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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**“NO LONGER LOST IN TRANSLATION”: SOUTH AFRICAN ADMIRALTY AND INSOLVENCY
PROCEEDINGS AT A CROSS-ROADS.**

By

PHIWE NGCOBO

SOUTH AFRICA

A dissertation submitted to the World Maritime University in partial

fulfilment of the requirement for the award of the degree of

MASTER OF SCIENCE

In

MARITIME AFFAIRS

(MARITIME LAW AND POLICY)

DECLARATION

I, Phiwe Mathabo Ngcobo, certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views and are not necessarily endorsed by the University.

(Signature):

(Date):

Supervised by:

Supervisor's affiliation.....

ACKNOWLEDGEMENTS

The completion of my dissertation would have not been possible if it were not for my supervisors, Professor Laura Carballo Piñeiro and Professor Sanele Gumede. Thank you for all the invaluable advice and guidance you gave to me during this year. I would also like to thank my family for their endless support.

ABSTRACT

Title of Dissertation No longer lost in translation: South African admiralty and insolvency proceedings at a cross-roads.

Degree: MSc in Maritime Law and Policy

The purpose of this dissertation is to determine whether a vessel which has been arrested by a claimant either in terms of action *in rem* or action *in personam* in accordance with the Admiralty Jurisdiction Regulation Act 105 of 1983, South Africa, will fall into the estate owned by a company that is subject to winding-up, liquidation or business rescue proceedings in terms of the Company Act of 1973 and Companies Act of 2008. To this end, two scenarios will be examined, i.e. whether admiralty proceedings were commenced before or after the commencement of winding-up, liquidation or business rescue proceedings.

In order to provide a constructive assessment of the effect of winding-up, liquidation and business rescue proceedings on admiralty matters, this dissertation examines the relevant provisions of the Admiralty Act which address arrests and attachments in parallel to the relevant provisions of the Companies Act of 1973 and 2008 which address the treatment and disposal of property under winding-up, liquidation and business rescue proceedings. This dissertation also includes a comparative analysis of the admiralty and insolvency laws of Australia and England in order to understand the international approach adopted by other courts addressing maritime claims against insolvent companies and shipowners.

KEYWORDS: admiralty proceedings, winding-up, liquidation, business rescue proceedings, maritime creditors, insolvent estate, arrest of vessels, maritime liens.

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CHAPTER ONE

INTRODUCTION

1.1. BACKGROUND

South Africa is considered to be a favourable jurisdiction for many claimants seeking to enforce their *in rem* or *in personam* claims against a vessel. In South Africa, by virtue of the Admiralty Jurisdiction Regulation Act 105 of 1983 (“the Admiralty Act”), claimants have been afforded special treatment in so far as their maritime claims against insolvent owing companies are concerned. Despite the Admiralty Act providing creditors with such unique arrest and attachment options and/or procedures, these are not acknowledged by legislation, such as the Companies Act of 1973 and Companies Act of 2008, which address winding-up, liquidation and business rescue proceedings against an insolvent company.

This therefore creates a conflict between the admiralty and insolvency legislation in South Africa. Often, a court is faced with the predicament of ascertaining whether the arrested property of an owner that is subject to winding-up, liquidation or business rescue proceedings, is to be resolved and disposed of in terms of the Admiralty Act or in terms of the Companies Act of 2008. The other issues which arise is that where either admiralty or insolvency proceedings have commenced, either before or simultaneously with the other proceeding, this leads to the question arising, both before and after proceedings, of whether the claimant may even be able to enforce or pursue its claim in terms of admiralty proceedings.

The lack of coordination and interpretation between the admiralty law and insolvency laws was accurately described by D R Thomas in his textbook “Maritime Liens”, where he stated the following:

“The law of corporate liquidation and bankruptcy seems to have developed with little regard to the Admiralty proceeding in rem. Certainly it is difficult to fit the Admiralty proceedings into the legislative language of the relevant statutes which regulate the winding-up of companies and bankruptcy. Yet the need for the latter to accommodate the action in rem and the potential conflict between the two processes is plain. A res may concurrently be the subject of an arrest in the Admiralty Court and an asset capable of liquidation in a company winding-up or personal bankruptcy. In such a circumstance it is important for a maritime claimant to be able to ascertain whether it the

*jurisdiction of the Admiralty Court or some other court which prevails, and which mode of legal process is available for the satisfaction of the claim”*¹

Given the difference between the admiralty and insolvency laws, it is understood how there can be conflict in the event that a claimant seeks to enforce its claim against an insolvent company, which in turn, seeks to commence winding-up, liquidation or business rescue proceedings in order to protect its assets or estate. The overlap created between admiralty and insolvency proceedings was addressed in the recent South African case of Southern African Shipyards (Pty) Ltd v MFV "Polaris" and Others [2018] 3 All SA 219 (WCC), the Western Cape High Court was presented with the issue of whether section 10 of the Admiralty Act was in conflict with sections 128 to 155, Chapter 6 of the Companies Act No 71 of 2008 (the “Companies Act of 2008”) in so far as business proceedings in respect of companies in business rescue and/or insolvency were concerned.

In this case, the Applicant, Southern African Shipyards (Pty) Ltd, sought to sell the fishing vessel, MFV “Polaris” (the “vessel”), along with her equipment, bunkers, furniture and cargo in terms of section 9 of the Admiralty Act which provides for the sale and auction of vessels in South Africa. The sale was opposed by the respondents, MFV Polaris and others on the ground that by virtue of the owner of the vessel undergoing business rescue proceedings in terms of the Companies Act, these proceedings placed an automatic moratorium on all legal proceedings against the company, and therefore the application for the sale of the vessel could not proceed any further. It was further argued by the respondent that section 10 of the Admiralty Act was thus in conflict with the Companies Act of 2008, and that the applicable sections of the Companies Act of 2008, namely those envisaged in section 5(4)(b)(ii) prevailed the Admiralty Act.

The respondent further contended that where there is a conflict between legislation, the court will refer to section 5(4) of the Companies Act of 2008 in order to ascertain which legislation must be deferred to. In applying this section to the present case, the respondent’s view was that it was not the legislature’s intention for the Admiralty Act to prevail the Companies Act of 2008, as the act was not included in section 5(4) of the latter act. The respondents further sought to have the application for the sale of the vessel dismissed on the ground that judicial management proceedings as provided for in the Companies Act No 61 of 1973 (the “Companies Act of 1973”) had since been repealed by business rescue proceedings in the new Companies Act of 2008. Therefore, judicial management as argued by the applicant, was longer applicable.

¹Thomas D R, *Maritime Liens*, Volume 14 of British Shipping Laws (1980) Stevens & Sons at page 55.

After consideration of English and South African legislatures, as well various judicial decisions, the Western Cape High Court found that once a company in business rescue, its property shall vest in the business rescue practitioner and cannot be arrested once business rescue has commenced. However, if the arrest of the vessel occurs before the commencement of business rescue proceedings, the property will not fall under the control of the business rescue practitioner. This case, as one of the few reported South African cases on the issue, is a welcome interpretation of the overlap which exists between business rescue proceedings and admiralty proceedings.

The Polaris judgement is a welcome case in South Africa as it provides some clarity on the overlap created between admiralty law and insolvency law in South Africa. It is also of importance if one takes into account the unstable financial status of the global maritime market where it is becoming common for claimants to encounter owners of vessels that are subject to insolvency proceedings so as to restructure their financial affairs. What is worth noting from the Polaris judgement, and what becomes the focus of this dissertation, is that whether a claimant with a maritime claim will be able to enforce or pursue its claim *in rem* or *in personam* against a vessel owned by a company subject to winding-up, liquidation or business rescue proceedings, it will ultimately depend on the timing of it commencing such admiralty proceedings and the stage at which insolvency proceedings lie. i.e. before insolvency proceedings, after the presentation of winding-up or liquidation order or after a winding-up or liquidation order has been granted by the court.

1.2. AIMS AND OBJECTIVES

The purpose of this dissertation is to determine whether a vessel which has been arrested by a claimant either in terms of action *in rem* or action *in personam* in terms of the Admiralty Act will fall into the estate owned by a company that is subject to winding-up, liquidation or business rescue proceedings in terms of the Company Act of 1973 and Companies Act of 2008 if admiralty proceedings were commenced before or after the commencement of winding-up, liquidation or business rescue proceedings.

In order to provide a constructive assessment of the effect of winding-up, liquidation and business rescue proceedings on admiralty matters, this dissertation will examine the relevant provisions of the Admiralty Act which address arrests and attachments in parallel to the relevant provisions of the Companies Act of 1973 and 2008 dealing with the treatment and disposal of property under winding-up, liquidation and business rescue proceedings. This shall take into account the overlap created between certain procedures under the Admiralty Act and the Companies Acts and how the interpretation of these pieces of legislation

by the courts in South Africa has affected the manner in which maritime claims against insolvent companies and shipowners have been successfully dealt with South Africa.

This dissertation will furthermore examine the overlap between admiralty law and winding-up, liquidation and business rescue proceedings under Australian and English law taking into consideration relevant judgments in these jurisdictions. South African law is a hybrid between a civil legal system, a common law system and customary law. For purposes of this comparative, Australia and England have been selected as both are common law countries. More specifically, South Africa's admiralty law draws many references from English admiralty and common law. Australia has been selected as its common law system is derived from English common law and will thus share similarities or commonalities in a few respects regarding South African admiralty and insolvency law.

It should be noted that this dissertation shall not examine any cross-border issues which may arise from the interaction between admiralty law and insolvency law but will focus on the domestic interaction between admiralty law and insolvency law in South Africa. In addition, this dissertation will not examine in depth whether secured maritime creditors enjoy the same privileged treatment (which they receive under admiralty proceedings) under insolvency proceedings but whether their claims are affected depending on when either admiralty or insolvency proceedings are commenced in respect of a vessel belonging to an insolvent owner.

1.3. HYPOTHESIS

This dissertation explores the hypothesis that a vessel which has been arrested by a claimant either in terms of action *in rem* or action *in personam* in terms of the Admiralty Act shall not form part of the estate or owned by a company that is subject to winding-up, liquidation or business rescue proceedings in terms of the Company Act of 1973 and Companies Act of 2008, provided that the arrest of the vessel occurs prior to the owner being subjected to such proceedings.

1.4. RESEARCH QUESTIONS

How has the overlap created by an arrested vessel that falls subject to both admiralty and insolvency laws been interpreted? in order to determine this question, this dissertation shall examine the position under the following:

- 1.4.1. Whether a claimant that has a maritime claim in terms of the Admiralty Act may enforce or pursue its claim either by way of an action *in rem* or action *in personam* against a vessel prior to or after winding-up, liquidation or business rescue proceedings have commenced against the owner of such vessel. It shall also be determined whether the legal position remains the same upon the presentation of a winding-up or liquidation application to the court.
- 1.4.2. Whether a claimant that has a maritime claim in terms of the Admiralty Act may enforce or pursue its claim either by way of an action *in rem* or action *in personam* against a vessel once a court has granted a winding-up or liquidation order against the owner of such vessel.
- 1.4.3. Whether the nature of a claimant's maritime claim i.e. a maritime lien or statutory right *in rem* or statutory interest may affect the timing at which a claimant decides to enforce its maritime claim against an owner subject to winding-up, liquidation or business rescue proceedings.

1.5. RESEARCH METHODOLOGY

The primary research method for this dissertation will be the legal – dogmatic methodology which shall include an analysis and review of primary and secondary legal sources. It will also involve a comparative analysis of the legal position regarding this dissertation's hypothesis in other countries, namely Australia and England.

1.6. STRUCTURE OF DISSERTATION

This dissertation shall be divided into six chapters

Chapter 1 of this dissertation is the introduction which shall set out the aims, objective and purpose of this study as well as the research questions to be answered.

Chapter 2 of this dissertation shall introduce the admiralty proceedings in terms of actions of arrest and attachment of a vessel or maritime property under the respective provisions of the Admiralty Act that are available to a claimant that seeks to enforce or pursue its claim *in rem* or *in personam* against a vessel. The provisions of the Admiralty Act will be examined to also determine the rights available to a claimant under admiralty proceedings, how a claimant must pursue its maritime claim in terms of admiralty proceedings and which court in South Africa has the necessary jurisdiction to handle such admiralty proceedings.

