *in personam*

¹⁵⁵ Ibid; para 1.

¹⁵⁶ *MV Alina* (see note 154; para 9).

¹⁵⁷ *MV Alina* (see note 154; para 13).

¹⁵⁸ *MV Alina* (see note 154; para 36).

¹⁵⁹ Christopher Hill *Maritime Law* 2ed (1985) 94.

because the claimant simply waits for the ship to arrive within the courts territorial jurisdiction and serves papers.¹⁶⁰

2.3 Conclusion

The House of Lords provided that the idea that a ship can be a defendant in a matter is simply fiction.¹⁶¹ The theory that is found mostly in modern admiralty law is the personification theory, namely that the lien is travelling with the ship into whosoever's possession. However, it will ultimately affect the owner, or a new owner, depending on when the person who has the lien against the vessel decides to enforce it. The maritime lien is a complicated tool utilised to protect claimants with a recognised lien in the maritime industry. It is enforced through the action *in rem* and generally thought of as inextinguishable.

For purposes of this paper, the writer will draw attention in the next chapter to what happens if the claimant is a seaman. In this case, the seaman must firstly establish whether there is a seaman's lien. For it to exist, we should also question how the lien has developed over the years and the law applicable to it in modern admiralty law. At the heart of it, the seaman is a protected litigant because of the lien he may possibly hold. The next chapter will define the seaman's lien and its development in South Africa and internationally.

¹⁶⁰ Hill (see note 159; 96).

¹⁶¹ *Republic of India v Indian SS Co (The Indian Endurance)* [1998] AC 878 HLat 10.

Chapter 3

3. Development and defining the seaman's lien

A seaman's lien has been held to constitute whatever can be fairly said to have been earned by a seaman for services he or she has rendered or any payment he or she receives for executing his or her duties.¹⁶² Also, this extends to benefits which may have accrued to the seaman by reason of his or her employment.¹⁶³ However, not all wages give rise to a maritime lien.¹⁶⁴ The general rule is, in order to give rise to a seaman's lien, the payment due must be for services rendered to the ship.¹⁶⁵ In *The Halcyon Skies*¹⁶⁶, Brandon J states that what constituted wages in terms of Admiralty for the purposes of a seaman's lien was extended long ago.¹⁶⁷ In *The Halcyon Skies*¹⁶⁸, Brandon J held that a seaman's claim in respect of the contribution to which the seaman's employer was obliged to pay to a pension fund for the seaman, was a claim for wages within the meaning of s1(1)(o) of the Administration of Justice Act, 1956.¹⁶⁹ Brandon J also refers to *The Arosa Star*¹⁷⁰ where in an Admiralty action in *rem* it was held that a seaman could recover the employers contributions for social insurance as being emoluments in the nature of wages to which he was entitled under his of employment.¹⁷¹

Section 1(1)(s) of the Admiralty Jurisdiction Regulation Act ("AJRA")¹⁷², provides

the employment of any master, officer or seaman of a ship in connection with or in relation to a ship, including the remuneration of any such person, and contributions in respect of any such person to any pension fund, provident fund, medical aid fund, benefit fund, similar fund, association or institution in relation to or for the benefit of any master, officer or seaman;

¹⁶² Gys Hofmeyr *Admiralty Jurisdiction, Law and Practice in South Africa* 2ed (2012)263-264.

¹⁶³ Ibid.

¹⁶⁴ Hofmeyr (see note 162; 264).

¹⁶⁵ Ibid. When considering what defines "the ship", this includes her tackle, apparel and furniture and any part thereof and the freight are burdened with the lien. As the lien is based upon service rendered to the ship, cargo is not subject to the lien. (Hofmeyr see note 162; 266).

¹⁶⁶ [1976] 1 LLR 461.

¹⁶⁷ Ibid.

¹⁶⁸ See note 166 above.

¹⁶⁹ Ibid, 466 – 467.

¹⁷⁰ [1959] 2 LLR 396.

¹⁷¹ *The Halcyon Skies* (see note 166, 464 – 465).

¹⁷² 105 of 1983.

The *Windrush Intercontinental SA and Another v UACC Bergshav AS Asphalt Venture (Windrush)*¹⁷³ decision centralises around the seaman's lien and whether in the circumstances, the lien existed. The employment contracts were used as a means of proving that the crew were indeed employed on the ship, however the real question was whether they held a lien in respect of their claims. Discussing the development and definitions given to the lien provide a stable foundation for understanding the *Windrush* case and the decision reached by the Supreme Court of Appeal.

3.1 Development of the seaman's lien internationally

Hofmeyr provides that the development of the seaman's lien is thought to be based on considerations of public policy with special sympathy given to seamen which needed to be extended by the court to all seamen.¹⁷⁴ Lord Stowell provided that the need to protect the seaman was based on their lack of formal education, providing that they were

a set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection, even against themselves.¹⁷⁵

However, the writer is of the opinion that this description does not give the picture of the seaman's place in society, namely that of a highly respected litigant. More so when the seaman enters the courtroom and it has been stated that their "questions of wages should be speedily settled".¹⁷⁶ Lord Stowell stated time and time again that the seaman has a sacred lien. He went on to provide, quite dramatically: "A seaman's claim for his wages was sacred so long as a single plank of the ship remained".¹⁷⁷

¹⁷³ 2017 (3) SA 1 (SCA).

¹⁷⁴ Hofmeyr (see note 162, 262-263).

¹⁷⁵ *The Minerva* (1985) 1 Hagg 347. See also *The Prince George* (1837) 3 Hag Adm 376; 382 where a mortgagee wanted to contest litigation by a seaman for his wages against the ship. The Admiralty court rejected the claim as impractical and the seaman need not be exposed to this drawn out litigation.

¹⁷⁶ *The Caracas Bay: Ex Parte the Crew of the MV Caracas Bay* 1977 (4) SA 945 (C); 951H.

¹⁷⁷ *The Sydney Cove* (1815) 1 Dods 11 This, however, is difficult to implement when the doctrine of impossibility is at play. The doctrine will be examined at a later stage under chapter 4.

Initially freight was known as the “mother all wages”.¹⁷⁸ This meant that wages could not be earned if freight had not been earned on the journey.¹⁷⁹ This, however, became difficult because if the ship was destroyed or for some reason there was no freight earned the seaman would not be paid any wages although this was not caused by them.¹⁸⁰ The condition was thrown out when the Merchant Shipping Act of 1854 (United Kingdom) (MSAUK) under section 183 provided that:

“No Right to Wages shall be dependent on the earning of Freight; and every Seaman and Apprentice who would be entitled to demand and recover any Wages if the Ship in which he has served had earned Freight, shall, subject to all other Rules of Law and Conditions applicable to the case, be entitled to claim and recover the same, notwithstanding that Freight has not been earned; but in all cases of Wreck or Loss of the Ship, Proof that he has not exerted himself to the utmost to save the Ship, Cargo, and Stores, shall bar his claim.”¹⁸¹

Once this legislation was enacted, seamen could claim wages even where the ship had not earned any freight.¹⁸²

Another issue that plagued the seaman was whether the wages being claimed were wages earned “on board the ship” as envisioned under section 10 of the Admiralty Act 1861 (United Kingdom).¹⁸³ This was extremely restrictive as it was left to the courts approaching the

¹⁷⁸ *The Minerva* at 357 & *The Juliana* (1822) 2 Dods 501; 510.

¹⁷⁹ Hilton Staniland “Should a seaman sue for his wages as a favoured litigant” (1986) 7 *Industrial Law Journal* 45; 458.

¹⁸⁰ *Ibid.*

¹⁸¹ Section 183 of the Merchant Shipping Act of 1854 (United Kingdom).

¹⁸² Michael Ng “The Protection of seafarers’ wages in admiralty: A critical analysis in the context of modern shipping.” (2008) 22 *Australian & New Zealand Maritime Law Journal*; 138. Liens can still attach to freight earned by a vessel however in order to attach same, the claimant must also have a lien over the ship on which the freight was earned. Therefore, as Ng puts it, the lien over the freight must stem from a lien over the ship.

¹⁸³ *Ibid*; 140. Section 10 of the Admiralty Act 1861 (UK) provided that : “The High Court of Admiralty shall have Jurisdiction over any Claim by a Seaman of any Ship for Wages earned by him on board the Ship, whether the same be due under a special contract or otherwise, and also over any Claim by the Master of any Ship for Wages earned by him on board the Ship, and for Disbursements made by him on account of the Ship: Provided always that if in any cause the Plaintiff does not recover Fifty Pounds, he shall not e entitled to any Costs, Charges or Expenses incurred by him therein, unless the Judge shall certify that the cause was a fit one to be tried in the said Court.”.

seamen's claims in a relaxed fashion to interpret the meaning thereof.¹⁸⁴ The phrase has been abandoned in modern maritime statutes.¹⁸⁵

In American law, the seaman has been regarded as a mature individual, capable of entering into commercial contracts on his own. Despite this, the American courts have leaned towards monitoring the seaman as though he were a child.¹⁸⁶ In the case of *Harden v Gordon*¹⁸⁷ a seaman claimed for expenses incurred because he had suffered an illness during a journey and the shipowner reduced his wages as a result. Justice Story provided that seamen were to be treated how young heirs are treated by courts of equity.¹⁸⁸ Further, seamen because of their lifestyle, are more susceptible to sickness from change of climate, exposure to perils and strenuous labour. They are,

“... generally poor and friendless, and acquire habits of gross indulgence, careless, and improvidence. If some provision be not made for the in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment.”¹⁸⁹

The court ruled in favour of the seaman claiming for his medical expenses incurred whilst on a ship, including nurses, diet and accommodation if they are carried offshore.¹⁹⁰ The courts have recognised seamen as needing protection because they are often thoughtless and require indulgence because they are gullible and easily taken advantage of.¹⁹¹

As a result of the character of the seaman, American law developed rules to protect the seaman, such as placing the burden of proof on the shipowner to prove that the seaman contracted freely and without coercion when entering into the contract.¹⁹² Further, payment of the seaman is

¹⁸⁴ Ng (see note 182; 139).

¹⁸⁵ Ibid.

¹⁸⁶ Martin J Norris “Seaman As Ward of the Admiralty” (1953-1954) 52 *Michigan Law Review* 479.

¹⁸⁷ 11 Fed. Cas. 480, No. 6047.

¹⁸⁸ Ibid; 485.

¹⁸⁹ Ibid; 483.

¹⁹⁰ Ibid; 484.

¹⁹¹ *Harden* (see note 187; 485)

¹⁹² Norris (see note 186; 487).

regulated by legislation and is due within 24 hours after the cargo has been discharged or within four days of the seaman being discharged, whichever occurs first.¹⁹³

Noteworthy internationally is also the Maritime Labour Convention, 2006 (“MLC, 2006”) which came in force on 18 January 2017.¹⁹⁴ The purpose behind the instrument is to create a single document encompassing the standards and norms adopted internationally.¹⁹⁵ Further, it was created to accommodate many different governments, shipowners and seafarers who are committed to decent working environments.¹⁹⁶

It is intended to protect a wider group of workers as seafarers and a large number of ships.¹⁹⁷ The definitions of a seafarer and shipowner are wide and thus inclusive.¹⁹⁸ Moria L. McConnell describes it as a delicate balance and is geared towards providing solutions for problems that exist between seafarers and shipowners.¹⁹⁹ It largely reflects solutions developed by the industry.²⁰⁰ MLC, 2006 under Article IV paragraph 2 states that every seafarer has a right to fair employment terms but wages and contracts of employment are not discussed. However, the Amendments to MLC, 2006 provide provisions granting financial security to seafarers when they experience abandonment. Abandonment has been described as having occurring when a shipowner,

¹⁹³ Norris (see note 186; 488).

¹⁹⁴ MLC Maritime Labour Convention, 2006 available at <https://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/lang--en/index.htm> accessed 16.07.2018.

¹⁹⁵ Ibid, Preamble.

¹⁹⁶ MLC (see note 194, Preamble).

¹⁹⁷ Moria L. McConnell “A delicate balance: The seafarers’ employment agreement, the system of the Maritime Labour Convention, 2006 and the role of flag States. Seafarers: an international labour market in perspective” (2016) *Editorial Gomylex*, 119-174 at 22 available at <https://hal.archives-ouvertes.fr/hal-01470314/document> accessed 11.11.2018.

¹⁹⁸ Article II paragraph 1 (f) “seafarer” means any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies”. Article II paragraph 1 (j) “shipowner” means the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this Convention, regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner.

¹⁹⁹ McConnell (see note 197, 23).

²⁰⁰ Ibid.

- (a) fails to cover the cost of the seafarer's repatriation; or
- (b) has left the seafarer without the necessary maintenance and support; or
- (c) has otherwise unilaterally severed their ties with the seafarer including failure to pay contractual wages for a period of at least two months.

The Amendments of 2014 to the MLC, 2006 are in force as of 18 July 2016 and are in force in South Africa.²⁰¹

Considering the existence of the MLC, 2006, it can be deduced that the need to protect the seaman is a necessity recognised by the international legal community. The writer is of the opinion that the international community's support for the protection of the seafarer can be seen by the number of signatories to the MLC, 2006, which are over 60 countries.²⁰² South Africa being one of them, also indicates a strong move by our country to ensure the continued protection of the seaman's rights.

²⁰¹ Maritime Labour Convention, 2006, as amended (MLC, 2006) available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:91:0::NO::P91_ILO_CODE:C186 accessed 11.11.2018.

²⁰² Ibid.

3.2 Seaman's lien in South Africa

According to Hofmeyr wages include “whatever could fairly be said to have been earned by the seaman's services or whatever the seaman received in the course of such service as compensation for the execution of his or her duties or the benefits which accrued to the seaman by reason of his or her employment”.²⁰³

Section 2 of the Merchant Shipping Act 57 of 1951 (“MSASA”) provides that a seaman is

any person (except a master, pilot or apprentice-officer) employed or engaged in any capacity as a member of the crew of a ship

The phrase “member of the crew” is similar to the wording used in the Admiralty Jurisdiction Regulation Act 105 of 1983 (AJRA) where the Admiralty Court's jurisdiction is stated as any claim brought with respect to;

the employment of any master, officer or seaman of a ship in connection with or in relation to a ship, including the remuneration of any such person, and contributions in respect of any such person to any pension fund, provident fund, medical aid fund, benefit fund, similar fund, association or institution in relation to or for the benefit of any master, officer or seaman;²⁰⁴

An early case to look at the seaman's lien in South Africa is *Continental Illinois National Bank and Trust Co of Chicago v Greek Seaman's Pension Fund*.²⁰⁵ In this case a fund constituted in terms of section 9 of the Act²⁰⁶ had a claim against it brought by the Greek Seaman's Pension Fund (GSPF) providing that the claim suffices as a maritime claim as defined in the Act. The GSPF claimed on its own behalf and on behalf of other funds established under Greek law for the benefit of Greek seamen.²⁰⁷

Contributions made to the GSPF were made up of an amount deducted from the seaman's salary.²⁰⁸ The GSPF then claimed preference for its claims as it was for the benefit of the master

²⁰³ Gys Hofmeyr *Admiralty Jurisdiction, Law and Practice in South Africa* 2ed (2012) 263-264.

²⁰⁴ Section 1(1) ‘maritime claim’ (s) of the Act.

²⁰⁵ 1989 (2) SA 515 (D).

²⁰⁶ Section 9 of the Act addresses the sale of arrested property.

²⁰⁷ *Continental Illinois* (see note 205; 521G-522A).

²⁰⁸ *Continental Illinois* (see note 205; 521G-J).

and crew of the ship. The court held that it was a maritime claim in terms of section 1(1) (ii)(u) of the Act and the expression “wages and other sums due to or payable in respect of the master, officers and other members of the ship’s complement, in connection with their employment on the ship”.²⁰⁹ The contributions were found to be seaman’s wages.²¹⁰

An important case when considering the seaman’s lien in the South African context is *Master and Crew of the MT Argun and Others v MT Argun*.²¹¹ In this case there were three actions *in rem* instituted in terms of the Act against the defendant vessel by the master and crew of said vessel. The actions were based on the seaman’s maritime lien for wages.

The seamen had ceded their claims for unpaid wages to a firm of attorneys for past and future legal costs incurred to act as their representatives. The defendant raised a special plea that by law, a maritime lien is not transferable by cession or assignment and therefore the firm has no action *in rem* against the defendant vessel.²¹²

The court found that it was clear that the master and the crew never intended to deprive themselves of their right to sue. The court also found that by matter of the law, indeed a maritime lien was not transferable by cession or assignment.²¹³ The court held that the seamen never stripped themselves of their maritime liens and transferred them to the attorneys.²¹⁴

Another case of relevance when looking at the nature of the seaman’s lien is the case of *Quick & Louw & Moore (Pty) Ltd and Another v SS Almoural and Others*.²¹⁵ In this case the court held that the person who at the request of the owner of the vessel paid the crew’s wages should

²⁰⁹ *Continental Illinois* (see note 205; 548).

²¹⁰ *Ibid*. Another case worth noting is *MAK Mediterraree Sarl v The Fund Constituting the proceeds o the judicial sale of the MC Thunder (SD Arch, Interested Party)* 1994 (3) SA 599 (C). The claim against a fund constituted in terms of section 9 of the Act. This was a claim for money’s lent and advanced to the owner for future payment of wages for the master and the crew. The money’s were held to be money advanced to obtain necessaries and therefore recognised as a maritime claim.

²¹¹ 2003 (24) ILJ 1104 (C).

²¹² *Ibid*; 1114E-F.

²¹³ *Ibid*.

²¹⁴ *MT Argun* (see note 211; 1118A-B). On appeal (*MT Argun v Master and Crew of the MT Argun and Others* 2004 1 (SA) 1 (SCA)) there were six issues raised, however, the appeal was dismissed on all grounds.

²¹⁵ 1982 (3) SA 406 (C). See also *Kandagasabapathy and Others v MV Melina* 1981 (3) SA 950 (N) at 956B-F.

be recognised as a necessary man and not a seaman and therefore cannot gain the protection of the seaman's lien. The court found that seamen continued being a favourite of the law and a protected litigant.²¹⁶

3.3 Conclusion

If the lien is as protected as it has been alleged, incapable of being transferred by cession or assignment, how is it then possible that an event such as piracy is a supervening event which will render the sacred contract that has been protected over many years unenforceable?

Seamen are favoured vulnerable litigants and should continuously be protected against exploitation, which the courts have seemingly continued to do. However, there have been instances when the sanctity of the lien has been jeopardised by the law of contract. A principle to focus on in this paper is the doctrine of supervening event of impossibility applied in the case of *Windrush Intercontinental SA v UACC Bershav Tankers AS*.²¹⁷

The following chapter will discuss the decision of the High Court, KwaZulu Natal Local Division, Durban and the decision of the Supreme Court of Appeal. I will highlight the issues raised in each court and how each court arrived at their decisions.

²¹⁶ Ibid; 411.

²¹⁷ 2017 (3) SA 1 (SCA).

Chapter 4

4. The Windrush Decision

Before the High Court of South Africa, Durban Local Division, KwaZulu Natal (hereon referred to as the court a quo) the first applicant, Windrush Intercontinental SA (Windrush) sought to set aside the deemed arrest of the *Asphalt Venture* instituted *in rem* by the respondent, UACC Bergshav Tankers AS (Bergshav); and the return of any monies paid in pursuit of the release of the *Asphalt Venture* (the vessel) by its Protection and Indemnity Club. This application came before the court a quo based on the following facts.²¹⁸

In May 2008 Windrush entered into a bareboat charterparty with the registered owner of the vessel, Bitumen Invest A/S (Bitumen), in terms of which Windrush took the vessel on charter from 7 May 2008 to 7 November 2015. Thereafter Windrush entered into a sub-bareboat charterparty with Concord Worldwide Inc I (Concord) for the same period. Concord (represented by its ship managers) entered into contracts of employment with 15 crew members from India for the *Asphalt Venture*. The contracts of employment were entered into between April and August 2010.²¹⁹ The vessel was at that stage employed under a time charterparty to carry Bitumen, apparently principally between Durban and the Indian Ocean islands.

On 28 September 2010 the vessel was hijacked by Somali pirates when it was about 100 nautical miles east of Mombasa. The vessel and its crew became prisoners of the Somali pirates. Concord then engaged with its insurers, attorneys and instructing solicitors, consulting security advisers and, most importantly, appointing a negotiator to deal with the pirates. As a result of such, an agreement was reached which resulted in a ransom of some USD 3,4 million being paid to the pirates on 15 April 2011 in exchange for the promised release of the vessel and the 15 crew members. The vessel was released with only eight of the crew members. The pirates went back on their word and retained seven of the crew members as hostages. They offered the release of the remaining seven against the release of some 120 Somali detainees held in India awaiting trial, presumably on charges of or relating to piracy. Unfortunately, from the

²¹⁸ 2015 (4) SA 381 (KZD).

²¹⁹ Court a quo, para 3.

perspective of the seven Indian hostages, their government does not negotiate with pirates. As a result, the seven crew members remained in captivity.²²⁰

Each of the seven crew members had been employed by Concord in terms of a written agreement specifically for service on the *Asphalt Venture*. The contracts were concluded at different times between April 2010 and August 2010, and the fixed periods of employment varied between four months and nine months. The latest expiry date among the seven contracts was the end of February 2011. Accordingly, the specified period of employment of each of the seven hostages had terminated by the time the vessel was released in during April 2011. Notwithstanding this, Concord continued to pay the wages of all the crew up to 15 April 2011, when the ship and eight crew members were released.