Chapter 3 of this dissertation shall introduce the insolvency proceedings, namely winding-up, liquidation and business rescue proceedings available under the Companies Act of 1973 and Companies Act of 2008. This chapter shall examine the legal effect of that the commencement of insolvency proceedings i.e. a stay or moratorium has on any legal proceedings pending or instituted against an insolvent owner or company. The rights of creditors and the insolvent company shall also be examined.

Chapter 4 of this dissertation shall examine the overlap between admiralty law and insolvency law primarily focusing on the timing of when a claimant should enforce its maritime claim against the insolvent owner or company that is subject to insolvency proceedings. This shall involve a comparative analysis of this overlap between admiralty and insolvency proceedings in Australia and England.

Chapter 5 of this dissertation shall determine whether the legal position regarding the overlap, as discussed under chapter 4, is similar or different in South Africa and how the courts have approached or should approach the issues arising from it.

Chapter 6 of this dissertation is the conclusion which shall provide conclusionary remarks, findings and recommendations.

CHAPTER TWO

SHIP ARRESTS IN SOUTH AFRICA

2.1 INTRODUCTION

Historically, South Africa was predominantly colonised by the British and the Dutch. As a result of such, it is of no surprise that most of South Africa's admiralty law has its origins and roots in English and Roman Dutch law. Whilst South Africa was considered a colony under British rule, admiralty matters were heard by the Vice - Admiralty Courts established in the Cape and Natal². The Vice-Admiralty courts were established as admiralty matters taking place in British colonies that could not be heard by the English Admiralty Court due to logistical reasons³. In hearing admiralty matters, the Vice-Admiralty courts would exercise and practice English admiralty law. In addition to these admiralty courts, colonies also had ordinary courts which practiced Roman Dutch law. The existence of both courts, which both had concurrent jurisdiction, led to a claimant having a choice between two courts to hear its matter with the chances of each court reaching a different finding on the issues of its claim⁴.

In an attempt to clarify this, the Colonial Courts of Admiralty Act (the "Colonial Court of Admiralty Act") was enacted on 25 July 1890 abolishing all Vice-Admiralty Courts and replacing them with Colonial Courts of Admiralty⁵. The objective of the Colonial Courts of Admiralty Act was to confer the same admiralty jurisdiction as exercised by the High Court of England to colonial courts in South Africa and to ensure that courts practiced the same substantive law in terms of section 2(1) of the Colonial Courts of Admiralty Act 1890 which provided as follows:

"Every Court of law in a British possession, which is for the time being declared in pursuance of this Act to be a court of Admiralty, or which, if no such declaration is in force or in the possession, has therein original unlimited civil jurisdiction, shall be a court of admiralty, within the jurisdiction in this Act mentioned, and may for the purposes of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty... "

In 1910, South Africa became the Union of South Africa and the colonies thereunder remained under British possession⁶. The divisions of the Supreme Court of the Union and any other court which exercised unlimited

² Hofmeyr, G, *Admiralty Jurisdiction in South Africa*. 1982, Acta Juridica pages 30-50.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

original jurisdiction became Colonial Courts of Admiralty as per the above section⁷. In as much the objective of the Colonial Courts of Admiralty Act was to confer the same jurisdiction on Colonial Courts of Admiralty as exercised by the English Admiralty Court, it also attempted to ensure that these admiralty courts practiced the same substantive law, namely English admiralty law⁸. However, most of these admiralty courts did not apply English admiralty or substantive law as practiced and developed by the English High Court in England therefore continuing to perpetuate the existence of two separate jurisdictions i.e. Roman-Dutch law on one hand and English admiralty law on the other hand⁹. This meant that Roman Dutch law would be administered by the Supreme Court of the Union when exercising its ordinary jurisdiction, however English Law would be administered by the same court when it was sitting as a court of admiralty and thus exercising its admiralty jurisdiction thus enabling a claimant the ability to invoke either jurisdiction as this court was figuratively operating as two courts at the time¹⁰.

Another issue which colonial courts were faced with when exercising their admiralty jurisdiction was the ambit and scope thereof. Under the Colonial Courts of Admiralty Act, colonial courts were restricted to admiralty matters which concerned vessels under arrest or security which was paid to the court in respect of such arrest¹¹. However, courts were unable to address or assert their inherent jurisdiction in respect of admiralty matters where contracts were concluded or breached at sea. In order to provide reform on the existence of a dual jurisdiction system, as discussed above, and to also broaden the scope and extent of the courts' jurisdiction regarding admiralty matters, the Admiralty Jurisdiction Regulation Act 105 was enacted on 1 November 1983¹². In its enactment, the Admiralty Act provided the following significant changes in South African admiralty law:

- 2.2.1. the Admiralty Act confirmed English common law remains applicable in so far as maritime liens and admiralty law;
- 2.2.2. the Admiralty Act also clarified the position of a court exercising two jurisdictions for the same matter and claimants being able to elect which jurisdiction to invoke by instilling that maritime claims would be dealt with by a court exercising its admiralty jurisdiction. The Admiralty Act further provides procedures in the event that there are any disputes in respect of a venue or jurisdiction in terms of which, depending on the facts of the matter, a court may either stay legal proceedings or

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Hare J, *Shipping Law & Admiralty Jurisdiction in South Africa* (1999) South Africa, Juta & Company, Ltd .

¹² Ibid.

decline to exercise its admiralty jurisdiction if it is of the view that a court located elsewhere is better suited to adjudicate the matter;

- 2.2.3. the Admiralty Act extended the courts' admiralty jurisdiction to all maritime matters inclusive of maritime claims which did not previously exist under the Colonial Courts Admiralty Act;
- 2.2.4. the powers of the court were also extended in terms of section 5(5) of the Admiralty Act. These powers include "*make an order for the examination, testing or inspection by any person of any ship cargo, documents or any other thing and for the taking of the evidence of any person*", grant an order for security of costs and expenses, submit hearsay evidence and to refer matters to arbitrators and tribunals;
- 2.2.5. under the Colonial Courts Admiralty Act, the scope of ship arrests was quite restricted and only extended in so far as claims and security in respect of that particular ship arrest was concerned. On the other hand, the Admiralty Act extended the scope of ship arrests to include associated ship arrests, thus extending the right to arrest to other ships under common ownership of the same owner and/or management and not limited only to the arrested ship. Furthermore, claimants could institute an arrest *in rem* to secure security for proceedings before a South African court provided that the claimant has an action against the owner of the ship either *in personam* or *in rem*. In addition, security in an arrest before a foreign court was recognised in South Africa; and
- 2.2.6. the Admiralty Act extended an action *in personam* to allow a claimant to attach property in order to found jurisdiction of a ship.

In order for a claimant to have an enforceable maritime claim under South African admiralty law, such claim must be a maritime claim in terms of section 1(1) of Admiralty Act and the court must have or be conferred jurisdiction, which, in an action against a foreigner is affected by an attachment or an arrest of its vessel located in South Africa or on territorial waters. Despite the extensive list of maritime claims under section 1(1) of the Admiralty Act, courts are not limited to only adjudicate on those claims listed under this section. This is affirmed by the catch call section 1(1)(ee) of the Admiralty Act which provides that "*any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs*". Once it is established that a claimant has a maritime claim in terms of the Admiralty Act, it can be enforced either through an action *in rem*, an action *in personam*, security arrest or an associated arrest. It should be noted that the Admiralty Act is the main governing legislation regarding admiralty matters in South Africa and that it has not acceded to any other international conventions, such

as the Ship Arrest Convention of 1952, the Ship Arrest Conventions of 1999 or the International Convention on Maritime Liens and Mortgages of 1993 although provisions thereunder regarding associated ship arrests were and may be considered and incorporated into our domestic admiralty legislation¹³. Therefore, the Admiralty Act provides both the law applicable to maritime claims and the arrest procedures available to a claimant¹⁴.

2.2 PROCEDURES FOR THE ENFORCEMENT OF CLAIMS IN SOUTH AFRICAN ADMIRALTY LAW

In comparison to other countries, South Africa is considered to be a favourable arrest jurisdiction for a claimant seeking to enforce its maritime claim against the vessel or owner of such vessel¹⁵. South Africa has become a favourable arrest jurisdiction as it provides claimants with a few options to arrest or attach a vessel under its domestic admiralty legislation, notably the Admiralty Act¹⁶. In terms of this Act, a claimant may institute either an action *in rem* or an action *in personam*. Other available arrest options include security arrests and the unique action of associated arrests, which other than in South Africa, is offered in Australia, by way of a sister arrest.

With so many arrest options available to it, the claimant will need to ascertain which of these is the best option to pursue for purposes of recovery of its claim. This can be a somewhat difficult decision; however, the claimant will have to consider the circumstances of its claim and the form of security sought. An *in rem* arrest is generally favoured by most claimants in urgent matters as it is the easiest arrest to seek compared to an arrest *in personam* or security arrest. This is because an arrest *in rem* does not require an application pleading extensive averments. However, as noted by John Hare, a claimant's choice of arrest may depend on the value of security sought for its claim¹⁷. In as much as an *in rem* arrest is less complicated, the security sought by a claimant is limited to only the value of the vessel or the value of the claim inclusive of interests and costs (whichever is the lesser), whereas in an attachment, the full value of the claim, regardless of the vessel's value, must be secured in order for the vessel to be released from arrest¹⁸. Where a claimant has a maritime lien, it can institute its claim either through an *in rem* or *in personam* arrest and it only needs to

¹³ Dwyer S, *Ship Arrest in South Africa* (2016) Ship Arrests in Practice by Shiparrested.com Members, at page 288

¹⁴ Ibid at page 288.

¹⁵ UK Pandi P&I Club, *A Quick Overview of Ship Arrest in Popular Jurisdictions*, 2016, page 3)

¹⁶ Ibid at page 3.

¹⁷ Hare J, *Shipping Law & Admiralty Jurisdiction in South Africa* (1999) South Africa, Juta & Company, Ltd, page 90

¹⁸ Ibid at page 90.

prove that there is a connection between the vessel and the maritime lien in respect of which its claim lies irrespective of ownership of the vessel¹⁹.

John Hare, in his book, suggests that a claimant, where possible, should institute its claim by way of both arrest actions. His suggestion is based on the reasoning that an *in rem* arrest is limited as it is only against the vessel as the cited defendant and the only other option of execution against the vessel is that of launching sale proceedings. He further explains that an *in rem* arrest only exists for as long as the vessel has not been sold and a claimant is restricted to only claim the value of that vessel and no other assets. Whereas if *in personam* proceedings were also instituted, a claimant would be able to attach any other assets belonging to the owner of the vessel in order to fulfill its claim as per the judgment²⁰. This does raise issues where the cited defendant is the disponent owner or the ships manager and not the actual registered owner of the vessel. In these circumstances, a claimant would have extensive rights to attach the assets or property of the disponent owner or ship manager in terms of an action *in personam*.

This view raises the debate created from English law where the principle of extending execution was discussed in the case of *The Dictator*²¹. This case involved a claim for salvage whereby the owners put up an amount of £5000 for bail of the cargo. The court was faced with the issue of whether the claimant could seek an execution against the owners in terms of the judgement in the value of £7000 or if it was restricted to seeking execution against the bail in the value of £5000 and recovering the remaining value by way of a new action against the owners. The court held that “*it is necessary to consider whether in an action in rem, where a personal action would lie against the owners, judgment can be enforced for more than the value of the res; because, if it can, no doubt it can be enforced for more than the amount of the bail*”²². This principle came into question and was clarified by Wallis J in the case of *Transnet Ltd v The Owner of the Alina II*²³

In the above case, the Supreme Court of Appeal was faced with the issue of whether a claimant that has instituted an *in rem* action in respect of its claim could then seek an attachment *ad fundandam et confirmandam jurisdictionem* of the vessel and confirm jurisdiction in separate proceedings against the owner of the vessel in respect of those claims in South Africa. The applicant, Transnet, contended that the Admiralty Act envisages a claimant pursuing its claim by way of both an action *in rem* and *in personam* which are distinctly different from one another. In which case, Transnet contended that an attachment was

¹⁹ Ibid.

²⁰ Ibid at page 90 – 91.

²¹ [1896] P 64.

²² Ibid at page 310.

²³ (898/10) [2011] ZASCA 129 (15 September 2011).

not possible and that the actions of the owner of a vessel under an *in rem* action do not amount to a submission to jurisdiction in respect of *in personam* claims. Transnet based its argument on Rule 8(3) of the Admiralty Court Rules 1997. The owners of the vessel, *Alina II*, rejected Transnet's argument on the basis that it had submitted to the jurisdiction of the court in respect of the *in rem* claims against it and that by Transnet pursuing the same claims under *in personam* by way of an attachment was an abuse of *lis pendens*²⁴.

In his analysis of the merits of the matter, Wallis J considered the case of *The Dictator*²⁵ and how its finding applies in South African Admiralty Law, particularly the Admiralty Act and Rules. Wallis J reasoned that the Admiralty Act and the Admiralty Proceedings Rules 1997 ("Admiralty Proceedings Rules") do not prohibit a claimant from pursuing an action *in personam* against the owner of a vessel and thus seeking an attachment of assets belonging to that owner in order to found jurisdiction under circumstances where the claim has not been fully satisfied in terms of an *in rem* action or the owner has not entered into an appearance to defend regarding its personal liability²⁶. He further explained that the Admiralty Act does provide a claimant with two actions to arrest being an action *in rem* and an action *in personam* and that the Admiralty Act does not prohibit a claimant from using both actions²⁷. In the *Alina II*, the owner had submitted to the jurisdiction of the court for purposes of dealing with the *in rem* claims. Transnet was of the view, that "*the ordinary principles were inapplicable, because of the special nature of such an action*" and that the principle in *The Dictator*²⁸ which has been applied under South African prior to the promulgation of the Admiralty Act and Rules was reversed in terms of Rule 8(3) of the Admiralty Proceedings Rules.

Rule 8(3) of the Admiralty Proceedings Rules, provides as follows:

"A person giving notice of intention to defend an action in rem shall not merely by reason thereof incur any liability and shall, in particular, not become liable in personam, save as to costs, merely by reason of having given such notice and having defended the action in rem".

On an interpretation of Jeune J's judgement and consideration of its application in past South African cases, Wallis J was of the view that the application of the rules under the Admiralty Act post 1 November 1983 was in keeping with the application of the principle in *The Dictator*²⁹, namely that if a defendant has entered

²⁴ *Transnet Ltd v The Owner of the Alina II* (898/10) [2011] ZASCA 129 (15 September 2011) at para 7.

²⁵ [1896] P 64.

²⁶ *Ibid* at para 9.

²⁷ *Ibid*

²⁸ [1896] P 64.

²⁹ *Ibid*.

into an appearance to defend in its personal capacity, such appearance was a submission to the jurisdiction of the court, thus the claimant's action would proceed as both an action *in rem* and an action *in personam* against the defendant. Throughout *The Dictator*³⁰ judgment it was emphasized by Jeune J that the owner must have personal liability for this to apply and for its liability to not be limited to only the value of the vessel and costs. Therefore, one must bear in mind that this judgement does not mean that by a defendant entering an appearance in an *in rem* action it immediately attracts personal liability for the respective claim. It means that by a defendant entering into an appearance to defend, it submits to the jurisdiction of the court and that under English law, where it proceeds to defend its personal liability in the claim and that person is cited, a judgment can be enforceable against it in its personal capacity³¹. This was further substantiated by Douglas Shaw QC stating that “*this rule does not affect any liability which might otherwise exist, a subject which has been dealt with. It merely provides that the procedural step of giving notice of intention to defend and defending the action is not to subject anyone to the greater liability*”³².

Under South African law, the latter of the above, i.e. where a defendant proceeds to defend its personal liability in the claim and that person is cited, a judgment can be enforceable against the Defendant in its personal capacity, differs in light of that provided under the Admiralty Act and Rules³³. Generally, a summons *in rem* issued in a South African court will have the vessel and not any other interested party cited as the defendant. If the claimant wishes to seek recovery of its claim by way of an action *in personam*, it may institute a separate action in terms of a summons *in personam*. It is also possible for the claimant to join a person or company to the *in rem* proceedings in terms of joinder proceedings and by doing so the action can proceed on both an *in rem* and *in personam* action³⁴.

In answering the issue of whether a defendant that enters an appearance to defend *in rem*, has submitted to the jurisdiction of the court in terms of an *in personam* action, Wallis J further found that the Admiralty Proceedings Rule 8(3) did not reverse *The Dictator*³⁵ principle as it does not deal with the issue of submission to a court's jurisdiction and it is primarily focused on the liability of a person that enters an appearance to defend an action *in rem* not automatically extending to liability under an *in personam* action. In doing so, he disagreed with the judges' findings in the cases of *Bouyges Offshore & another v Owner of*

³⁰ Ibid.

³¹ *The Dictator* [1896] P 64 para 9.

³² Shaw D J, *Admiralty Jurisdiction and Practice in South Africa* (1987) Cape Town, Juta & Co Ltd at page 112, *Transnet Ltd v The Owner of the Alina II* (898/10) [2011] ZASCA 129 (15 September 2011) at para 28.

³³ *Transnet Ltd v The Owner of the Alina II* (898/10) [2011] ZASCA 129 (15 September 2011) at para 29.

³⁴ Rule 22(5) of *Admiralty Court Rules* of 1997.

³⁵ [1896] P 64.

*the MT Tigr & Another*³⁶ and *The August 8* which were of the view that admiralty proceedings rule 8(3) reversed *The Dictator* principle.

What does remain clear from the above, is that depending on the nature of its maritime claim and the value of security sought, a claimant can elect to pursue either the quicker option of an action *in rem*, an action *in personam* or security arrest. The various arrest options are further discussed below.

2.2.1 *In rem* proceedings

An action *in rem* is whereby a claimant institutes a claim against the vessel and/or any of its equipment, bunkers, cargo or freight whereas an action *in personam* is whereby the claimant has a delictual or contractual claim against the defendant. In terms of section 3(4) of the Admiralty Act, in order to institute an action *in rem* against the vessel, the claimant must have a maritime lien over the property to be arrested or if the owner of the vessel to be arrested would be liable to the claimant by way of an action *in personam* in respect of the cause of the action concerned.

In terms of section 3(4) of the Admiralty Act in order to establish a claim *in rem*, a claimant must prove that it has a maritime lien over the defendant's property and that if the defendant, as owner of the respective property, would be liable *in personam* in respect of the cause of the action.

There are several ways in which an arrest can be instituted by the claimant by arresting property in the jurisdiction of the court in respect of its claim. Under section 3(5) of the Admiralty Act, such property that can be arrested for an *in rem* claim, is limited to the vessel with or without its equipment, furniture, stores or bunkers or alternatively only the vessel's equipment, furniture, stores or bunkers. The claimant may arrest the vessel's freight, cargo or any container onboard if its claim arises out of or relates to the use of that container in or on a vessel or the carriage of goods by sea or by water otherwise in that container. The claimant may seek an arrest *in rem* in terms of a fund constituted by the proceeds of the judicial sale of any of the property.

Unlike *in personam* proceedings, a claimant need not issue and serve an application in respect of the defendant's property. In so far as *in rem* proceedings are concerned, the claimant must prepare a summons *in rem* which is accompanied by a warrant of arrest and certificate in terms of Rule 4(3) of the Admiralty Proceedings Rules. The warrant of arrest will set out the terms on which the arrest may be lifted by the defendant and these generally provide that the arrest will be lifted upon the defendant

³⁶ 1995 (4) SA 49 (C).

providing security for the claim. The accompanying certificate must confirm the averments included in the summons, namely that the claim is a maritime claim for which the defendant is liable, the property sought to be arrested belongs to the defendant, whether any security has been furnished by the defendant in respect of its claim and the attorney must confirm that the contents of the summons are true and correct. If there is an urgency for security, this must also be addressed in the summons and the claimant must provide its reasons for requesting the court's aid in the matter. In practice, the certificate addresses these averments very briefly as it is already sufficiently dealt with in detail under the summons *in rem*.

The summons and accompanying documents are then issued by the High Court registrar under the same admiralty case number and are thereafter provided to the local sheriff who will proceed to serve the summons and the warrant of arrest on the property to be arrested. If the property to be arrested is a vessel, the papers shall be affixed by the sheriff onto the vessel and copies thereof are also served on the master of the vessel. The process of action *in rem* formally commences when the summons and warrant of arrest have been served. If the defendant does not furnish security in respect of the arrest, it may file a notice of defence and thereafter challenge the arrest. The form of security and the manner in which the arrest may be challenged by the defendant is similar to the process followed in in respect of setting aside an attachment.

2.2.2 *In personam* proceedings

In South African admiralty law, an action *in personam* is whereby the claimant institutes a maritime claim against the named defendant. It is important that the named defendant is liable to the claimant either in terms of delict or contract. In order for a claimant to have a maritime claim enforceable by way of an action *in personam*, the following grounds in terms of section 3(2) of the Admiralty Act must be met:

“(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 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 27 of 1943);*
- (e) *in the case of a company, if the company has a registered office in the Republic”.*

An action *in personam* can be exercised by both *incola* and *peregrinus*. In terms of common law, an *incola* is a litigant that is domiciled or resident in South Africa or alternatively is located within the court’s area of jurisdiction, whereas a *peregrinus* is a foreign litigant that is not domiciled or resident within the country. In terms of section 3(2), in the event that the defendant is not domiciled or resident in South Africa, it will be necessary for it to consent to the jurisdiction of a South African court or to have its property attached in order to found or confirm the court’s jurisdiction.

Generally, where the defendant is domiciled or carries on business in the Republic of South Africa, it will not be essential for the claimant to delve into detail on these grounds as the court already has jurisdiction over such wrongdoers or persons. Under these circumstances, the claimant must file and serve a summons against the cited defendant (as the defendant).

On the other hand, if the defendant is a *peregrinus* and is not domiciled or carries on business in South Africa, it is necessary to attach property belonging to the *peregrinus*, regardless of its value or nature, in order to confirm jurisdiction. In order to attach property in terms of an action *in personam* proceedings, the claimant (as an applicant) must issue and serve an application comprised of a notice of motion accompanied with a supporting affidavit against the cited defendant (as the respondent). In preparing the affidavit, the applicant must prove that it has a *prima facie* case on the merits of the claim in terms of which it seeks an attachment. In addition, the applicant bears the onus to prove on a balance of probabilities that its claim is a *prima facie* maritime claim in terms of section 1(1) of the Admiralty Act, that the court has jurisdiction pursuant to the attachment of the respective property, that the respondent is a person as cited in section 3(2)(a) – (e) of the Admiralty Act, that the property sought to be attached belongs to the cited defendant and will or is likely to come into the jurisdiction as contemplated in section 4(4)(b) of the Admiralty Act. Furthermore, the applicant must prove that it has a genuine and reasonable need for security. Generally, where the claimant has a genuine and reasonable belief that the respondent will absent its property from the jurisdiction of the court or that it has insufficient property, it may issue and file its application *ex parte* for the court to urgently grant an attachment order.

In as far as the arrest or attachment of the property is concerned, the claimant's application may be challenged by any party that has *locus standi* and whose interests in the property would be prejudicially affected if the court were to grant an order of attachment. If the court is of the view that certain interests will be affected, the application may be set aside by the court, thus lifting the attachment. In the event, that leave to appeal the decision to set aside the attachment is granted by the court, the initial attachment order against the defendant's property shall fall aside. If the application is not challenged, an order for the attachment of property will be granted by the court and served on the defendant by the sheriff. If the order of attachment needs to be served on a *peregrinus*, the order shall be served outside the jurisdiction of the court, by edictal citation, with the leave of the court.

Where the claimant has attached the property of the cited defendant, it is not necessary for the claimant in doing so, to provide countersecurity for such an attachment. The defendant is able to lodge a counter-security application provided that it can establish on the merits of the matter that the attachment of its property by the claimant is without a genuine and reasonable need for security. If the defendant is successful in proving this, it will have a claim for damages on the grounds of a wrongful arrest. The order which is issued by the court will *"order the provision of counter-security, the usual form being an order that the furnishing of security by the owner of the vessel, in the original application for an arrest for security, is conditional upon security being provided for the counterclaim and if not provided within a specified period, the ship be released from the original arrest"*³⁷. Therefore, in South African law, a defendant will not be automatically provided with countersecurity in respect of the arrested or attached property or for a wrongful arrest, until such time that the necessary requirements are established and proven in court.