The eight crew members who were released were discharged from the vessel and Concord paid for their repatriation. Concord then continued to pay amounts equivalent to the wages of the seven detained crew members to their families up to and including October 2011. Concord claimed this was done on a voluntary basis and out of sympathy. However, around October 2011 Concord experienced financial difficulties and could no longer pay the crew and maintain their obligations in terms of the subbareboat charterparty with Windrush. This led to Windrush terminating the terms of the sub-bareboat charterparty on or about 17 June 2011. After 31 October 2011 Concord no longer paid the amounts to the families which of course would have caused financial suffering for the families a great deal.²²¹

On 17 January 2012 a vessel belonging to the respondent- UACC Bergshav Tankers AS (Bergshav), the *UACC Eagle*, was arrested in Mumbai, India, by the relatives of the remaining seven crew members still in captivity, stating that they represented the crew members in that litigation. The arrest was sought to be justified upon the basis that under Indian law the *UACC Eagle* was a sister ship of the *Asphalt Venture*. It is common cause between the applicants and the respondent that in fact there is (and never was) any relationship between the two vessels. Nevertheless, the sum of the claims made by the families was USD 6,787 million, and the quantum was premised upon the proposition that the plaintiffs were entitled to seek in respect

²²⁰ Court a quo, para 4-7.

²²¹ Court a quo, para 8 – 9.

of each of the hostages a 'decree for daily wages' which each hostage would be entitled to be paid from November 2011 until each reached the age of 70 years.²²²

The respondent claimed that due to the size of the claim against the *UACC Eagle* and the time-consuming litigation which would ensue in the Indian courts, the respondent decided to reach a settlement with the relatives of the remaining seven crew members. This occurred during February 2012. The respondent undertook to pay the claims for crew wages for the period 1 November 2011 to 29 February 2012, to pay USD 306 000 into an escrow account to cover future wages to the end of December 2012, and to undertake to pay and guarantee the payment of crew wages for the period 1 January 2013 to 31 December 2013.²²³

Against that the crew members who were held hostage, represented by their families, ceded their claims paid or guaranteed under the settlement agreement to the respondent, together with what they contended to be their associated maritime liens. Following the settlement agreement the respondent's vessel was released by order of the court in Mumbai.²²⁴ As cessionary of the relatives claims, in September 2012 Bergshav issued a summons *in rem* out of this court against the *Asphalt Venture*. The respondent sought payment of what it had already paid to the families of the seven hostages, and an order declaring the respondent's entitlement against the *Asphalt Venture* to payment of the amounts still to be paid in terms of the settlement agreement.

The summons and the particulars of claim which followed asserted that the remaining seven crew members were entitled to be paid the wages reflected in their employment contracts during the currency of those contracts and, following any valid determination thereof, until such time as each of them might be repatriated. It was alleged that the crew had been employed by Bitumen as owner; alternatively by Concord as sub-bareboat charterer; or further alternatively by the first applicant as bareboat charterer. It was alleged in the main that the

²²² Court a quo, para 10 – 11.

²²³ This latter obligation to cover the wage claim during 2013 was subject to a right in favour of the respondent to call for arbitration on the issue of whether the seven crew members were entitled to wages pending repatriation for the period covered under the settlement agreement.

²²⁴ Court a quo, para 11.

claim by the seven hostages was for unpaid wages, which gives rise to a maritime lien against the second applicant.²²⁵

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

The hijacking of the *Asphalt Venture* on 28 September 2010 set in motion a series of problems for the sub-bareboat charterer, namely Concord Worldwide Inc (Concord). The ransom which only released the eight crew members cost Concord over USD 3 million. Concord also had to ensure payment obligations in terms of the charterparty were met. With all these obligations, Concord faced financial difficulties. These difficulties, and other subsequent events are what led Bergshav to resort to arresting the *Asphalt Venture*.

4.1 The High Court of South Africa, KwaZulu Natal Local Division, Durban (court a quo) decision

The case of *Windrush Intercontinental SA and Another v UACC Bergshav AS Asphalt Venture* (Court a quo)²²⁶ was a judgment which resulted from Bergshav (the respondent) issuing summons and particulars of claim for an action *in rem* arresting the *Asphalt Venture*. This action *in rem* provided that the respondent's were entitled to claims acquired as cessionary of the claims by the seven crew members against the *Asphalt Venture*. The respondent further contended that the seven detained crew members were and remained entitled to be paid their wages. However, the court was of the view that the pleadings lacked clarity concerning the precise basis upon which the obligation to pay wages stems from.

²²⁵ An alternative claim was made that the action *in rem* could be maintained because one of Bitumen, Concord or Windrush was both owner of the *Asphalt Venture* and liable *in personam* to the crew (and therefore to the respondent as cessionary of such claims) for payment of the claimed wages. Bergshav's counsel conceded that a case had not been established with regards to the alternative claim therefore the only claim was whether a maritime lien exists, which the respondents, Bergshav were relying on.

²²⁶ 2015 (4) SA 381 (KZD).

On the other hand, Windrush Intercontinental SA and the *Asphalt Venture* (the applicants) contended that firstly, no claim for wages ever existed which were allegedly ceded by the seven crew members to the respondent. Secondly, the applicants claimed that there was no maritime lien which had arisen as the seven crew members employment had already ended, especially considering the ship having received no service from any of the seven crew members. Thirdly, if the maritime lien did exist, the cession of the liens was invalid. Lastly, if none of the previous challenges were upheld, a London arbitration and agreement conducted and concluded after the arrest divested the respondent of its claim and lien and therefore the deemed arrest should be set aside.

The contracts of employment in contention were interpreted in terms of Indian law, which governed the contracts.²²⁷ The clauses of the contracts which were discussed were article 5 (Duration of Employment)²²⁸, article 18 (Termination of employment)²²⁹; and article 19²³⁰.

²²⁷ This was an agreed premise. Ibid, para 18.

²²⁸ Court a quo, para 20. Article 5 provides “An officer shall be engaged for the period specified in Appendix 1 to this Agreement and such period may be extended or reduced by the amount D shown in Appendix 1 for operational convenience. The employment shall be automatically terminated upon the terms of this Agreement at the first arrival of the ship in port after expiration of that period, unless the company operates a permanent employment system.”.

²²⁹ Court a quo; para 21. Article 18 states “The maximum period of engagement referred to in Article 5 shall be G nine months, which may be extended to ten months or reduced to eight months for operational convenience. Thereafter, the Officer's engagement shall be automatically terminated in accordance with Article 18 of this Agreement.”.

²³⁰ Court a quo; para 23. Article 19 states “19.1 Repatriation shall take place in such a manner that it takes into account the needs and reasonable requirements for comfort of the B Officer.

19.2 During repatriation for normal reasons, the company shall be liable for the following costs:

- (a) payment of basic wages between the time of discharge and the arrival of the Officer at their place of original engagement or home;
- (b) the cost of maintaining the Officer ashore until repatriation takes effect;
- (c) reasonable personal travel and subsistence costs during the travel period;
- (d) transport of the Officer's personal effects up to the amount allowed free of charge by the relevant carrier.

19.3 An Officer shall be entitled to repatriation at the Company's expense on termination of employment as per Article 18 except where such termination arises under Clause 18.2(b) and 18.3(a).”.

Another article of the contract discussed was “in the event of the seafarer being stranded, the company undertakes to repatriate him to his port of engagement”.²³¹

The respondents relied on the opinion of two legal experts on Indian law, namely Mr Venkiteswaran and Mr Mukherji whilst the applicants rendered the opinion of former Chief Justice, Justice Khare.²³² Mr Venkiteswaran, a senior advocate practicing in Mumbai, provided that in terms of Indian law the terms of the contracts of employment of the seven crew members in question continued to be in employment until their employment was terminated which could only be terminated simultaneously with their repatriation.²³³ The court a quo believed this opinion was incomplete. Mr Venkiteswaran, passed away before he could provide a second opinion explaining the first opinion he provided. The second opinion was then provided by Mr Mukherji who was an advocate practising in Mumbai.²³⁴ Mukherji supported Venkiteswaran’s opinion and relied on the decision reached by the Indian Supreme Court, *Konavalov v Commander, Coast Guard Region and Others*²³⁵.

The opinion provided by the applicants was of Justice Khare who stated that the seven crew members were entitled to their wages until repatriation. However, based on the facts, the contracts would have been terminated as a result of the impossibility or frustration.²³⁶ The High Court was of the view that Justice Khare did not provide an explanation for his view. It is noteworthy at this point to state that the High Court made mention of Justice Khare’s opinion regarding the impossibility of performing the contract. Beyond the reliance on the case *Horlock v Beal*²³⁷, the court did not discuss the nature of the doctrine of impossibility or frustration and why the opinion was not a possible argument.²³⁸

²³¹ Court a quo; para 17.

²³² Court a quo; para 25 and 27.

²³³ Court a quo; para 30.

²³⁴ Court a quo; para 25,26 and 30.

²³⁵ (2006) 4 SCC 620. The facts in this case will be discussed below.

²³⁶ Court a quo; para 31.

²³⁷ 1916 AC 486. In this case the wife of a seaman approached the court for her husband’s wages for the duration of his employment. The husband had been detained in a German port because of the war. The court held the wife’s claim failed as the capture and holding of the ship by the German amounted to a frustration of the contract which rendered the performance of the contract impossible.

²³⁸ Court a quo; para 31.

The High Court dealt with the application in four parts under the following headings:

a. Did a claim for wages arise?

The respondent bore the onus of establishing whether a claim for wages existed. The court briefly discussed the case of *Konavalov*²³⁹ where a vessel, Kobe Queen 1, was arrested at Chennai by the Madra High Court at the instance of the owners of the cargo. Thereafter the crew lodged a claim for wages out of the anticipated proceeds of the sale of the vessel. The crew remained on board the vessel even after the vessel was seized and her cargo. The court noted that the *Windrush* case facts and the *Konavalov* facts are different. In *Konavalov*, the crew members were on board the vessel at all material times whilst in the *Windrush* case, the crew members were not. The first month which they are claiming for, and the claim accrues from is November 2011, seven months after the seven crew members were no longer on board the vessel. The court found that the *Konavalov* case did not support the respondent's contentions. The court turned its focus towards what was discussed in *The Ever Success*²⁴⁰ where the court endorsed the following quote

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

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

²³⁹ Ibid.

²⁴⁰ [1999] 1 Lloyd's Rep 824.

was entitled to a maritime lien in respect of his wages in respect of that period assessed in accordance with his contract.”²⁴¹

The court a quo believed that the decision of *Konavalov* was in line with what was said in *The Ever Success* as the matter relied on the wages, which were ordered to be paid in *Konavalov*, were taken from the contracts of employment. The respondent relied on the contention made in *Konavalov* that the confiscation of the vessel by customs authority put paid to any claim for wages or a lien and that Indian law would take a view favourable to the seven crew members. The court in *Konavalov* noted the “high pedestal” which the seamen’s rights to wages have been placed. Based on this, the court in *Konavalov* found that the confiscation of the vessel did not extinguish the maritime lien.

Based on this, the court a quo believed the respondent had made out a *prima facie* case for the proposition that Indian law would recognise the wages claims of the seven crew members.²⁴²

b. Is the claim (established *prima facie*) supported by a maritime lien?

The parties agreed that in order to determine whether the benefit of a maritime lien existed the *lex fori* (the law of the forum) needed to be applied.²⁴³ As per section 6 of the Admiralty Jurisdiction Regulation Act 103 of 1983 (AJRA), the law of the United Kingdom as at 1 November 1983 was applied in order to determine whether a maritime lien existed.