If the defendant has provided security for its property, it is entitled to the release of its property. There are a few ways in which security may be furnished by the defendant. These include security in the form of a letter of undertaking from the defendant's P&I Club or security in the form of a bank guarantee from a South African bank or a foreign bank. If a bank guarantee is obtained from a foreign bank, such bank guarantee must be negotiable in South Africa in order to be accepted for the property arrested in the South African jurisdiction.

³⁷ Edwards, T, *South Africa: Ship Arrests: Counter – Security and Wrongful Arrest* (2018).

2.2.3 Security Arrests

In South Africa, security arrests are provided for in terms of section 5(3) of the Admiralty Act which provides as follows:

“A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action in personam against the owner of the property concerned or an action in rem against such property or which would be so enforceable but for any such arbitration or proceedings”.

A security arrest is whereby a claimant may can arrest the property of the named defendant as security for its claim. Security arrests are also favorable in circumstances whereby arbitration or legal proceedings against the defendant in question have already commenced in a jurisdiction beyond that of South Africa and the claimant therein has a reasonable concern as to whether sufficient security may be obtained for the court’s judgment due to the defendant’s financial status. In such circumstances, a claimant would be able to pursue an arrest for purposes of obtaining security for its claim, pending the outcome of the court’s decision in the ongoing legal proceedings or arbitration.

Since applications in respect of security arrests are normally brought to a court *ex parte* and on an urgent basis, it is critical that a claimant make full disclosure of all averments in its application regarding why (s)he is entitled to such security. In doing so, a claimant thus bears the onus to prove on a *prima facie* level, firstly, that (s)he has an enforceable claim either *in rem* or *in personam* and secondly, that the claim can or may be heard in arbitration or legal proceedings in a South African or foreign court that has jurisdiction to hear the matter. Furthermore, in terms of the case of *Cargo laden and lately laden on board the mv Thalassini Avgi vs mv Dimitris*³⁸, a claimant must prove on a balance of probabilities the grounds which were established by the Supreme Court of Appeal, namely that (s)he has an enforceable claim in terms of *in rem* or *in personam*, that (s)he has a *prima facie* case in respect of its claim and that such claim is enforceable in South Africa or the nominated country of choice and that (s)he has a reasonable and genuine need for security.

³⁸ 1989 (3) SA 820 (A).

In so far as the extent to which a claimant needs to prove its *prima facie* claim in order to obtain security for its claim in terms of section 5(3) is concerned, this was addressed in the Supreme Court of Appeal case of the *Imperial Marine Company v Pasquale della Gatta; Imperial Marine Company v Filippo Lembo*³⁹ in which the court was faced with the issue of whether the applicant, Imperial Marine Company, had established a *prima facie* claim for purposes of the security arrest. In his judgment, Wallis J was of the view that ascertaining whether there is a *prima facie* case will “depend upon issues of both fact and law”. In his reasoning, Wallis J made reference to the case of *Hülse-Reutter & others v Gödde*⁴⁰ in which the judge, Scott JA, focusing on the subject of evidence was of the view that the evidence submitted or relied on by a claimant “*must consist of allegations of fact as opposed to mere assertions*”⁴¹.

It was further noted by Scott JA that despite South African court giving latitude in this regard, the inferences which are drawn from the facts which are proven should not be ignored by the courts. Such inferences drawn must be reasonable and if not, the *prima facie* case would be considered as null⁴². Taking this into account, Wallis J held that it is important for a claimant to prove the existence of a *prima facie* case and once proven the court must still test this on both a substantive and procedural level. A court cannot simply disregard the evidence placed before it as the nature of a ship arrest is not a minor exercise to be taken lightly by those involved. Therefore, the strength of both the facts and the law are “*inextricably linked: a security arrest order should not be granted if it cannot be sustained*”⁴³. This view was supported by Wallis J as he stated that “*it seems incongruous for a court faced with a decision whether to order or sustain such an arrest to ignore materially relevant and undisputed evidence*”⁴⁴.

Once a claimant has proven these grounds and security is obtained it may proceed with the legal proceedings and arbitration as contemplated. In so far as this security is concerned, the Admiralty Act confers the court with the power to either grant an order the defendant to provide security for costs of a claim or, alternatively, order that security be provided for a claim as a precondition in respect of any arrest or attachment made or to be made⁴⁵.

³⁹ (638/10)[2011] ZASCA 131.

⁴⁰ 2001 (4) SA 1336 (SCA).

⁴¹ Ibid at para 14.

⁴² 2001 (4) SA 1336 (SCA) at para 12.

⁴³ Clark A & Simpson T, *Security Arrests in South Africa* (2016) page 2.

⁴⁴ *Imperial Marine Company v Pasquale della Gatta; Imperial Marine Company v Filippo Lembo* (638/10)[2011] ZASCA 131 at para 22 – 23.

⁴⁵ Section 5(2)(b) – 5(2)(c) of the *Admiralty Jurisdiction Regulation Act* 105 of 1983.

In practice, the security to be provided in place of the vessel will be in the form of a letter of undertaking from a P&I club or a bank guarantee from a reputable bank. If security is not provided by the defendant, the vessel will continue to be held under arrest until the legal proceedings or arbitration are concluded. Under such circumstances, the vessel may be sold, and a fund shall be formed in terms of section 9 of the Admiralty Act. The latter is not ideal for most creditors as was expressed by Judge Malcom Wallis as this indicates that the defendant is in a dire financial position which most likely means that there will be other creditors whose claims remain outstanding that will seek to either recover such claims by arresting the vessel or the fund. This is not ideal in the event that there are many creditors and despite the sale of the vessel, the value of the fund is not sufficient to satisfy all of these creditors' claims, including that of the arresting claimant⁴⁶. Fortunately, in South Africa there are not many reported cases regarding the proceeds of a fund stemming from the sale of a vessel which was initially arrested under a security arrest in terms of section 5(3) of the Admiralty Act. As noted by Judge Malcom Wallis, this could be due to the fact that although a security arrest shares similarities with an action *in rem* and an action *in personam*, it is more executionary in nature as it enables a claimant to compel the defendant for security in order to settle its claim and ensure that it does not lose its vessel in sale proceedings⁴⁷.

2.2.4 Associated Arrests

South Africa's admiralty jurisdiction is favoured by many creditors seeking to enforce their claim against an associated vessel under the same ownership or control of the vessel against which its claim lies. In terms of sections 3(6) and 3(7) of the Admiralty Act, the associated vessel must be owned by the company that either owns, controls the vessel at the time which the claimant's claim commenced⁴⁸. Ownership or control by such person or company is established where (s)he has power, directly or indirectly, to control the company, alternatively, by a person or company that have the majority in respect of voting or shares⁴⁹.

In so far as a chartered vessel is concerned, section 3(6) and 3(7) remain applicable thereto. Under these circumstances, the charterer or sub-charterer thereof shall be deemed to be the owner of the vessel at the time that the action commenced. Therefore, it is not the owner of the vessel, but the charterer or sub-charterer against whom the claim lies that will be held liable.

⁴⁶ Wallis M, *Associated Ship and South African Admiralty Jurisdiction* (2010) University of KwaZulu Natal, South Africa at page 309.

⁴⁷ Ibid at page 310.

⁴⁸ Section 3(7)(a) of the *Admiralty Jurisdiction Regulation Act* 105 of 1983.

⁴⁹ Section 3(7)(b) of the *Admiralty Jurisdiction Regulation Act* 105 of 1983.

2.3 JUDICIAL SALE OF VESSELS

It is evident that in South Africa, a claimant with a maritime claim against a vessel and/or its owner has various options in which s/he may enforce an arrest or attachment of the maritime property as provided under the Admiralty Act. However, if one takes into account the turbulent nature of the economy and that there may be instances where the owner of a vessel is financially unable to provide security for the arrest or attachment in order to lift the arrest or attachment of the vessel, it can often lead to the judicial sale of the arrested vessel.

In terms of South African admiralty law, an arrested vessel may be sold at any time subject to the order of a court and the proceeds from the sale shall be held in a fund regulated by the court (Section 9(1) of the Admiralty Act, South Africa). In the event that the owners of the vessel have failed to provide security for the arrest, the court may order the sale of the vessel after judgment either after proceedings have been closed or upon default in the event that the owner did not oppose the proceedings. The advantage of a court order permitting the sale of a vessel is that the value of the vessel can be secured despite currency fluctuations or exchange control limitations⁵⁰. A further advantage for claimants is that any interest earned will be accumulated for their benefit⁵¹. Pending the judicial sale, the vessel remains under arrest and effectively under the control of the sheriff. In the event that the sheriff incurs any costs for the preservation and maintenance of the vessel as its custodian, the arresting creditor will be liable to for the sheriff's expenses⁵². Once the sale procedure has been concluded, the vessel will be sold either by public auction or tender. The proceeds from the sale shall vest in a fund controlled by the court and all claims shall be settled in line with the ranking of claims in section 11 of the Admiralty Act. Generally, claims regarding preservation, maintenance, port dues, loss or damage from vessel, wreckage, salvage, liens, repairs and necessities shall rank highly whereas a mortgage claim ranks lower in comparison⁵³.

Conflict between admiralty and insolvency proceedings may arise due to the ranking or preference which maritime claims enjoy in terms of section 11 of the Admiralty Act. This conflict arises particularly where the owner of the arrested vessel has entered into or is subject to insolvency proceedings as they, similarly to admiralty proceedings, have their own distinct processes and ranking regime which protects the assets of the insolvent owner and the interests of non-maritime claimants or affected parties. The former does not consider the ranking regime set under insolvency proceedings and an example of this is that mortgage claims rank higher

⁵⁰ Bowmans, *A guide to the enforcement and defence of maritime claims in South Africa*, page 11 - 12.

⁵¹ Ibid.

⁵² *Mt 'Argun' v Master and Crew of The Mt 'Argun' Claiming Under Case No AC127/99 and Others* 2003] 4 All SA 139 (SCA) (19 September 2003) (SCA).

⁵³ Section 11 of the *Admiralty Jurisdiction Regulation Act* 105 of 1983.

under insolvency proceedings, however this is not the case in admiralty proceedings where they rank lower. Under these circumstances, a mortgagee bank as a claimant will not seek to enforce admiralty proceedings to recover its claim but it would most likely enforce insolvency proceedings against the owner. Another issue worth noting is that unlike insolvency proceedings, the period of time taken to close the sale and distribution of a fund in the sale of a vessel and to settle all claims against the vessel is approximately one to two months, whereas under insolvency proceedings, it can take up to approximately eight months for claims to be settled⁵⁴

The legal proceedings which are sought by a claimant will depend on whether it has a maritime or non-maritime claim as it will enforce the legal proceedings that it sees best to recover its claim. In most instances if a claimant has a maritime claim, it will secure its claim against the vessel in terms of the arrest and attachment proceedings available under the Admiralty Act. If the claimant does so successfully and the arrested vessel is which is subject to insolvency proceedings, its claim will still be handled by a court exercising its admiralty jurisdiction under this Act and the vessel will not form part of the insolvent estate subject to insolvency proceedings (Section 10 of the Admiralty Act, South Africa). To a non-maritime claimant, it may seem as an unfair advantage for the vessel to be ringfenced from the owner's estate that is subject to insolvency proceedings in so far as its own claim is concerned but insolvent claimants should take into account the unique nature of vessels as a mobile asset involved in international trade and therefore likely to be located anywhere in the world at any point in time. Therefore, in light of the nomadic nature of vessels, it would be unfair to limit the measures of recovery or the manner in which vessels are treated as claimants would experience immense difficulties in recovering outstanding claims against an insolvent owner of a vessel. Thus, the maritime claim under admiralty proceedings shall also rank higher compared to the claim of a secured or unsecured creditor under insolvency proceedings and will most likely be distributed before the latter is even finalised by an administrator, liquidator or business practitioner, thus lessening the value of the owner's estate from which claims are settled.