The applicants stressed that the period which is being claimed for, the contracts of employment had terminated and that no service to the vessel had been performed by the seven crew members during the period claimed for.²⁴⁴ The applicants further emphasised that the maritime lien arises in respect to wages when the benefit to the vessel has been established. Without the service, the maritime lien cannot arise.

The respondent relied on case law²⁴⁵ to state that the concept of wages is given an extended meaning to include shore leave, sick leave or repatriation expenses. These were said to be evidence that service to a vessel was no longer a requirement in order to establish a maritime

²⁴¹ Court a quo, para 41.

²⁴² Court a quo; para 41 – 44.

²⁴³ Court a quo; para 45.

²⁴⁴ Court a quo; para 46.

²⁴⁵ *The Tacoma City* [1991] 1 Lloyd’s Rep 330 (CA); *The Arosa Star* [1959] 2 Lloyd’s Rep 396, 402; *The Westport (No 4)* [1968] 2 Lloyd’s Rep 559.

lien for wages. The court however was of the opinion that the facts of such cases were markedly different because in this case the period being claimed for had no service being rendered to the vessel. However, the court made mention that in this case, there were no services rendered at all after April 2011. The respondent argued that the claim may be described as a benefit due to the member of the crew can be labelled “as recompense for the execution of his duty”. If this were correct, the respondent argued that the contracts of employment governed and subject to Indian law, promised them wages from the date of termination of their contracts of employment to the date of repatriation. This promise was made without regard to the duration of the delay, without regard to what caused the delay in repatriation. The court was of the opinion that this promise was given for service actually rendered in terms of the employment contract and therefore enjoys the benefit of the maritime lien.²⁴⁶ The court was however of the opinion that the difficulty in this case may be that the terms of the contracts of employment and Indian statute would apply to facts which may never had been intended.²⁴⁷

The applicants accepted that the claim made by the seven crew members is a maritime claim as recognised under section 1(1) para (s) of AJRA which provides for the definition of a maritime claim to include “any claim arising out of or relating to the employment of any master, officer or seaman of a ship in connection with or in relation to a ship, including the remuneration of any such person, and contributions in respect of any such person to any pension fund, provident fund, medical aid fund, benefit fund, similar fund, association or institution in relation to or for the benefit of any master, officer or seaman..”

The respondent stated that in order to decide whether the claim in question enjoyed the benefit of a maritime lien rested on the court considering the ambit of the lien. The court considered case law recognising a seaman’s claim for pension fund contributions as wages²⁴⁸ and further where a maritime claim is recognised as “wages” it is accompanied by a maritime lien.²⁴⁹ The court was of the view that the claim established *prima facie* in these proceedings was a claim

²⁴⁶ Court a quo; para 48.

²⁴⁷ Ibid.

²⁴⁸ *The Halcyon Skies* [1977] 1 QB 14 ([1976] 1 Lloyd’s Rep 461).

²⁴⁹ *The Tacoma City* [1991] 1 Lloyd’s Rep 330 (CA), Court a quo; para 50-51.

that passed the traditional test of recompense for execution of duty and therefore the lien supports the claim.²⁵⁰

The court found that the privileged priority given to claims for wages was justified. Further, the court found that a maritime lien arose for the benefit of the seven crew members with respect to their wage claims. This was based on the court's view that the issue is not the time when the debt arises but whether when it arises it has the qualities which place it within the scope of a maritime lien for wages.²⁵¹

c. Were the claims and maritime liens assigned to the respondent?

Counsel for the applicant made a contention that the assignment, if legally possible with the sanction of the Indian court, was not actually made. The order for the Indian court does not approve the assignment of the wages. However, in the Indian court, the applicants had advanced the opinion of Justice Khare who had provided that a maritime lien for wages, although not always assignable, could be assigned with the leave of the court. Further, Justice Khare provided the Bombay High Court had unquestionably granted liberty to the plaintiffs (relatives) to assigning their maritime lien. The first applicant thereafter did not take any issue with the assignment as they had been sanctioned by the Bombay High Court.²⁵² The court a quo found that the applicants therefore could not argue that there was a lack of sanction from the court in India in order to refute the validity of the assignment of the wages.²⁵³

The court considered the case of *Mak Mediterranee SARL v the Fund Constituting the Proceeds of the Judicial Sale of the MC Thunder (SD Arch, Interested Party)*²⁵⁴ where the court provided that a person who voluntarily pays the claim of a seaman does not acquire the seaman's lien and priority unless before making such payment, the volunteer received the leave of the court. Based on the fact that in this case, the court a quo was faced with circumstances where the

²⁵⁰ Court a quo; para 52. The court grappled with issues of jurisdiction which the cases *The Halcyon Skies* and *The Tacoma City* provided where the expansion of wages corresponded with the expansion of the maritime lien.

²⁵¹ Court a quo; para 55 – 57.

²⁵² Court a quo; para 58 – 60.

²⁵³ Court a quo; para 61.

²⁵⁴ 1994 (3) SA 599 (C)

leave of the court had already been provided, the maritime lien had been validly ceded or assigned to the respondent. Therefore, the court must recognise the respondent's title.²⁵⁵

The court also discussed the issue of a lien for future wages. The applicant's argued that there is no such lien because no line can be assigned that has not come into existence and therefore have not fallen due in any case. The applicants' counsel provided that there was no evidence put forward to show the total claim being made in this respect and what claims had already accrued. The court agreed that the papers filed did not deal with the aspect of a lien for future wages. When the applicants tendered security, it was provided in full and it was not questioned that a lien could not exist for wages that had not yet accrued. The court a quo found that applicants should have addressed these issues in their plea to the action *in rem* and not in court a quo.²⁵⁶

d. The London arbitration and agreement.

The *UACC Eagle*, upon being arrested in Mumbai was under a bareboat charter to the United Arab Chemical Carriers Ltd (UACC). The award made by the arbitrator concerned both unpaid hire and indemnity claimed by the respondent against the UACC regarding the respondent's disbursements to the families of the seven crew members made in terms of the Indian settlement agreement. The arbitrators award directed UACC to pay the respondent USD 705 100.81 by way of indemnity and declared UACC liable to indemnify the respondent regarding the remaining payments due under the Indian settlement.²⁵⁷

The court found that the London arbitration and agreement were to establish where the loss lies if the respondent is unsuccessful in its action against the applicants. Therefore, the respondent had a right to pursue the arrest of the *Asphalt Venture* for the debt assigned to them.

²⁵⁵ Court a quo; para 66-68. There are conflicting arguments in the maritime industry regarding the cession of maritime liens, especially those of seamen. In Canada the wages lien cannot be assigned whilst other debts are assignable by agreement. On the other hand, in the British courts there is a reluctance to recognise the transfer, cession or assignment of a maritime lien. However, this cannot take place by assignment of a debt. The United States are more accepting of assigning liens. Please see William Tetley "Assignment and Transfer of Maritime Liens: Is there subrogation of the privilege." (1984) 15 (3) *Journal of Maritime Law and Commerce* 393 at 403 – 408.

²⁵⁶ Court a quo; para 69 – 72.

²⁵⁷ Court a quo; para 80.

The court a quo held that the application to set aside the deemed arrest of *Asphalt Venture* be dismissed.

4.2 The Supreme Court of Appeal decision²⁵⁸

The Supreme Court of Appeal with Deputy Judge President Maya (as she was then known)²⁵⁹ sitting was faced one crisp issue, namely whether a maritime lien existed for crew's wages which would entitle the respondent, UACC Bergshav Tankers AS (Bergshav) to arrest the *Asphalt Venture* in terms of section 3(4) of AJRA.²⁶⁰ The appellants, Windrush Intercontinental SA (Windrush) and the *Asphalt Venture* argued that no maritime lien existed because the employment contracts were frustrated or supervening impossibility of any remaining performance of the contract. The appellants argued that the contracts of employment terminated on 15 April 2011 because beyond this date, they could not procure the release of the hostages or repatriate them under their employment contracts. Alternatively, if the lien existed, it was destroyed by Bergshav's payment to the hostage's families under the settlement agreement and the liens could not be assigned to Bergshav.²⁶¹

Bergshav, on the other hand argued that a lien existed and had been transferred to them in terms of section 11(8) of the Act.²⁶² They argued that the lien existed because the employment contracts did not terminate after the release of the vessel. Alternatively, their employment contracts entitled the hostages to repatriation and payment of their wages until so repatriated.²⁶³

In response to the issue, there were two inquiries made, namely firstly whether on a *prima facie* case Bergshav established the existence and nature of the claims sought to be enforced against the *Asphalt Venture*. Secondly, whether in terms of South African law Bergshav had *prima*

²⁵⁸ *Windrush Intercontinental SA and Another v UACC Bergshav Tankers AS Asphalt Venture* 2017 (3) SA 1 (SCA) ("*Windrush*").

²⁵⁹ With Shongwe JA, Wallis JA and Dambuza JJA and Makgoka AJA concurring.

²⁶⁰ *Windrush*; para 14.

²⁶¹ *Windrush*; para 15.

²⁶² Section 11(8) of AJRA provides "Any person who has, at any time, paid any claim or any part thereof which, if not paid, would have ranked under this section, shall be entitled to all the rights, privileges and preferences to which the person paid would have been entitled if the claim had not been paid."

²⁶³ *Windrush*; para 15.

facie established claims which by reason of their nature and character, are protected by a maritime lien.²⁶⁴

The court provided that the maritime lien is not defined in AJRA, the term “maritime lien” is included under the definition of maritime claim under section 1 of AJRA. The court provided that a maritime lien is maritime lien by definition and its importance lies in that it constitutes one of the bases upon which a claimant may found an action *in rem* and secondly it bestows preference in the ranking of claims in terms of section 11 of AJRA. The *lex fori* decided whether a maritime lien exists and is enforceable.²⁶⁵

The SCA considered the expert opinions advanced by Mr Venkiteswaran and Mr Mukherji relied on by the respondent. The SCA felt that none of their opinions were satisfactory. The opinion of Mr Venkiteswaran provided that in terms of Indian law, the contracts of employment of the seven crew members would be recognised as continuing until their employment was terminated. However, for this contention, Mr Venkiteswaran did not provide any reference.²⁶⁶ In the SCA, Counsel for the respondent did not rely on the opinions and instead looked to the decision of the case of *O Konavalov v Commander, Coast Guard Region*²⁶⁷ and section 141(1) of the Indian Merchant Shipping Act²⁶⁸.

Section 141(1) of the Indian Merchant Shipping Act states that “[W]here the service of any seaman engaged under this Act terminates before the date contemplated in the agreement by reason of the wreck, loss or abandonment of the ship or by reason of his being left on shore at any place outside India under certificate granted under this Act of his unfitness or inability to proceed on the voyage, the seaman shall be entitled to receive – (a) In the case of wreck, loss or abandonment of the ship – (i) Wages at the rate to which he was entitled at the date of termination of his service for the period from the date his service is so terminated until he is returned to and arrives at a proper return port.”²⁶⁹

²⁶⁴ *Windrush*; para 17.

²⁶⁵ *Windrush*; para 18.

²⁶⁶ *Windrush*; para 23.

²⁶⁷ (2006) 4 SCC 620.

²⁶⁸ 44 of 1958.

²⁶⁹ *Windrush*; para 24. See also Directorate General of Shipping, Ministry of Shipping, Government of India available at <http://dgsshipping.gov.in/Content/MerchantShippingAct.aspx> accessed 20.07.2018.

The *Konavalov* case was also considered by the SCA.²⁷⁰ Based on *Konavalov*, Mr Venkiteswaran and Mr Mukherji were of the opinion that Indian law would regard the *Asphalt Venture* as being “lost” and therefore entitle the seven crew members to their wages until repatriation.²⁷¹

The SCA also discussed the opinion of Justice Khare, whose opinion was relied on by the applicants. Justice Khare provided that the seven crew members were not entitled to wages. He opined that even if the contracts of employment of the seven crew members remained in force, any further obligation by Concord repatriate them after April 2011 was impossible due to a supervening event that to a reasonable person was not foreseeable. It could not have been contemplated in his opinion, that even after the full ransom was paid, the seven crew members would remain in captivity.²⁷²

The SCA was of the opinion that the first error made by the court a quo was in the evaluation of the expert evidence and accepting the credibility of the opinion of Bergshav’s experts without analysing the evidence. The SCA provided that where a court is dealing with the evidence of experts on foreign law, it is entitled to consider it in the same way in which it considers the evidence of any other expert. The SCA went on to further state that foreign law is a question of fact and must be proved through reference to other experts of the country whose law needs to be ascertained.²⁷³

The SCA stated that it was strange that the court a quo specifically stated that “Justice Khare may well be right” but decided to find the opinions provided by Bergshav as acceptable.²⁷⁴ The court provided that the doctrine of impossibility is applicable to contracts of employment where

²⁷⁰ The court in this case held that a seaman whose service is terminated by reason of wreck, loss or abandonment of ship (among other reasons) before the termination date envisaged in his or her contract of employment is entitled to payment of certain wages and compensation until his repatriation. The loss of a vessel did not result in a loss of a right to wages. Therefore, the crew were lawfully in the employment of the vessel against which they had a maritime lien for service. The court stressed the sanctity of the wages claim brought to the courts by the seamen and the importance of reasonably settling wage claims of seamen as they are of lower means in society and a duty to act fairly exists.

²⁷¹ *Windrush*; para 27 – 28.

²⁷² *Windrush*; para 28 – 29. Justice Khare relied on the case of *Horlock v Beal* [1916] UKHL 795.

²⁷³ *Windrush*; para 30 – 31.

²⁷⁴ The SCA stated that experts’ evidence on foreign law needed to be evaluated as it would consider the evidence of any other expert. Therefore, looking to prove the factual evidence. *Windrush*; para 30-31.

supervening events render the performance of the contract impossible or majorly different to what was initially agreed to. It is a matter of fact of whether the contract of employment had been frustrated in certain circumstances. In support of this, the court looked at the case of *Prest v Petrodel Resources*²⁷⁵ which were ancillary divorce proceedings. The SCA chose to focus on the quote “Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different”.²⁷⁶ Using the *Prest* case in support of their contention, the SCA stated that this principle was possible to implement even in contracts of employment.²⁷⁷ At this juncture it is important to mention that the SCA used the terms “impossibility” and “frustration” interchangeably.²⁷⁸ The court provided,

“The doctrine of impossibility or frustration is applicable to contracts of employment where supervening events rendered the performance of the contract impossible or radically different from what had been undertaken when the contract was entered into. And whether a contract is frustrated in the particular circumstances of the case will be a matter of fact and degree. In English law a contract may be frustrated if supervening events prevent its further performance.”²⁷⁹

A distinction between the two principles will be discussed in the following chapter as academics have recognised the two as different principles.

The court provided that the piracy events constituted a supervening event which frustrated the performance of the contract of employment. The SCA went on to provide that the court

“To continue to pay and support a crew not on board the vessel and not rendering service to the vessel, whose contracts of employment had terminated and who were held in captivity by intransigent pirates, who had been paid a ransom but demanded an exchange that was not within Concord’s power, could hardly have been contemplated by the employment contracts.”²⁸⁰

Therefore, the further ransom and exchange demanded by the pirates became the unforeseeable event which frustrated the performance of the contract. As a result of the continued captivity

²⁷⁵ [2013] 2 AC 415.

²⁷⁶ *Windrush*; para 37.

²⁷⁷ *Windrush*; para 34.

²⁷⁸ *Windrush*; para 33-34.

²⁷⁹ *Windrush*; para 33.

²⁸⁰ *Windrush*; para 35.

of the crew, the crew could not benefit the *Asphalt Venture*. The SCA quoted *The Ever Success*²⁸¹ where the court provided that the maritime lien was in service to the vessel and service is usually measured in terms of their employment contract. Further, the service is measured by inquiring on whether during the period in question the claimant was rendering a service to the ship as a member of the crew.²⁸²

Evidently the crew members were not on the *Asphalt Venture* and therefore in light of the reasoning provided, the conclusion reached by the SCA was that the seven crew members were not entitled to claim a wages lien as they had not rendered any services to the ship's benefit during the period they were claiming for. The SCA disagreed with the court a quo and ordered that the deemed arrest of the *Asphalt Venture* be set aside, the security paid on behalf of *Windrush* be released and costs to be borne by the respondents.

4.3 Conclusion

The words used by the SCA regarding piracy rendering the performance of the contracts of employment impossible were that piracy “could never have been contemplated by the employment contracts”.²⁸³ The SCA looked at the opinion of Justice Khare, in support thereof mentioning that the legal expert chose to rely on the case of *Horlock v Beal*.²⁸⁴ *Horlock* is a leading case as this case establishes that the occurrence of a war which leads to the imprisonment of a seaman, warranting the frustration of the contracts of employment, rendering the obligations in the contract impossible to fulfil.

However, the SCA's decision begs the question of whether piracy, in the Eastern region of Africa where the *Asphalt Venture* was hijacked, is indeed an event that could not have been contemplated. In discussing the decision reached by the SCA, defining what the doctrine of supervening impossibility is and whether piracy qualifies as such are vital. The next chapter will discuss the doctrine of supervening impossibility and frustration. Further, the chapter will define piracy and discuss whether the piracy event in *Windrush* suffices as a supervening event.

²⁸¹ [1999] 1 Lloyd's Rep 824.

²⁸² Ibid; 831.

²⁸³ *Windrush*; para 28.

²⁸⁴ 1916 AC 486.

Chapter 5

5. The doctrine of impossibility and piracy along the East African coast

The general rule is that contracts concluded should be performed.²⁸⁵ When an event occurs subsequent to the conclusion of the contract, the promisor may be excused.²⁸⁶ The doctrine of impossibility acts as a good defense against an absolute agreement where the performance can no longer be effected due to a number of reasons; such as, where the existence of a particular thing, the existence of it being necessary for performance of the contract, is destroyed.²⁸⁷

In the judgment of *Windrush Intercontinental SA and Another v UACC Bergshav AS Asphalt Venture*²⁸⁸, the applicants, Windrush, relied on the doctrine of impossibility in order to be excused from fulfilling the contractual obligations.²⁸⁹ The judgment relies on the doctrine of impossibility and frustration in order to hold that the applicants need not make payments to the seamen's responsibilities.²⁹⁰ For purposes of this paper, it is important to provide a detailed definition of the doctrine of impossibility.

5.1. Defining impossibility

Robert Sharrock defines the doctrine of impossibility as occurring where if a contract has been entered into but later becomes physically or legally impossible for the debtor to render his performance, the debtor is excused from doing so.²⁹¹ When the term impossibility is used, it does not refer to a situation where performance for a debtor has become too difficult or

²⁸⁵ Gilbert A. Cuneo and Eldon H. Crowell "Impossibility of Performance: Assumption of Risk or Act of Submission" available at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3011&context=lcp> accessed 11.11.2018. at 534.

²⁸⁶ Ibid.

²⁸⁷ William J. Conlen "Intervening Impossibility of Performance as Affecting Obligations of Contracts" 12 *University of Pennsylvania Law Review* 28 (1917) 31-32

²⁸⁸ 2017 (3) SA 1 (SCA).

²⁸⁹ *Windrush*; para 28 – 29.

²⁹⁰ *Windrush*, para 33 - 35

²⁹¹ Robert Sharrock *Business Transactions Law* 9ed (2016) at 739.

expensive.²⁹² This is not enough to excuse performance.²⁹³ Therefore additional difficulty or the performance becoming expensive will not constitute impossibility.²⁹⁴

A good case to consider is *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal*²⁹⁵. In this case the *Snow Crystal* had arranged with the dock master in Cape Town harbour to dock at the dry dock from 1 December to 14 December 2002. When the *Snow Crystal* arrived, another vessel was occupying the dock. The vessel in the dry dock was undergoing repairs but moving her to another dock was not difficult. The contractor refused to move to another dock. In order not to upset the contractor, the dock master decided, although he had the power to, decided not to act against the contractor. Transnet claimed impossibility when the owners of the *Snow Crystal* claimed damages for breach of contract. However, they were not successful as it was not an impossible task but simply a matter of instructing an employee to act in accordance with the original contract.

Christopher J. Bruce provides that according to the doctrine of impossibility,

“...failure to fulfill contractual obligations may result in discharge of the contract, rather than breach, if the contract has become physically impossible to perform—for example, if the individual who was to have performed the contract has died—or if the cost of carrying out the contract has risen to such an extent that performance has become uneconomical—for example, if, after it had burned down, extraordinary steps were required to reconstruct a factory in time to fulfill a contract.”²⁹⁶

Posner and Rosenfield provide that “impossibility” has previously been divided into 3 subdivisions, namely “impossibility of performance”, “frustration of purpose” and “extreme impracticability”.²⁹⁷ They state that impossibility is the rubric used when fulfilling an

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA).

²⁹⁵ Ibid.

²⁹⁶ Christopher J. Bruce “An Economic Analysis of the Impossibility Doctrine” 11 *The Journal of Legal Studies* 311 (1982).