2.4 CONCLUSION

The introduction of the Admiralty Act provided a claimant with various options, in addition to widening pre-existing arrest options, enabling him or her to arrest for purposes of securing its claim against a vessel. In as much as an action *in rem*, an action *in personam*, security arrests and associated ship arrests have their own

⁵⁴ Pitman K, *Recovery procedures for concurrent creditors in the admiralty jurisdiction* (Lexology) (<https://www.lexology.com/library/detail.aspx?g=6eb699f4-1da9-4e51-85e4-26691446b7bf>) accessed July 2020.

unique nuances and differences from one another, what remains clear is that in order for a claimant to have secured its claim against the owner of the vessel, the claimant must successfully complete one of these actions and the subjective tests under each respective action in order for him or her to have security for its claim. Conflict begins to arise where a claimant has secured its claim against the owner of the vessel and insolvency proceedings have commenced against the owner of the vessel. Under South African admiralty law, where such arises, the vessel shall not fall under the owner's insolvent estate and may be subject to a sale in terms of the Admiralty Act⁵⁵. However, the position is not clear where insolvency proceedings have commenced prior to an arrest or attachment of the vessel or *vice versa*. It is against this understanding that one embarks on attempting to ascertain what the position is whereby liquidation or business rescue proceedings undertaken or commenced against the owner of the arrested vessel before or after a claimant has successfully secured its claim against the vessel and owner.

⁵⁵ Pitman K, *Recovery procedures for concurrent creditors in the admiralty jurisdiction* (Lexology) (<https://www.lexology.com/library/detail.aspx?g=6eb699f4-1da9-4e51-85e4-26691446b7bf>) accessed July 2020.

CHAPTER THREE

LIQUIDATION, WINDING-UP AND BUSINESS RESCUE PROCEEDINGS IN SOUTH AFRICA IN TERMS OF THE COMPANIES ACT OF 1973 AND COMPANIES ACT OF 2008

3.1 INTRODUCTION

Globally, South Africa, is a country that has been favoured by many creditors who are seeking to recover settlement of claims against a respective vessel due to the liberal arrest regime that it has in place. This arrest regime as seen in the previous chapter provides a creditor with certain rights and procedures in order to institute an action against the vessel and its owners. The provisions regarding insolvency proceedings under the Admiralty Act are no different as it provides that any property arrested or security that is put up in South Africa in respect of a maritime claim will not vest in the hands of a trustee in insolvency and will not form part of the assets to be administered by a trustee or liquidator. It further states that proceedings in respect of this property or security shall not be stayed by any other proceedings the property's owner's liquidation. Consequently, such property or security will not form part of the winding-up or liquidation proceedings⁵⁶.

Despite the Admiralty Act providing creditors with such rights and procedures, these rights and procedures are not acknowledged by legislation dealing with business rescue, winding-up and liquidation proceedings, thus creating a conflict between the two acts, especially where a court is faced with the predicament of ascertaining whether the arrested property of an owner that is subject to business rescue or liquidation proceedings is to be resolved in terms of the Admiralty Act or the Companies Act of 2008. A reason for the conflict between the Admiralty Act and statutes such as the Companies Acts which provide for business rescue and liquidation proceedings as noted by some authors is due to corporate legislation having developed with little regard to the various admiralty proceedings regarding the arrests of vessels. This causes issues to arise where a vessel becomes subject to both admiralty and insolvency proceedings. As noted by authors, it becomes critical for a maritime claimant to ascertain whether admiralty or corporate processes are best suited to resolve its claim against an insolvent owner of a vessel.⁵⁷

In as much as the promulgation of the Companies Act of 2008 introduced new business rescue and management proceedings, it remains important to review the provisions in respect of business rescue, winding-up and insolvency proceedings as provided for in the act in order to determine how the rights and relief provided for in terms of the Admiralty Act may be affected by these provisions.

⁵⁶ Section 10 of the *Admiralty Regulation Jurisdiction Act* 105 of 1983.

⁵⁷ Thomas DR, *Maritime Liens*, Volume 14 of British Shipping Laws (1980) Stevens & Sons at page 65.

3.2 WINDING-UP PROCEEDINGS IN TERMS OF THE COMPANIES ACT OF 1973 AND COMPANIES ACT OF 2008

Despite the Companies Act of 2008 replacing the Companies Act of 1973, Chapter XIV of the Companies Act of 1973 remains in place by virtue of Item 9 of Schedule 5 of the Companies Act of 2008 which provides that *“despite the repeal of the previous Act...Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed...Despite [this subparagraph]... sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2⁵⁸”*. In light of this item, winding-up procedures remain in force as per the Companies Act of 1973.

Further to the winding-up procedures that are provided for under sections 337 to 446 of the Companies Act of 1973, this act also makes insolvency law applicable to winding-up procedures by virtue of section 339 the act which provides that *“in the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act”*. The purpose of this clause is to cater for specific matters that are not addressed in the Companies Act of 1973 and to make substantive insolvency law applicable to winding-up proceedings⁵⁹. This reasoning is evident in instances where despite the Companies Act of 2008 does not make provision for the liquidation procedure necessary for the administration of a solvent company in the same manner that the Companies Act of 1973 does in the case of insolvent companies⁶⁰.

In terms of both Companies Act's there are two ways in which winding-up proceedings may be commenced against a company. The first is by way of a voluntary winding-up and the second is by way of compulsory winding-up. In order to ascertain which act's provisions regarding winding-up procedures are to be followed, one must ascertain whether the respective company is solvent or insolvent. A solvent company is a company which despite its assets exceeding its liabilities it is still unable to pay or settle any of its outstanding debts. Solvent companies are thus wound up in terms of sections 80 and 81 of the Companies Act of 2008 and cannot be wound up in terms of the Companies Act of 1973.

As per the Companies Act of 2008, the voluntary winding-up procedure is whereby a company is wound up by way of a special company resolution which specifically provides that the respective company and its creditors must be wound up. Once adopted, the special resolution must be filed along with the prescribed

⁵⁸ Item 9 of Schedule 5 of the *Companies Act* of 2008.

⁵⁹ Burdette DA, *Winding-up of Insolvent Companies and Close Corporations* 2003 (66) THRHR at page 593.

⁶⁰ Halita H, *A comparative Study of Some Issues Relating to Corporate Insolvency Law in Nigeria and South Africa* (2013) University of Pretoria, South Africa at page 12.

notice and filing fee⁶¹. Prior to the filing of the special resolution, the company must arrange for security that the master⁶² deems to be satisfactory for the payment of its debts⁶³. The company's debts must be paid within twelve months after winding-up procedures have commenced⁶⁴. Alternatively, the company may with the master's permission dispense with arranging security to pay its debts⁶⁵. The task of obtaining such security shall only be dispensed if either the company's director provides a sworn affidavit that the company has no debts or the company's auditor issues a certificate declaring that to the best of its knowledge and belief and according to the company's financial records, the company does not have any debts⁶⁶.

Once the special resolution has been filed and a copy provided to the master, winding-up procedures shall immediately commence⁶⁷. The commencement of voluntary winding-up procedures means that the company shall immediately cease business activities and its directors shall cease to have any powers⁶⁸.

The compulsory winding-up procedure in the Companies Act of 2008 is whereby a company is instructed to undergo winding-up procedures in terms of a court order. There are six ways in which a company may be imposed to compulsory winding-up procedures. The first is where a South African court may order a company to undergo winding-up procedures if the company has applied to the court to be wound or it has passed a special resolution that it be wound up by a court⁶⁹. The second is where an appointed business rescue practitioner has applied for a company to undergo liquidation as there is no reasonable prospect of it being rescued⁷⁰. The third is where the company's creditors apply to the court for the company to be wound up⁷¹. The fourth is where the company's directors and shareholders apply for the company to be wound up where there is an internal management deadlock which is not to the benefit of the company or its shareholders⁷². The fifth is where a shareholder has applied with leave of the court for an order to wind up the company⁷³. The last is where if the company's directors or shareholders have acted in an illegal or fraudulent manner in terms of this act or the Close Corporations Act, 1984 (Act No. 69 of 1984) and legal action has been taken against the company in the last five years in regard to this, either the commissioner

⁶¹ Section 80(2) of the *Companies Act* of 2008.

⁶² In terms of section 1 of the *Companies Act of 2008*, the Master is the officer of the High Court in South Africa and its roles and duties include overseeing the administration of insolvent estates. The Master will also have jurisdiction in respect of the estate or property subject to the liquidation or winding-up proceedings.

⁶³ Section 80(3) of the *Companies Act of 2008*.

⁶⁴ Section 80(3)(a) of *Companies Act of 2008*.

⁶⁵ Section 80(3)(b) of the *Companies Act of 2008*.

⁶⁶ Section 80(3)(b)(i) and (ii) of the *Companies Act of 2008*.

⁶⁷ Section 80(6) of the *Companies Act of 2008*.

⁶⁸ Section 80(8) of the *Companies Act of 2008*.

⁶⁹ Section 81(a) of the *Companies Act of 2008*.

⁷⁰ Section 81(b) of the *Companies Act of 2008*.

⁷¹ Section 81(c) of the *Companies Act of 2008*.

⁷² Section 81(d) of the *Companies Act of 2008*.

⁷³ Section 81(e) of the *Companies Act of 2008*.

or panel may apply to the court for the company to be wound up⁷⁴. Once an application has been made to the court and the court has made an order winding-up proceedings may be commenced against the respective company.

It may seem peculiar that a solvent company can be subject to winding-up procedures if its assets exceed its liabilities. However, in South Africa, due to the temperamental nature of the currency to either international and local economic and political affairs and events, the value of assets and money are subject to change either positively or negatively. Considering this, it substantiates the Legislatures reasoning for keeping section 345 of the Companies Act of 1973 for instances where a company regardless of it being deemed solvent is unable to pay or settle its debts. This was highlighted in the case of *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd*⁷⁵ where the court found that a commercially solvent company is capable of being wound up in terms of the Companies Act of 2008, irrespective of whether or not it is factually solvent. Willis J stated as follows:

*“The confusion which has arisen as to when a company may be wound-up in terms of the new Act or in terms of the old Act is thus eliminated. The so-called factual solvency of a company is not, in itself, a determinant of whether a company should be placed in liquidation or not. The veracity of this deduction may be illustrated, as in the present case, where the issue has arisen as to whether a company which is factually solvent, but commercially insolvent, is to be wound-up in terms of the new Act or the old Act. To attribute so-called ‘factual solvency’ to the meaning of the term ‘solvent company’ in the new Act would lead to an unbusiness-like result that would not make sense”*⁷⁶

On the opposite spectrum of solvent companies, one has insolvent companies. An insolvent company is a company whose liabilities exceed its assets and it is not reasonably possible for it to pay or settle any of its outstanding debts. Insolvent companies are thus wound up in terms of the Companies Act of 1973. The Companies Act of 1973 similarly to the Companies Act of 2008 also provides that an insolvent company can be wound up either voluntarily by way of a special resolution or compulsorily by way of a court order⁷⁷.

Where winding-up proceedings have commenced by way of a court order in terms of the Companies Act of 1973, this may be due to one of eight grounds. These grounds include the company has passed a special resolution⁷⁸, it has commenced business before the Registrar certified that it could commence business⁷⁹, it

⁷⁴ Section 81(f) of the *Companies Act* of 2008.

⁷⁵ (936/12) [2013] ZASCA 173 (28 November 2013).

⁷⁶ Ibid at paragraph 23.

⁷⁷ Section 343 of the *Companies Act* of 1973.

⁷⁸ Section 344(a) of the *Companies Act* of 1973.

⁷⁹ Section 344(b) of the *Companies Act* of 1973.

has not commenced business within a year of its incorporation⁸⁰, as a public company the numbers of its members has reduced⁸¹, seventy-five percent of the issued share is lost⁸², it is unable to pay or settle its debts⁸³, it has been dissolved in the country it was incorporated in⁸⁴ or the court is of the reasonable and justified view that it should be wound up⁸⁵. Where a company has been wound up in terms of a court order, the winding-up procedures shall commence upon the presentation of the application for winding-up to the court⁸⁶.

In addition to commencing winding-up procedures by way of a court order as per the above, a company may be wound up voluntarily if the company has passed a special resolution that it must be wound up⁸⁷. A company may be voluntarily wound up either by its members or its creditors. In the event that the members of the company seek to wind up the company, the special resolution must be registered in terms of section 200 of the Companies Act of 1973 and security must be furnished to the master for the payment of its debts within a period of twelve months⁸⁸. If the creditors of the company have sought to wind up the company, the special resolution, like the one involved in the members' winding-up, must be registered in terms of section 200 of the Companies Act of 1973⁸⁹.