²⁹⁷ Richard A. Posner and Andrew M. Rosenfield “Impossibility and related doctrines in contract law: An economic analysis” 6 *The Journal of Legal Studies* 83 (1977).

obligation which is no longer physically or legally possible whilst “frustration of purpose” refers to a state of affairs where performance of the obligation is physically and legally impossible but the underlying purpose of the contract no longer exists.²⁹⁸ Frustration has been defined in the case of *Tatem v Gamboa*²⁹⁹ as occurring when something which is the “subject-matter of the contract disappears, the contract disappears with that it was founded upon.”³⁰⁰ Justice Goddard goes on to provide,

“But it seems to me, with respect, that if the doctrine laid down by Lord Haldane, the absolute disappearance of the contract, or if it be, as Lord Finaly put it, “the continued existence of a certain state of facts” then whether circumstances are foreseen or not makes very little difference. If the foundation of the contract goes....it goes whether the parties have made a provision for it or not.”³⁰¹

Impracticability is the term used when performance of the obligation is physically possible and the underlying purpose of the contract is achievable but as a result of an unexpected event enforcement of the promise would entail a much higher cost than originally contemplated.³⁰² The term has also been said to refer to instances where performance will be extremely expensive, unreasonably time-consuming thus rendering it impracticable for the one who must render performance.³⁰³

However, Posner and Rosenfield feel that these distinctions are unnecessary as it is a distinction without relevance to the purposes of contracts.³⁰⁴ In every contract case where one argues a discharge of obligations initially meant to be fulfilled, the issue to be decided is which party must bear the loss resulting from an event that has rendered performance by one party uneconomical.³⁰⁵ From their economics perspective, the discharge of obligations should only be allowed where the promisee is the superior risk bearer.³⁰⁶ If the superior risk bearer is the

²⁹⁸ Ibid; 86.

²⁹⁹ [1938] KB 149.

³⁰⁰ Ibid; 154 – 155.

³⁰¹ Ibid; 155.

³⁰² Posner and Rosenfield (see note 297, 85).

³⁰³ Pamela R. Pepper *The Law of Contracts and the Uniform Commercial Code* 3 ed (2014) 244.

³⁰⁴ Posner and Rosenfield (see note 297, 85).

³⁰⁵ Ibid.

³⁰⁶ Posner and Rosenfield (see note 297, 90).

promisor, it should be treated as a breach of contract.³⁰⁷ They provide that the term “superior risk bearer” refers to the party that is the more efficient bearer of the particular risk in question, in the particular circumstances of the transaction.³⁰⁸

There are instances when the liability of the debtor will stand, despite the impossibility of performance occurring. These instances are when there is self-created impossibility³⁰⁹; where the debtor assumed the risk and where the debtor is late in performing.³¹⁰ For the purposes of this paper, we will focus on the instance when the debtor has assumed the risk.

a. Assumption of Risk

If the debtor assumes the risk but continues to pursue the contract, he cannot be excused from the obligations of the contract based on impossibility.³¹¹ In order to determine whether the risk was assumed, the court has regard to whether the debtor foresaw the cause of the impossibility or ought to reasonably have foreseen it.³¹² As provided by Charles Brown, one of the conditions for impossibility is that the event which rendered performance impossible must have been unforeseen by the parties at the time of entering into the contract.³¹³ Brown goes on to provide that in situations where the event was foreseeable and the defaulting party did not provide for its contingency in the contract, such party would be liable for damages, even if his performance may have not been commercially practicable.³¹⁴ The relief in this situation is based on the notion that a state of facts remain unchanged.³¹⁵ Brown felt that this interpretation of the doctrine of impossibility and its application thereof is accurate.³¹⁶ This interpretation would be

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) paras 23 – 25.

³¹⁰ Robert Sharrock *Business Transactions Law* 9th ed (2016) at 741-742. These limitations are well established in English law. See also Andrew Hutchison “The doctrine of frustration: a solution to the problem of changed circumstances in South African contract law” 127 (2010) *South African Law Journal* 84 at 96.

³¹¹ Ibid at 741.

³¹² Ibid.

³¹³ Charles G. Brown “The Doctrine of Impossibility of Performance and the Foreseeability Test” 6 *The Loyola University Law Journal* 575 (1975) 576 – 577.

³¹⁴ Ibid at 577.

³¹⁵ Ibid.

³¹⁶ Ibid.

the traditional legal rationale, which is different to what is the modern legal rationale. The modern legal rationale is based on the premise of balancing the community's interest in having contracts fulfilled according to the terms, against pursuing performance which makes no commercial sense.³¹⁷

However, application of the foreseeability test has been met with criticism. One of the criticisms is that the test relies on the reasonable man test.³¹⁸ Although the reasonable man test is helpful, it fails to protect the individual who does not foresee the foreseeable.³¹⁹ The trouble in applying the foreseeability test in cases where the event was foreseeable, is assessing the nature and extent of the risk.³²⁰ Another position of criticism of the doctrine is that it suggests that a party has assumed the risk of the supervening event by failing to provide for it.³²¹

In the American case of *Lloyd v Murphy*³²² the plaintiffs had leased property to the defendant where the defendant could conduct the business of displaying and selling new automobiles and no other purpose without the consent of the lessor. However, due to restrictions placed on the lessee regarding the selling of new automobiles, the defendant fell behind on his rent. The defendant then pleaded that the purpose for which the premises had been leased was frustrated, therefore his duties under the lease were discharged. The obligations in this case were not discharged as the court found difficulty in discharging duties under a leasehold and therefore the defendant could not rely on frustration. In this case, Justice Traynor provided a well-rounded explanation of the assumption of risk and its consequences: -

“The purpose of a contract is to place the risks of performance upon the promisor, and the relation of the parties, terms of the contract, and circumstances surrounding its formation must be examined to determine whether it can be fairly inferred that the risk of the event that has supervened to cause the alleged frustration was not reasonably foreseeable. If it was foreseeable

³¹⁷ Ibid.

³¹⁸ Brown (see note 313, 578).

³¹⁹ Ibid.

³²⁰ Brown (see note 313, 579).

³²¹ Brown (see note 313, 580).

³²² 25 Cal. 2d. 48.

there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.”³²³

Understandably, the assumption of risk has created issues in the past, such as in the South African case of *Hersman v Shapiro*³²⁴, one of South Africa’s early cases to look at the assumption of risk. In this case a dealer in corn (farmer 1) contracted with another dealer in corn (farmer 2) to sell and deliver to farmer 2 corn of quality and grade on a specific date and time. Farmer 1 however was unable to deliver same due to a failure of crops. The court provided that farmer 1 cannot rely on the doctrine of impossibility because the risk ought to have been assumed by farmer 1 and therefore not a supervening event. *Hersman's* case therefore implies that in order to be successful in pleading impossibility in South African courts, there needs to be absolute impossibility.³²⁵

b. Frustration

Frustration (commercial) was first recognised as an excuse for non-performance of a contractual duty by the courts of England.³²⁶ The doctrine of frustration has been limited to cases of extreme hardship so that parties to contracts make their arrangements in advance, can rely with certainty on their contracts.³²⁷ The principle, although Posner and Rosenfield provide that it should not be distinguished from the doctrine of impossibility, it has been the subject of debate.³²⁸ Andrew Hutchison provides that the term “supervening impossibility” and “frustration” are analogous.³²⁹ The scholarly difference between the two doctrines is that supervening impossibility is absolute whilst frustration is regarding changed circumstances

³²³ Ibid, 50.

³²⁴ 1926 TPD 367.

³²⁵ Andrew Hutchison “The doctrine of frustration: a solution to the problem of changed circumstances in South African contract law” 127 (2010) *South African Law Journal* 84; 95-97.

³²⁶ See *Taylor v Cadwell* 122 Eng. Rep 309 (1863); *Krell v Henry* C.A 1903 2 K.B 740.

³²⁷ *Lloyd v Murphy* (see note 322, 50).

³²⁸ Richard A. Posner and Andrew M. Rosenfield “Impossibility and related doctrines in contract law: An economic analysis” *The Journal of Legal Studies* 6 (1977) 83; 85.

³²⁹ Andrew Hutchison “The doctrine of frustration: a solution to the problem of changed circumstances in South African contract law” *South African Law Journal* 127 (2010) 84; 97.

however common is that they must be beyond the control of the contracting parties and not attributable to any parties fault.³³⁰

Authority for the doctrine of frustration is the famous English case of *Krell v Henry*.³³¹ In this case a man (lessee) had rented a certain apartment overlooking a part of the city where the procession for King Edward VII would proceed through the streets of the London, celebrating his coronation. Both the lessee and the lessor were aware that the main reason the lessee wanted to hire the apartment was to observe the procession from the apartment. Unfortunately, the coronation did not take place as scheduled and the lessee refused to continue with the lease agreement and the lessor sued for the rental amount agreed to. The court held that the purpose of the lease no longer existed, and the purpose had been frustrated for entering into the lease agreement.

In one instance, Hutchison provides that South African law does not possess the doctrine of frustration.³³² Our courts, in order to avoid confusion introduced the doctrine of impossibility and the English concept of frustration; decided to refer to English authority directly. An example of this application can be seen in the case of *MacDuff & Co Ltd v Johannesburg Consolidated Investment Co Ltd*.³³³ In this case the respondent had undertaken to takeover the running of the appellant's company. The business of the appellant was the import and export of coal. There was a sudden decrease in value on the stock market for coal which meant that the respondent would suffer financial loss.³³⁴

The respondent pleaded that the venture had become commercially impracticable due to the changed circumstances. The court referred to English authority, *Tamplin Steamship Co*³³⁵ to support the contention.³³⁶ The court held however that in South African law this was a case of commercial impossibility and in this regard increased expenditure in performance does not

³³⁰ Ibid.

³³¹ C.A 1903 2 K.B 740.

³³² Hutchison (see note 329; 104).

³³³ 1924 AD 573; 601.

³³⁴ Ibid; 600.

³³⁵ [1916] 2 AC 397.

³³⁶ *MacDuff* (see note 333; 602).

discharge the obligation.³³⁷ The English case used to support this contention was *Tennants Ltd v CS Wilson & Co Ltd*.³³⁸

Hutchison provides that the doctrine of frustration is better to utilise because although it is a lacuna in our law, it is of assistance in times of war, hyper-inflation, change in political regime and any other unforeseen contingency which is blinding in the contract unjustly. The doctrine of impossibility is narrow.³³⁹

The question that arises is whether the hijacking by the pirates of the *Asphalt Venture* in the *Windrush Intercontinental SA and Another v UACC Bergshav AS Asphalt Venture*³⁴⁰ was a supervening event of impossibility or whether it caused frustration. In the judgment, the two principles are used interchangeably by the court to describe the hijacking.³⁴¹ The court goes on to discuss impossibility and frustration as follows;

“The doctrine of impossibility or frustration is applicable to contracts of employment where supervening events rendered the performance of the contract impossible or radically different from what had been undertaken when the contract was entered into. And whether a contract is frustrated in the particular circumstances of the case will be a matter of fact and degree. In English law a contract may be frustrated if supervening events prevent its further performance.”³⁴²

The writer submits that as seen in this judgment, the two principles of impossibility and frustration can be used interchangeably in South African case law. The writer submits that the principle of supervening impossibility and frustration should be used interchangeably like Posner and Rosenfield provide³⁴³, as well as Hutchison³⁴⁴ suggest.

³³⁷ *MacDuff* (see note 333; 605).

³³⁸ [1917] AC 495.

³³⁹ Andrew Hutchison “The doctrine of frustration: a solution to the problem of changed circumstances in South African contract law” *South African Law Journal* 127 (2010) 84; 104.

³⁴⁰ 2017 (3) SA 1 (SCA).

³⁴¹ *Ibid*, para 33.

³⁴² *Ibid*.