Where a company has been voluntarily wound up, such proceedings are deemed to have commenced at the time of the special resolution being registered in terms of section 200 of the Companies Act of 1973⁹⁰. Despite the commencement of voluntary winding-up procedures, a company shall remain a corporate body and retain its powers, however it will cease to continue with its business from the date on which such proceedings have commenced⁹¹. In addition to the business of the company ceasing, the powers of the company's directors shall cease unless they have been sanctioned by the liquidator, creditors or company in a creditors' or member's voluntary winding-up⁹².

Other legal effects that will take place upon the commencement of winding-up proceedings is that all legal proceedings including ongoing civil proceedings against the company shall be suspended until such time a

⁸⁰ Section 344(c) of the *Companies Act* of 1973.

⁸¹ Section 344(d) of the *Companies Act* of 1973.

⁸² Section 344(e) of the *Companies Act* of 1973.

⁸³ Section 344(f) of the *Companies Act* of 1973.

⁸⁴ Section 344(g) of the *Companies Act* of 1973.

⁸⁵ section 344(h) of the *Companies Act* of 1973.

⁸⁶ Section 348 of the *Companies Act* of 1973.

⁸⁷ Section 349 of the *Companies Act* of 1973.

⁸⁸ Section 350(1) of the *Companies Act* of 1973.

⁸⁹ Section 351 of the *Companies Act* of 1973.

⁹⁰ Section 352 of the *Companies Act* of 1973.

⁹¹ Section 353 of the *Companies Act* of 1973.

⁹² Section 353(2) of the *Companies Act* of 1973.

liquidator is appointed to handle the matter⁹³. In addition, any attachment of execution against the assets or property of the company shall be void once such winding-up proceedings have commenced⁹⁴. The notice must be given to a court by any person who has instituted legal proceedings against a company and such proceedings have since been suspended by the winding-up proceedings, however the person intends to continue with these instituted proceedings in order to enforce its claim against the company⁹⁵. The notice must be given to the court within four weeks after the appointment of a liquidator and the liquidator must have no less than three weeks' written notice prior to continuing or commencing the winding-up proceedings. It is important that these legal proceedings must have arisen prior to the winding-up proceedings. If a person fails to provide such notice to the court, the court will consider the individuals legal proceedings against the company as abandoned, unless directed otherwise by the court⁹⁶.

The court has powers to stay winding-up proceedings at any time after the commencement of a winding-up of a company if it has received an application from a liquidator, creditor or member. If the court is satisfied that all proceedings relating to the winding of a company should be stayed or set aside, it shall grant an order that such proceedings must be stayed or set aside⁹⁷. The court may also decide that voluntary winding-up procedures should continue as it deems fit. The court must have regard to the wishes of the creditors or members regarding the winding-up proceedings. However, in doing so, the court must have reference to sufficient evidence⁹⁸. In terms of section 358 of the Companies Act of 1973, where an application to stay proceedings has been made after the commencement of winding-up proceedings but prior to the court granting the final order, the company concerned, its creditors or members may in terms of sub section 358(a) and (b) apply for an application to stay proceedings in two instances. The first is where an action or proceeding against a company is pending in any South African court and the second is where an action or proceeding is being or about to be instituted against the company. In these circumstances, a court may stay or restrain the winding-up proceedings as it deems fit. Once all of a company's affairs have been wound up and all proceedings finalised by the master and a certificate filed with the registrar, it shall be dissolved of.

3.3. BUSINESS RESCUE PROCEEDINGS IN TERMS OF THE COMPANIES ACT OF 2008

Given the turbulent global economy, it is not unusual for a company to undergo a restructuring in circumstances where they are financially distressed. The restructuring provides a financially distressed company with an opportunity to reorganise its internal affairs. However, such proceedings shall have an

⁹³ Section 359(1) of the *Companies Act* of 1973.

⁹⁴ Section 359(2) of the *Companies Act* of 1973.

⁹⁵ Section 359(2) of the *Companies Act* of 1973.

⁹⁶ Section 359(b) of the *Companies Act* of 1973.

⁹⁷ Section 354(1) of the *Companies Act* of 1973.

⁹⁸ Section 354(2) of the *Companies Act* of 1973.

impact on its shareholders, assets and creditors. In South Africa, business rescue proceedings are addressed under Chapter 6, “*Business Rescue and Compromise with Creditors*”, of the Companies Act of 2008. In terms of section 128(1)(b) of the Companies Act, business rescue is defined as follows:

“(b) ‘business rescue’ means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—

- (i) the temporary supervision of the company, and of the management of its affairs, business and property;
- (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company”.

In light of section 128(1)(b) of the Companies Act of 2008, the purpose of business rescue is to provide financially distressed companies with an opportunity to restructure their internal affairs in such a manner that, once completed, the company shall be able to continue operations on a solvent basis or that it results in the company providing better returns for its shareholder, employees and creditors than if the company had undergone liquidation proceedings.

A company is subject to business rescue proceedings if in terms of section 128(1)(f) of the Companies Act of 2008 it is financially distressed. In order to determine whether a company is financially distressed, one must ascertain whether the company appears to be reasonably unlikely that the company will be in a position to pay all of its debts as they become due and payable, or alternatively, it appears that the company shall be insolvent within the next six months. It must be noted that business rescue proceedings are only capable of being of any use if the company has the potential to eventually become solvent. This view was reaffirmed in the case of *Welman v Marcelle Props*⁹⁹, where the court held that “business rescue proceedings are not for

⁹⁹ 193 CC JDR 0408 (GST).

terminally ill close corporations. Nor are they for chronically ill companies. They are for ailing companies, which given time will be rescued and become solvent”¹⁰⁰.

3.3.1 Commencement of Business Rescue Proceedings

If the test regarding the financial distress of a company reveals that the company shall either be unable to pay its debts as they become due and payable or that it shall be insolvent, business rescue proceedings may be commenced by one of two ways. These include commencement by way of a company board resolution or in terms of a court order.

3.3.1.1 Company’s Board Resolution

The board of a company may voluntarily place a company under business rescue proceedings if it is of the view that the company is financially distressed or there appears to be a reasonable prospect of rescuing the company¹⁰¹. Once the board has ascertained that there are reasonable grounds for the company to undergo business proceedings, a board resolution must be passed by the company. The board must ensure that when passing such a board resolution that it does so in line with its Memorandum of Incorporation¹⁰². Once the board resolution has been passed, the company must ensure that it is filed with the Companies Intellectual Property Commission within a period of five business days¹⁰³. A notice of the resolution stipulating its effective date must be published and provided to every affected person. “Affected persons” includes persons such as shareholders, creditors and employees of the company, as well as registered trade unions of the company. In the event that the company’s employees are not registered with a trade union, the employee’s representative must be duly notified¹⁰⁴. The published notice must be accompanied by a sworn statement of facts relevant to the grounds on which the board resolution has been founded¹⁰⁵.

3.3.1.2 Court Order

In the event that a board resolution calling for business rescue proceedings to commence is not passed by a company, the latter proceedings may be commenced by an affected person in terms of a court order¹⁰⁶. The affected person must prepare an application to the High Court

¹⁰⁰ Ibid.

¹⁰¹ Section 129(a) – (b) of the *Companies Act* of 2008.

¹⁰² Section 73 of the *Companies Act* of 2008.

¹⁰³ Section 129(3) of the *Companies Act* of 2008.

¹⁰⁴ Section 128(1)(a)(i) – (iii) of the *Companies Act* of 2008.

¹⁰⁵ Section 129 (3)(a) – (b) of the *Companies Act* of 2008.

¹⁰⁶ Section 131 of the *Companies Act* of 2008.

and notify all parties to be affected by the application. A copy of the application papers for the order will be provided to all affected parties and to the High Court. In order to grant an order for business rescue, the court will consider whether the company in question is financially distressed, that it has failed to pay any amounts in terms of public regulation or contract regarding employment-related matters, there is a reasonable prospect of the company being rescued and that it is just and equitable to do so¹⁰⁷. Alternatively, if the court is of the opinion that the company is not financially distressed and is able to meet payment of amounts related to employment-related matters, the affected person's application shall be dismissed¹⁰⁸.

Where the court has granted an order, it may also make a further order in which it appoints a business practitioner in terms of section 138 of the Companies Act of 2008. In addition to the requirements of section 138 of the Companies Act of 2008, the business practitioner must also be nominated by the affected person that made the application for the court subject to ratification by the holders of a majority of the independent creditors' voting interests at the first creditors meeting¹⁰⁹. If the court order is granted at a time when liquidation proceedings have commenced, the application will suspend the liquidation until such time that the application has been adjudicated or business proceedings have ended¹¹⁰. Once, the court order is granted, the respective company is barred from adopting a resolution that places it under liquidation proceedings¹¹¹. Furthermore, it must notify all affected parties of the order¹¹². In terms of section 132(a) of the Companies Act of 2008, business proceedings will end when the court has set aside the resolution or order that commenced business rescue proceedings, or the court has converted the proceedings to liquidation proceedings. Business rescue proceedings may also be ended if the practitioner has filed a notice with the Commission of the termination of business rescue proceedings, or if a business plan has been proposed and rejected without any affected person having acted to extend the rescue proceedings, or if the business practitioner has filed a notice declaring that the business plan has been substantially implemented¹¹³.

¹⁰⁷ Section 134(4)(a)(i) -(iii) of the *Companies Act* of 2008.

¹⁰⁸ Section 131(4)(b) of the *Companies Act* of 2008.

¹⁰⁹ Section 131(5) of the *Companies Act* of 2008.

¹¹⁰ Section 131(6) of the *Companies Act* of 2008.

¹¹¹ Section 131(8)(a) of the *Companies Act* of 2008.

¹¹² Section 131(8)(b) of the *Companies Act* of 2008.

¹¹³ Section 132(2)(b) – (c) of the *Companies Act* of 2008.

3.3.2 The effect of Business Rescue Proceedings on Legal Proceedings Against a Company

From the moment that business rescue proceedings have commenced, no legal proceedings may be commenced against the company¹¹⁴. The suspension against any legal proceedings is a moratorium. In terms of section 133 of the Companies Act, any legal proceedings can only continue if the company has obtained the written consent of the business practitioner or if the court has granted the company leave¹¹⁵. Whilst business rescue proceedings are ongoing, a guarantee in favour of any person against the company may not be enforced unless if leave of the court has been granted to do so¹¹⁶. If a right to commence proceedings against a company is subject to a time limit, the time limit must be suspended during the ongoing business rescue proceedings¹¹⁷.

During business rescue proceedings it is inevitable that certain affected persons', such as the company's employees, shareholders and directors' rights shall be affected until such time that these proceedings are finalised. Other aspects which are affected by business rescue proceedings are the company's assets or property and any contracts concluded prior to the commencement of such proceedings.

3.3.2.1 The effect of business rescue proceedings on the property

Property belonging to a company undergoing business rescue proceedings may be disposed only in the course of business, in *bona fide* transaction at arm's length for fair value approved by a business practitioner or in terms of a transaction undertaken as part of the implementation of business rescue plan in terms of section 152 of the Companies Act of 2008¹¹⁸. This section of the Companies Act of 2008 also ensures protection of certain rights that persons may have in respect of property belonging to a company under business rescue proceedings. For instance, persons who concluded an agreement with the said company prior to the commencement of business proceedings, is entitled to exercise any right in respect of that property¹¹⁹. Once business rescue proceedings have commenced, this right cannot be exercised unless if the business practitioner has consented such in writing¹²⁰.

¹¹⁴ Section 133 of the *Companies Act* of 2008.

¹¹⁵ Section 133(1) of the *Companies Act* of 2008.

¹¹⁶ Section 133(2) of the *Companies Act* of 2008.

¹¹⁷ Section 133(3) of the *Companies Act* of 2008.

¹¹⁸ Section 134(a)(i) - (iii) of the *Companies Act* of 2008.

¹¹⁹ Section 134(b) of the *Companies Act* of 2008.

¹²⁰ Section 134(c) of the *Companies Act* of 2008.

In terms of section 134(3) of the Companies Act, if the company, during business rescue proceedings, wants to dispose of property that another person has security or title interest in, the company must firstly obtain the consent of the other person unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest and secondly, the company may elect to either pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person or the company must provide security for the amount of those proceeds, to the reasonable satisfaction of that other person¹²¹.

3.3.2.2 The effect of business rescue proceedings on the rights of employees and contracts

In South Africa, the rights of an employee are generally quite protected by South African legislation as well as institutions such as the governmental labour department, trade unions and the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). In light of this, it is of no surprise that the Companies Act of 2008 extends such protection to those employees who are employed by a company that commences business rescue proceedings. In terms of section 136 of the Companies Act of 2008 during a company's business rescue proceedings, the employees of a company that are employed prior to these proceedings continue to be employed on the same terms and conditions¹²². This protection will not apply where changes occur in the course of attrition or the employees and the company agree to different terms and condition in line with South African labour laws¹²³. Further protection provided by the Companies Act of 2008 to employees is that the business practitioner may either cancel or partially suspend or partially or conditionally spend an agreement to which the company is party other than an employment agreement¹²⁴.

3.3.2.3 The effect of business rescue proceedings on the rights of shareholders and directors

Another important group of affected persons is that of shareholders and directors. Section 137(1) of the Companies Act of 2008 provides that as far as shareholders are affected, the classification and status of any issued securities must remain unamended during the time of business rescue proceedings. If an amendment to any of the issued securities is made by the company, it shall be deemed invalid¹²⁵. In terms of section 137(2) of the Companies Act of

¹²¹ Section 134(3) of the *Companies Act* of 2008.

¹²² Section 136(1) of the *Companies Act* of 2008.

¹²³ Section 136(1)(i) and (ii) of the *Companies Act* of 2008.

¹²⁴ Section 136(2) of the *Companies Act* of 2008.

¹²⁵ Section 137(1) of the *Companies Act* of 2008.

2008, the directors of a company under business rescue proceedings continue with most of their director's obligations and responsibilities although these are subject to the business practitioner's direction, authority or instructions¹²⁶. Any decision that has been made by a director during business rescue proceedings without the business rescue practitioner's authority or instructions is deemed void¹²⁷. If the business rescue practitioner is of the view that a director is preventing it from performing its business rescue functions, managing the company or impeding the implementation of a business rescue plan, it may apply to court for an order to remove the respective director¹²⁸.

3.3.3 Business Rescue Plan

Prior to the establishment of a business plan, a business practitioner shall be appointed either in terms of the company resolution or by an appointment by the court once it has considered an application regarding the business rescue of the company in question¹²⁹. It is important that the appointed business rescue practitioner be a member in good standing of a legal, accounting or management profession. In addition, the business practitioner shall be licensed in terms of CIPC¹³⁰. Due to the nature of an insolvency, it is imperative that the business rescue practitioner be an individual that is not affiliated or associated with the company subject to such proceedings as it must be impartial and exercise no bias in its decisions regarding the company's assets¹³¹.

Once the company has been placed under business rescue, the directors of the company shall remain directors of the company, however they shall not have any control or management of it as this will vest in the hands of the business rescue practitioner¹³². The business rescue practitioner will commence to prepare a business rescue plan which shall be considered by all affected parties, namely the company's employees, shareholders and creditors¹³³. The purpose of the affected parties considering the business rescue plan is due to the business rescue practitioner requiring the approval of the affected parties for the plan to be implemented¹³⁴. This also provides the affected parties with an opportunity

¹²⁶ Section 137(2)(a) – (d) of the *Companies Act* of 2008.

¹²⁷ Section 137(4) of the *Companies Act* of 2008.

¹²⁸ Section 137(5) of the *Companies Act* of 2008.

¹²⁹ Section 129(3), section 130(6); section 131(5) of the *Companies Act* of 2008.

¹³⁰ Section 138(a) – (b) of the *Companies Act* of 2008.

¹³¹ *Ibid.*

¹³² Section 137 of the *Companies Act* of 2008.

¹³³ Section 140 of the *Companies Act* of 2008.

¹³⁴ Section 150 of the *Companies Act* of 2008.

to provide their comments and inputs regarding the business rescue plan, if any¹³⁵. For the business rescue plan to be implemented, the business rescue practitioner must obtain the creditors and holders vote which is determined by the value of the creditor's right¹³⁶. If the business rescue plan is adopted after a vote, it shall become binding on the company and the business rescue practitioner shall issue a notice thereto¹³⁷. It is essential that this process is quick as a business rescue practitioner must successfully ensure that a business rescue plan has been published within twenty-five days of its appointment¹³⁸.

3.4 CONCLUSION

It is clear that with the introduction of business rescue proceedings under Chapter 6 of the Companies Act of 2008, the intention of the legislature was to afford solvent or insolvent companies with an opportunity to restructure its financial affairs prior to its winding up or liquidation, provided that it has the potential of financially recovering. What is further evident from both the Companies Act of 1973 and the Companies Act of 2008 is the protection which is extended to a solvent or insolvent company whereby any legal proceedings against it are halted until such insolvency proceedings have been concluded. In doing so, a solvent or insolvent company's creditors have little choice but to participate in the insolvency proceedings in an attempt to recover any outstanding and owing debts. However, in doing so, these creditors depending on whether they are secure or unsecured creditors, often receive far less than what they were originally owed. Furthermore, in as much as business rescue proceedings take into account the rights and interests of creditors they do not necessarily release the solvent or insolvent company of its debts, much to the dismay of creditors, but simply set out a number of sound options that a company may choose in order to achieve financial stability again.

It is inevitable that the differing approach which insolvency proceedings under the Companies Acts apply to its creditors or affected parties may come into conflict with the favourable approach that admiralty proceedings take when it comes to creditors under admiralty proceedings. The conflict is further aggravated by the former having not taken into consideration the unique nature of the arrest options available to a

¹³⁵ Ibid.

¹³⁶ Section 145 of the *Companies Act* of 2008.

¹³⁷ Section 152(4), section 152(8) of the *Companies Act* of 2008.

¹³⁸ <https://www.news24.com/fin24/Entrepreneurs/Resources/Business-rescue-explained-20150119> accessed on 3 June 2020.

creditor under admiralty proceedings including the distinct rights and interests it has under these proceedings in comparison to insolvency proceedings.

CHAPTER FOUR

COMPARATIVE OF THE INTERACTION BETWEEN INSOLVENCY LAW AND ADMIRALTY LAW IN AUSTRALIA LAW AND ENGLAND

4.1 INTRODUCTION

Due to the nomadic and international nature of vessels, it is quite possible for a vessel to incur debts in more than one jurisdiction. This sentiment was confirmed by Rares J in the case of *The Xin Tai Hai* (No. 2)¹³⁹, in which he stated that “ships are elusive...Ships engaged in international trade and commerce are literally here today and gone tomorrow”¹⁴⁰. In such circumstances, the importance of having laws which provide creditors with remedies to claim their maritime liens against a vessel, regardless of where the vessel is currently situated on the global map or despite any subsequent legal proceedings against said owner or company of the vessel, is of great relief. This was highlighted in the case of *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)*¹⁴¹ where it was stated that “the reason for this privileged status for maritime lien holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships ...Merchant seaman will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage...The ship itself is worth something and is readily available to provide a measure of security. Reliance on that security was and is vital to maritime commerce”¹⁴².

Vessels unlike other assets are afforded unique protection in terms of admiralty law which in turn means that claimants have access to rights that differ from those under general insolvency law. The complex relationship between admiralty and insolvency law begins to arise where the insolvent owner’s vessel that is subject to arrest or attachment proceedings is also subject to insolvency, business rescue or winding up procedures¹⁴³. If such arrest or attachment proceedings and insolvency, business rescue or winding up procedures have taken place in the jurisdiction in which the insolvent owner is domiciled, then the domestic admiralty and insolvency business rescue or winding up laws shall apply.

South Africa’s insolvency, winding up and business rescue proceedings are all regulated and overseen by a few pieces of legislation, namely the Companies Act 1973, the Companies Act 2008, the Close Corporations Act 69 of 1984 and the Insolvency Act 24 of 1936. As previously noted in Chapter 2 of this

¹³⁹ [2012] FCA 1497; 215 FCR 265.

¹⁴⁰ At paragraph 98.

¹⁴¹ [2001] 3 S.C.R 907 (Canada).

¹⁴² At page 925.

¹⁴³ Thomas DR, *Maritime Liens*, Volume 14 of British Shipping Laws (1980) Stevens & Sons at page 99.

dissertation, certain clauses of the Insolvency Act 1936 are applicable *mutatis mutandis* to winding up proceedings by virtue of section 339 of the Companies Act 1973. Despite the Companies Act 2008 being the latest act to be amended in order to provide uniformity to liquidation and winding up processes and having introduced the concept of business rescue with a view of rescue companies that are financially challenged, it was not drafted with the archaic admiralty law processes in mind as the challenge of interpreting and applying these laws specifically where security i.e. a vessel, is subject to both admiralty and insolvency processes remains unanswered. This position is further exasperated by South African courts having had minimal opportunities to interpret this “overlap” in matters addressing issues whereby insolvency regimes also regulate interests regarding such security¹⁴⁴.

Due to the fact that there are not many cases in South Africa which deal with the overlap between insolvency and admiralty law, it will be necessary to refer to the domestic law of countries such as England and Australia, which South African admiralty and insolvency law shares similarities with. Furthermore, these countries courts have had more matters before, than South African Courts, in which this issue has been addressed in their jurisdictions. For purposes of this study, the law of the cited countries shall be referred to in order to understand the approach applied by its respective courts in matters where a vessel is subject to both insolvency and admiralty proceedings. The subject of cross-border insolvency shall be briefly looked at in this dissertation where it provides guidance on the “overlap” between insolvency and admiralty processes, however the focus of this dissertation is South Africa’s domestic approach on the subject and not necessarily its approach under the Cross-Border Insolvency Act 2000 regarding cross-border insolvency. It should be noted that this dissertation will not discuss private international law issues as discussed under Cross-Border Insolvency but shall be limited to discuss the overlap between domestic admiralty law and insolvency laws in South Africa with a comparison of these laws in England and South Africa.

As noted with reference to cross-border proceedings, it appears that the solution in determining whether admiralty or insolvency law prevails will depend on the timing or order of the respective arrest or attachment under admiralty proceedings and the commencement of insolvency, business rescue or winding up proceedings. The timing or order of these legal proceedings can be broadly categorised as follows:

- a) the commencement of arrest or attachment under admiralty proceedings before the commencement of insolvency, business rescue or winding up proceedings; or

¹⁴⁴ Hafeez-Baig M, *Navigating the waters between admiralty and cross-border insolvency: A comparison of the Australian, German and French positions* (2018) Lloyd’s Maritime and Commercial law Quarterly Review, page 99; Thomas DR, *Maritime Liens*, Volume 14 of British Shipping Laws (1980) Stevens & Sons at page 99.

- b) the commencement of arrest or attachment under admiralty proceedings after the commencement of insolvency, business rescue or winding up proceedings.¹⁴⁵.

It would seem that, after consideration of various countries¹⁴⁶ legislation, that if an arrest or attachment of a vessel has commenced prior to the commencement of any liquidation, business rescue or winding up proceedings, preference will be given by the courts to the admiralty proceedings. There are no clauses in these countries legislations to suggest that if the claimant has successfully secured its claim against a vessel in terms of the country's respective admiralty laws, that those legal proceedings shall be affected by the commencement of insolvency proceedings thereafter. The same approach is practiced in terms of cross-border insolvency, whereby if arrest or attachment proceedings have commenced prior to the commencement or recognition of foreign proceedings, the court will give priority to the admiralty proceedings¹⁴⁷.

For purposes of determining the approach adopted by courts in ascertaining the “overlap” between insolvency and admiralty processes where the same asset is subject to both legal proceedings, the laws of Australia and England shall be discussed below.

4.2 ENGLAND

4.2.1 Admiralty Law

Admiralty law, in particular ship arrests, in England is mainly governed by English law or the Ship Arrest Convention 1952 and the Admiralty Court in London had admiralty jurisdiction to hear admiralty matters in England and Wales¹⁴⁸. Under English law, a claimant is able to enforce its maritime claim against a vessel either in terms of an *in rem* action or an *in personam* action. In terms of the *in rem* action, a claimant can pursue its *in rem* claim either in respect of a maritime lien or a statutory right *in rem*¹⁴⁹. The types of maritime claims which can be pursued by a claimant against a vessel are also provided for in the Senior Courts Act 1981. In order to commence arrest proceedings against a vessel in respect of a maritime claim, a claimant needs to file its application with certain

¹⁴⁵ Ibid at page 100; Derrington S, *The interaction between admiralty and insolvency law* (2009) 5 Australian and New Zealand Maritime LJ 30.