³⁴³ Posner and Rosenfield (see note 328; 85)

³⁴⁴ Hutchison (see note 329; 97)

The writer submits that the distinction between the two is not a major one nor is it necessary to disregard the one for the other. It will mainly depend on the jurisprudence the courts decide to follow between English or South African law.³⁴⁵ Therefore there is no need to make a distinction between the two principles, which is what has been rightfully done by the SCA.

c. Conclusion

The next question to be answered is whether the hijacking which occurred on 23 September 2010 was a supervening event of impossibility which led to the contract becoming fundamentally different to what was initially envisaged when the contract was entered into.

The question that needs to be answered is whether the hijacking by the Somali pirates was foreseeable and whether the owners of the vessel had assumed the risk. The next section will discuss what piracy is and whether in light of the above definition of supervening impossibility the hijacking of the *Asphalt Venture* suffice as a supervening event.

³⁴⁵ Hutchison (see note 339; 95 – 96)

5.2. Defining Piracy

Piracy is one of the oldest crimes in history and the only crime to have universal jurisdiction applicable to it.³⁴⁶ Defining it as any act of violence, Oppenheim provides the following definition:

“Piracy, in its original and strict meaning, is every unauthorised act of violence committed by a private vessel on the open sea against another vessel with intent to plunder (*animofurandi*). The majority of writers confine piracy to such acts, which indeed are the normal cases of piracy. But there are cases possible which are not covered by this narrow definition, and yet they are treated in practice as though they were cases of piracy. Thus, if the members of the crew revolt and convert the ship, and the goods thereon, to their own use, they are considered to be pirates, although they have not committed an act of violence against another ship. Again, if unauthorised acts of violence, such as murder of persons on board the attacked vessel, or destruction of goods thereon, are committed on the open sea without intent to plunder, such acts are in practice considered to be piratical.... If a definition is desired which really covers all such acts as are in practice treated as piratical, piracy must be defined as *every unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.*”³⁴⁷

Piracy has been defined in the UN Convention on the Law of the Sea as any of the following acts:

“(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

- (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

³⁴⁶ Malvina Halberstam “Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety” 82 *The American Journal of International Law* 269 (1988). See also Edwin D. Dickinson Draft Convention on Jurisdiction with Respect to Crime *The American Journal of International Law Supplement: Research in International Law* Vol 29 (1935) 435.

³⁴⁷ H. Lauchterpacht *Oppenheim’s International Law* Vol 1 (Peace) (1955) 608 – 609.

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”³⁴⁸

Piracy has been recognised as an international crime and the pirate is an enemy of every State and can be brought to justice in any court.³⁴⁹ It is the crime against the safety of traffic on the open sea and therefore it cannot be committed anywhere else than on the open sea.³⁵⁰

For purposes of this paper, it is important to consider whether along the African coast, particularly where the *Asphalt Venture* was attacked by the Somali pirates, was a random attack or whether these attacks were continuously occurring during the period in question.

a. Frequency of Pirate attacks along the African coast

Diana Chang describes the economic effect of piracy as a continuous international problem.³⁵¹ Majority of the reported attacks occur in Southeast Asia, off the Horn of Africa (East of Africa) and along the West coast of Africa.³⁵² For purposes of this paper, focus will be directed towards piracy attacks occurring on the East coast of Africa as the *Asphalt Venture* was hijacked 100 nautical miles from Mombasa, Kenya by Somalian pirates.

The International Commercial Crimes Services issued a report detailing the number of attacks which occurred off the Gulf of Aden and along the East coast of Africa.³⁵³ The report provided that

³⁴⁸ UN Convention on the Law of the Seas available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf accessed 11.06.2018. This definition is identical to the definition of piracy in the Geneva Convention on the High Seas, 1958.

³⁴⁹ Lauchterpacht (see note 347, 609). See also Article 105 of UN Convention of the Law of the Seas which states that “On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”

³⁵⁰ Lauchterpacht (see note 347, 615).

³⁵¹ Chang, D “Piracy laws and the Effective Prosecution of Pirates” (2010) 33 *Boston College International & Comparative Law Review* 273

³⁵² Ibid.

³⁵³ “Piracy figures for 2009 surpass those for previous year” available at <https://www.icc-ccs.org/index.php/330-piracy-figures-for-2009-surpass-those-for-previous-year> accessed 11.06.2018.

“As with the figures of 2008, the lion’s share of hijackings have taken place off the coast of Somalia, either in the Gulf of Aden or off the country’s east coast in the Indian Ocean. Ninety-seven of the 294 attacks have taken place in the Gulf of Aden, whilst a further 47 have taken place off the rest of the coast of Somalia. In addition, four attacks have taken place off the coast of Oman, although they can also be attributed to suspected Somali pirates. Somali pirates accounted for 32 hijackings with 532 crew taken hostage. Four crew were killed. Somali pirates are currently holding four ships and 82 crew off the east coast of Somalia.”³⁵⁴

Maps detailing the dangerous waters have been distributed within the maritime industry and publicly.³⁵⁵ One of the maps show incidences occurring as far as 500 nautical miles off the East African coastline in 2008.³⁵⁶ Articles have been written detailing or illustrating the increasing number of piracy incidents by the Somali pirates along the East African coastline.³⁵⁷ Milena Sterio states that the world should view the Somalia pirates as terrorists based on the attacks that occurred over 2008.³⁵⁸ She goes on to provide that the occurrence of pirate attacks started as early as 2007 and had increased to 200%.³⁵⁹

Annually the International Maritime Bureau prepare a report detailing the actual and attempted attacks by pirates in different regions.³⁶⁰ The 2009 report indicates 406 attempts and actual attacks having occurred. Of the 406, 116 were in the region of the Gulf of Aden and 80 were near Somalia.³⁶¹ Shipowners are advised that a 24 hour visual and radar watch must be

³⁵⁴ Ibid.

³⁵⁵ “A Pirates’s map” available at <https://www.theguardian.com/news/datablog/2009/apr/14/piracy-somalia> accessed 11.06.2018

³⁵⁶ “Pirates Map: Hot Spots off Somalia” available at <https://archive.nytimes.com/screenshots/www.nytimes.com/interactive/2009/04/17/weekinreview/0419-pirates.jpg> accessed 11.06.2018.

³⁵⁷ Ibid. See also James Kraska and Brian Wilson “Fighting Piracy” *Armed Forces Journal* February 2009 available at <http://armedforcesjournal.com/fighting-piracy/> accessed 11.06.2018.

³⁵⁸ Milena Sterio “Fighting Piracy in Somalia (and Elsewhere): Why More is Needed” SSRN ID468021.

³⁵⁹ Ibid; 8.

³⁶⁰ The International Commercial Crimes Services *The International Maritime Bureau* available at <https://www.icc-ccs.org/icc/imb> accessed 11.06.2018

³⁶¹ IMB Piracy and Armed Robbery Against Ships - Annual Report 2009 available at https://www.rk-marine-kiel.de/files/piraterie/imb/imb_piracy_report_2009.pdf accessed 12.06.2018; 5

maintained in order to have early sightings of approaching possible attacks, giving the master enough time to act accordingly.³⁶²

The writer submits that travelling in the East African coast was a risk and the international community was aware of this. James Kraska and Brian Wilson provide that many ships started to detour around South Africa instead of travelling within the waters where the Somalian pirates often operated.³⁶³ This however was costly and time consuming.³⁶⁴

Prima facie, the writer submits that the above reports and articles detailing the number of hijackings (attempted and successful) show that any member of the maritime industry ought to have been aware that the coastline near Somalia was dangerous water to travel in. When all the above is considered, is it possible to make a conclusion that the hijacking of the *Asphalt Venture* was random and could not have been foreseen by the parties?

b. Piracy along the East African coast as a supervening event of impossibility

As discussed above, when considering whether a party can rely on a supervening event to absolve themselves of their contractual duties, one should consider whether the defaulting party assumed the risk of the supervening event occurring and contracted with the other party nonetheless.³⁶⁵ In order to assume the risk, the party must have foreseen the possibility of the supervening event occurring.³⁶⁶ In this case, the supervening event is the hijacking of the *Asphalt Venture*.

The *Asphalt Venture* was hijacked 100 nautical miles east of Mombasa. This area, as illustrated by the incidents reported on above, shows that during 2009 as many as 47 attacks occurred.³⁶⁷

³⁶² Ibid; 23

³⁶³ James Kraska and Brian Wilson “Fighting Piracy” *Armed Forces Journal* February 2009 available at <http://armedforcesjournal.com/fighting-piracy/> accessed 11.06.2018. The authors argue that this does not guarantee safe travels, however the writer is of a different opinion. The maps illustrating the piracy attacks do not show any incidences around the South African coast.

³⁶⁴ Ibid.

³⁶⁵ Charles G. Brown “The Doctrine of Impossibility of Performance and the Foreseeability Test” 6 *The Loyola University Law Journal* 575 (1975) 576 – 577.

³⁶⁶ Ibid.

³⁶⁷ “Piracy figures for 2009 surpass those for previous year” available at <https://www.icc-ccs.org/index.php/330-piracy-figures-for-2009-surpass-those-for-previous-year> accessed 11.06.2018.

The frequency of the attacks shows that it had become an international concern.³⁶⁸ The SCA provides that the obligations can be discharged if it is clear that “the supervening events rendered performance of the contract impossible or radically different from what had been undertaken when the contract was entered into”.³⁶⁹

The SCA and the court a quo did not address whether the hijacking event could have been foreseen. Instead it dealt only with the doctrine of impossibility and the frustration of the contract that the piracy had caused.³⁷⁰ The writer therefore makes an inference that the risk was assumed by Concord, who had been the sub-bareboat charter at the time the *Asphalt Venture* fell into the hands of the Somali pirates. The hijacking occurred at a time when many reports had been issued.

Despite the assumption of risk, should Concord be absolved of their obligations in terms of the contracts of employment. One cannot simply ignore the efforts of Concord, who had contracted with the crew members on a basis of employment contracts. Concord had continued to pay the crew in terms of their employment contracts as if the contracts had remained in force. This was after USD 3.4 million had been paid in anticipation of the release of all crew members, which only resulted in the release of eight crew members.³⁷¹ Only after a further ransom were the remaining seven released.³⁷²

The nature and extent of the assumed risk of piracy however could not have been foreseen. The writer submits that the assumed risk could only be extended to the hijacking and the initial ransom asked for. It could not have stretched to the further ransom paid. When Concord experienced financial difficulties and no longer had substantial assets or income, it became clear that their obligations could no longer be met after the ransom monies had been paid out.³⁷³ Concord had simply continued to make the payments out of sympathy.³⁷⁴

³⁶⁸ Chang, D “Piracy laws and the Effective Prosecution of Pirates” (2010) 33 *Boston College International & Comparative Law Review* 273.

³⁶⁹ *Windrush Intercontinental SA and Another v UACC Bergshav AS Asphalt Venture* 2017 (3) SA 1 (SCA) para 33.

³⁷⁰ *Ibid.*

³⁷¹ *Windrush* (see note 369; para 3).

³⁷² *Ibid.*

³⁷³ *Windrush* (see note 369; para 5).

³⁷⁴ *Ibid.*

The court, drawing on *The Ever Success*³⁷⁵ case, that a maritime lien for wages exists because of the benefit to the vessel, brings one to understand the conclusion reached by the SCA. In this case it was provided that

“The maritime lien is in respect of service to the ship. In the absence of some very unusual contractual provision, that service will ordinarily be measured by reference to the seaman's contract of service ... under which he was hired, whether by the shipowner, or (as in this case) the putative shipowner, provided of course that there is a sufficient connection between the service and the ship in the sense discussed below. It follows that I accept [the] submission that it is never appropriate for the court to evaluate the services of each seaman on a quantum meruit basis. The proper approach is to ask whether in the relevant period the claimant was rendering a service to the ship as a member of the crew. If he was, he was entitled to a maritime lien in respect of his wages in respect of that period assessed in accordance with his contract.”³⁷⁶

The crew members had not benefitted the vessel in anyway after the hijacking had occurred. Concord had tried to alleviate the crew members plight by making payments for ransom as soon possible but unfortunately were met with further difficulty where a further ransom would have to be paid. The writer submits that the purpose of the contracts of employment had clearly been frustrated as no service and benefit to the *Asphalt Venture* had been conducted by the crew members. The contracts of employment had been frustrated but also impossible to be fulfilled as Concord no longer had any viable assets or income.³⁷⁷ The writer therefore submits that it was both impossibility and frustration which occurred in the *Windrush* case.

Further, as stated by the SCA, Concord could not have foreseen the further ransom and the exchange demanded.³⁷⁸ The supervening event of impossibility was therefore not the instance of the hijacking. Based on the information relating to piracy in the East African region, the writer submits that the hijacking was foreseeable. However, the nature and extent of the event was unforeseeable. The further ransom and exchange demanded were not foreseeable. Therefore, there was a supervening event of impossibility.

³⁷⁵ [1999] 1 Lloyd's Rep 824. QB (AC)

³⁷⁶ *Windrush* (see note 369, para 38).

³⁷⁷ *Ibid.*

³⁷⁸ *Windrush* (see note 369; para 28)

5.3. Conclusion

The SCA's findings although make one question the sanctity of the wages lien, it is important to consider the statement enunciated by the court. The SCA states in the *Windrush* case that

“No more are courts dealing with contracts of employment entitled to disregard the basic principles of contract and treat employment law as excluding basic legal principles.”³⁷⁹

This shows that the sanctity of the wage's lien must not be protected to a point where unreasonableness is adhered to. The risk assumed by Concord was catered for when they paid out the first ransom. However, one cannot ignore the problem which arises when the nature and extent, as raised by Brown³⁸⁰ of the risk was not foreseeable. Concord could not have anticipated the actions of the pirates beyond paying the initial ransom.³⁸¹

The next chapter will address the findings that have been made in this paper surrounding the *Windrush* case and address the conclusion reached by the writer.

³⁷⁹ *Windrush* (see note 369, para 34).

³⁸⁰ Charles G. Brown “The Doctrine of Impossibility of Performance and the Foreseeability Test” 6 *The Loyola University Law Journal* 575 (1975) 579.

³⁸¹ *Windrush* (see note 369, para 39).

CHAPTER 6

6. Conclusion

Griffith Price describes the area of maritime liens under Admiralty jurisdiction as the most difficult and inconsistent branch of English law.³⁸² English law recognises the bottomry, damage by collision, salvage seamen's and master's wages; and master's disbursements as the list of maritime liens.³⁸³ As a result of section 6 of the Admiralty Jurisdiction Regulation Act ("AJRA")³⁸⁴, South African Admiralty law recognises the liens listed by Price as English maritime liens.³⁸⁵

Price goes on to provide that the essential characteristics of the maritime lien are that firstly; it follows the property in question into the hands of third parties, irrespective of notice.³⁸⁶ Secondly, it is a privileged claim.³⁸⁷ The maritime liens are enforced by way of an action *in rem*.³⁸⁸ According to English law, the vessel is arrested as the action *in rem* is directed against the property itself.³⁸⁹

One of the recognised liens is the seaman's lien.³⁹⁰ The seaman in maritime law is continuously recognised as a favoured litigant because of the nature of his or her work.³⁹¹ The seaman has a lien for his or her wages against the vessel.³⁹² The wages earned by seamen are earned as a result of service to the vessel but are not limited to the shipping articles only and include overtime, extra wages and bonuses.³⁹³

³⁸² Griffith Price "Maritime Liens" *Law Quarterly Review* 57 (1941) 409.

³⁸³ *Ibid.*

³⁸⁴ 105 of 1983.

³⁸⁵ Price (see note 382). Section 6 of AJRA provides that South African admiralty courts should apply law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction applied immediately prior to the commencement of the AJRA, namely, 1 November 1983.

³⁸⁶ Price (see note 1).

³⁸⁷ *Ibid.*

³⁸⁸ Price (see note 382; 410).

³⁸⁹ Price (see note 382;411).

³⁹⁰ Price (see note 382).

³⁹¹ Martin Norris *Law of Seamen* (1962) 366.

³⁹² "Seaman's Wages" (1830) 3 *American Jurist & Law Magazine* 40.

³⁹³ Norris (see note 391; 367).

The main characteristic for the wages lien to arise is service to the vessel. In the case of *The Tacoma City*³⁹⁴ Lord Justice Ralph Gibson at 335 the seaman were claiming severance payments which were not related to service in connection to the particular vessel. The court provided that “the wages must have been earned in respect of services rendered to the ship.”³⁹⁵ Therefore as David Jackson provides; the lien is created by service to the ship and not the contract of employment.

The question of whether there was any service to the *Asphalt Venture* is answered in the negative. After the crew members were taken hostage, there was no further service rendered to the vessel. Concord had merely continued to make payments to the crew members out of sympathy, however the well soon run dry when a further ransom was demanded.

The question of whether the hijacking of the *Asphalt Venture* was a supervening event of impossibility remains an interesting point. The Somalian pirates have become infamous across the globe.³⁹⁶ Ships of different types and sizes have suffered at the hands of Somali pirates and the attacks were getting more and more sophisticated.³⁹⁷ This led to the international community adopting resolutions under Chapter VII of the UN Charter to combat the crimes.³⁹⁸ The Supreme Court of Appeal (SCA) did not discuss the doctrine of impossibility in great detail, especially in the context of seaman’s contracts of employment and piracy.

Whether Concord foresaw the possibility of the hijacking occurring is an answer one can never be certain of. The SCA did not discuss the probabilities surrounding whether the pirate attack was foreseeable and whether there was an assumed risk taken on by Concord regarding the first ransom demanded. Concord might have foreseen the possibility of the hijacking (and catered for it as seen with the funds for the initial ransom were paid) but whether Concord was able to foresee the extent of frustration is unknown.

The SCA also did not discuss the high risk of heading towards the East coast of Africa as discussed by Kraska and Wilson.³⁹⁹ Did Concord have the option of avoiding these waters?

³⁹⁴ [1991] 1 Lloyd’s Rep. 344.

³⁹⁵ Ibid; 335.

³⁹⁶ John Dugard *International Law: A South African Perspective* 4ed (2011) 381.

³⁹⁷ Ibid.

³⁹⁸ Ibid.

³⁹⁹ James Kraska and Brian Wilson “Fighting Piracy” *Armed Forces Journal* February 2009 available at <http://armedforcesjournal.com/fighting-piracy/> accessed 11.06.2018.

Did Concord assess the risk before travelling through the waters (100 nautical miles from Mombasa)? The uncertainty is unnerving as both the High Court, KwaZulu Natal Local Division (Durban) and the SCA did not deal with whether the risk was indeed assumed by Concord.

The writer is of the view that the SCA should have discussed whether the hijacking would be covered as an assumed risk but not the act of the further ransom demanded for the release of approximately 120 Somali pirates.⁴⁰⁰ The writer agrees that the demand for a further ransom became a supervening event of impossibility.⁴⁰¹ The region was one which piracy was occurring continuously but the fact that Concord was able to initially meet the demands of the pirates informs us that they had catered for the possibility of a piracy attack occurring and not the further ransom.⁴⁰² To pay and continue to support a crew no longer benefitting the vessel, which service is required in order to establish whether a maritime lien exists, shows that the lien could no longer exist.⁴⁰³

The sanctity of the seaman's contracts of employment were also responded to where the SCA stated that there was nothing special about the contracts of employment in question that would exempt them from the ordinary principles of frustration of contracts.⁴⁰⁴ The SCA also stated that the case of *Horlock v Beal*⁴⁰⁵ was good authority as it focused on the aspect of service, as required by the case of *The Ever Success*.⁴⁰⁶ The SCA stated that

“To continue to pay and support a crew not on board the vessel and not rendering service to the vessel, whose contracts of employment had terminated and who were held in captivity by intransigent pirates, who had been paid a ransom but demanded an exchange that was not within Concord's power, could hardly have been contemplated by the employment contracts.”⁴⁰⁷

⁴⁰⁰ *Windrush*; para 35.

⁴⁰¹ *Ibid*.

⁴⁰² *Ibid*.

⁴⁰³ *Windrush*; para 42.

⁴⁰⁴ *Windrush*; para 34.

⁴⁰⁵ [1916] UKHL 795.

⁴⁰⁶ [1999] 1 Lloyd's Rep 824.

⁴⁰⁷ *Windrush*; para 35.

The writer is of the opinion that using the words “nothing special” to describe to the contracts of employment of the crew was although not a drastic comment to note, the writer is of the view that it is important that the courts be wary of dismissing the seaman’s claim for wages as nothing special when there are decades of case law providing otherwise.⁴⁰⁸

The writer agrees with the findings of the SCA that Concord no longer had an obligation to pay and support the crew as a result of the supervening event. It is evident that Concord had stretched itself thin. The purpose of the contract of employment had been frustrated and therefore the employment contract could not be enforced. The SCA rightfully upheld the appeal by providing that due to impossibility Concord was discharged of its obligations in terms of the contracts of employments.

⁴⁰⁸ Please see *The Sydney Cove* (1815) 1 Dods 11; *Harden v Gordon* 11 Fed. Cas. 480, No. 6047; *The Caracas Bay: Ex Parte the Crew of the MV Caracas Bay* 1977 (4) SA 945 (C); and *The Minerva* (1985) 1 Hagg 347.

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18 March 2019

Ms Ntompumalelo Noluthando Surprise Nzimande (209505057)
School of Law
Howard College Campus

Dear Ms Nzimande,

Protocol reference number: HSS/0184/019M

Project title: Seaman's lien: A South African perspective on seaman's lien post the Supreme Court of Appeal's Decision in the *Asphalt Venture Windrush Intercontinental SA v UACC Bergshav Tankers AS 2017 (3) SA 1 (SCA)*

Full Approval – No Risk / Exempt Application

In response to your application received on 12 March 2019, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Title of the Project, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 1 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....
Dr Rosemary Sibanda (Chair)

/ms

Cc Supervisor: Khulekani Zondi
cc Academic leader Research: Dr Freddy Mnyongani
cc School Administrator: Mr Pradeep Ramsewak

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