¹⁴⁶ The countries referred to being Australia, England and South Africa.

¹⁴⁷ *Yu v STX Pan Ocean Co Ltd (South Korea)*; *STX Pan Ocean Co Ltd (Receivers appointed in South Korea)*[2013] FCA 680; Hafeez-Baig M, *Navigating the waters between admiralty and cross-border insolvency: A comparison of the Australian, German and French positions* (2018) Lloyd's Maritime and Commercial law Quarterly Review, page 101.

¹⁴⁸ Woollam L, *Maritime Arrest under English Law* (14 May 2010) Ben Macfarlane and Co.

¹⁴⁹ iylegal.com/a-summary-of-ship-arrest-in-the-uk-and-in-english-law-based-jurisdictions Accessed on 1 June 2020.

averments made to the Admiralty Marshal¹⁵⁰. Similar to Australian admiralty proceedings, the application will contain a confirmation from the claimant that the costs for the Admiralty Marshal issuing the application shall be recovered¹⁵¹.

The English law approach in terms of the Insolvency Act of 1986 seems to suggest that a claimant may be able to enforce its *in rem* claim against a company depending on the timing of the winding up procedures. However, one must also bear in mind that the same does not necessarily apply in the case of a maritime lien which in terms of English law attaches to the vessel as soon as the claim arises, whereas in order for security to be sought against a vessel, the claimant must enforce its claim first i.e. become a secured claimant. Reverting to the issue of timing, the Insolvency Act of 1986, deems winding up procedures to have commenced upon the presentation of a winding up petition, unless if a special resolution has been passed prior to the former¹⁵². However, it does appear that the Insolvency Act of 1986 does support the view that if a claimant seeks to ensure that its claim is enforced against a vessel, it must do so within a certain period of time, either before the presentation of the winding up petition to the court or at any time after the presentation of a winding up petition but before the court grants an order.

4.2.2 The commencement of admiralty proceedings prior to and after the presentation of a winding-up petition:

The periods or timing of events discussed above is evident in section 126 of the Insolvency Act 1986 which provides the following:

“(1) At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may—

(a)...

(b) where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding;

and the court to which the application is so made may (as the case may be) stay, sist or restrain the proceedings accordingly on such terms as it thinks fit”

¹⁵⁰ Members of The Shiparrested.Com Network, *Ship Arrests in Practice*, Eleventh Edition, 2018 at page 130.

¹⁵¹ *Ibid* at page 130.

¹⁵² Section 129 of the *Insolvency Act* of 1986.

Similarly, to the stay and suspension clauses under South African law, the Insolvency Act 1986 enforces similar effects regarding the attachment, execution or disposition of a company's assets during winding up proceedings by the following clauses:

Section 127 Avoidance of property dispositions, etc.

“(1) In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void” [underlined for emphasis].

Section 128 Avoidance of attachments, etc.

“(1) Where a company registered in England and Wales is being wound up by the court, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up is void” [underlined for emphasis].

Section 183 Effect of execution or attachment (England and Wales).

“(1) Where a creditor has issued execution against the goods or land of a company or has attached any debt due to it, and the company is subsequently wound up, he is not entitled to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution or attachment before the commencement of the winding up [underlined for emphasis].

It is evident from the above that a claimant must be aware of the above period or timing when seeking to enforce its claim, but it must also distinguish the legal steps required within different stages within a ship arrest, namely the issue of an *in rem* claim form, the arrest of the property, and the order made for the appraisal and sale of the vessel¹⁵³. In the case of the *John Carlbom & Co., Ltd. V. The "Zafiro" (Owners) (In Liquidation) (The "Zafiro")*¹⁵⁴, the court held that a claimant that has enforced its *in rem* claim prior to the presentation of a winding up petition to the court shall be considered to have a secure claim i.e. a secured creditor. It appears to be of importance in English insolvency law that the claimant must be a secured claimant, whereas this is not addressed in South African law, as admiralty and insolvency proceedings are treated separately from each other and claimants' rights are clearly stipulated within the respective legislation.

¹⁵³ Meeson N and Kimbell J, *Admiralty Jurisdiction and Regulation* (2018), London, Informa at paragraph 3.68.

¹⁵⁴ 1 Lloyd's Rep 359.

It is clear from the above statutory provisions that they do not contain wording which suggests that a claimant is prevented from enforcing its claim against an insolvent owner after the commencement of winding up or liquidation proceedings. The possible issue that may arise under the circumstances, is that which has arisen under Australian law, as discussed above, of what is the legal position where the claimant seeks to commence *in rem* proceedings not in respect of a maritime lien, but in terms of a statutory right or interest *in rem*. As discussed under the Australian section of this chapter, where a claimant has commenced an action *in rem* based on a maritime lien, its claim will be secured prior to the commencement of the arrest of a vessel as a maritime lien arises at the same time that the claim arises. Whereas if the claim is based on a statutory right or interest *in rem*, the claim will only be secured on the commencement of *in rem* proceedings against the owner of the vessel.

A claimant who wishes to pursue its *in rem* claim after the commencement of winding up or liquidation proceedings must take note to do so prior to a court granting a winding up order. The Insolvency Act of 1986 takes a hard stance on any proceedings that are instituted once a winding up order has been granted. This was further reinstated in the case of *The Bolivia*. This case concerned the vessel, the *Bolivia*, which was owned by a foreign corporation, in terms of which the corporation's creditor sought a winding up order. Prior to this order, the *Bolivia* had been arrested *in rem* by other claimants. The creditor's application for a default judgment was granted by the court and the creditor was permitted to commence sale proceedings of the *Bolivia*. Shortly thereafter, the claimants who had issued writs *in rem* prior to the creditor's application for default judgment, sought leave from the court to commence *in rem* proceedings against the *Bolivia*. This was challenged by the creditor and the appointed liquidator on grounds that any proceedings embarked after the commencement of the winding up proceedings could not proceed any further. On interpretation of the provisions of the Insolvency Act of 1986, Arden J held that the writs *in rem* against the company could not be considered as an attachment, sequestration or execution in terms of section 128(1) of the Insolvency Act of 1986 as the company no longer owned the vessel¹⁵⁵. She further reasoned that if the writs *in rem* conflicted with this clause, it would be for the court to make the decision of granting the claimants leave to pursue their *in rem* proceedings.

With respect, despite Arden J providing clarity on the applicability of section 128 of the Insolvency Act of 1986 to writs *in rem* pursued after the commencement of winding up proceedings, she fails to do the same in regard to section 127 of the Insolvency Act of 1986 which specifically addresses the disposal of a company's assets as is usually seen in winding up or liquidation proceedings. It would

¹⁵⁵ Ibid at 676F.

have also been beneficial had Arden J considered the position of claims that are brought against a company after the commencement of winding up proceedings but prior to the court granting a winding up order.

The legal position under English law therefore appears to be that upon an arrest of a vessel, the claim is secured against the vessel's owner and these proceedings will be overseen by the court in its admiralty jurisdiction. In terms of section 128 of the Insolvency Act of 1986 if an arrest is pursued after the commencement of winding up proceedings it shall be deemed void. If the claimant wishes to proceed with its *in rem* proceedings prior to the presentation of a winding up petition (s)he must apply for leave in terms of section 130 of the Insolvency Act of 1986 to do so¹⁵⁶. Nigel Meeson and John Kimbell are of the view that the position is the same even if the arrest were effected prior to the commencement of winding up and liquidation proceedings, as a "*sequestration (the arrest) is "put in force" when the warrant of arrest is executed by the Admiralty Marshall*"¹⁵⁷.

The above discussions mainly focus on compulsory winding or liquidation proceedings, but if a company enters voluntary winding up or liquidation proceedings, section 183(1) of the Insolvency Act of 1986 will apply. Under voluntary winding up or liquidation proceedings, a claimant may pursue its claim *in rem* against a company from the date upon receipt of the notice in respect of the creditors' meeting. As seen under compulsory winding up or liquidation proceedings, a claimant will become a secured creditor upon issue of the Admiralty form or arrest of the vessel.

4.2.3 The commencement of admiralty proceedings after the granting of a winding up order:

The above periods or timing of proceedings is evident in section 130 of the Insolvency Act of 1986 which provides the following:

"(1) When a winding up order has been made or a provincial liquidator has been appointed, no action or proceedings shall be proceeded with or commenced against the company or its property, except by the leave of the court and subject to the terms as the court may impose".

Section 130(1) of the Insolvency Act 1986 is clear on its position regarding claims *in rem* once a winding up order has been granted by the court. Essentially, a claimant will only be able to proceed with any *in rem* proceedings against a vessel provided that the court grants it leave to do so. Generally, as also seen under Australian law, a claimant is in a better position if it has a claim in terms of a maritime lien or mortgage as it is a secured creditor as its claim arises. A court is also more likely to

¹⁵⁶ Section 130(1) of the *Insolvency Act* of 1986

¹⁵⁷ Meeson N and Kimbell J, *Admiralty Jurisdiction and Regulation* (2018), London, Informa at paragraph 3.82.

grant such claimant leave to pursue its *in rem* claim as its interests lie against the vessel more so than the company itself¹⁵⁸. In as far as a claimant with a statutory right is concerned, it will become a secured creditor upon issuing of the admiralty claim form or upon the arrest of the vessel.

4.3 AUSTRALIA

4.3.1 Admiralty Law

Admiralty law in Australia is regulated by the *Admiralty Act 1988 (Cth)* in terms of which a claimant is able to secure its claim against the vessel or insolvent owner of a vessel by way of an action *in rem* or an action *in personam*. Under Australian admiralty law, an action *in rem* may be brought against a vessel in terms of a maritime lien¹⁵⁹, proprietary maritime claims¹⁶⁰, owner's liabilities¹⁶¹ and demise charterers liabilities¹⁶² which fall within two broad categories, namely the first category of actions *in rem* based on maritime liens and the second category of actions *in rem* which are based on proprietary and non-proprietary maritime claims¹⁶³.

In terms of the Australian Admiralty Rules 1988, once *in rem* proceedings have commenced, the claimant must file an application seeking an arrest warrant to an Australian court which has jurisdiction to deal with the matter in question¹⁶⁴. Such application shall be accompanied by a supporting affidavit either in the name of the claimant or that of its legal representative¹⁶⁵. Similar to the South African and English summons process, the claimant's application must contain the necessary averments regarding the action *in rem* and the grounds on which it is brought to the court¹⁶⁶. In terms of Australian Admiralty Rules 1988, an application seeking an order of arrest is considered to be an undertaking by the party in whose name it has been submitted i.e. the claimant in its personal capacity or the legal representative or agent on behalf of the claimant, to the court that it shall reimburse the court for the costs and expenses of the marshal in relation to the arrest of the vessel¹⁶⁷.

¹⁵⁸ Ibid at paragraph 3.87, *Re Rio Grande do Sul Steamship Company* (1877) 5 Ch. D 282 (CA).

¹⁵⁹ Clause 15 of the *Admiralty Act 1988 (Cth)*.

¹⁶⁰ Clause 16 of the *Admiralty Act 1988 (Cth)*.

¹⁶¹ Clause 17 of the *Admiralty Act 1988 (Cth)*.

¹⁶² Clause 18 of the *Admiralty Act 1988 (Cth)*.

¹⁶³ Hafeez-Baig M, *Navigating the waters between admiralty and cross-border insolvency: A comparison of the Australian, German and French positions* (2018) Lloyd's Maritime and Commercial law Quarterly Review, page 109.

¹⁶⁴ *Australian Admiralty Rule* 39(1).

¹⁶⁵ *Australian Admiralty Rule* 39(2).

¹⁶⁶ *Australian Admiralty Rule* 39(3).

¹⁶⁷ *Australian Admiralty Rule* 41.

The arrest of the vessel will be undertaken by the marshal, who shall serve the warrant on the vessel and the latter shall remain under arrest until such time that the arrest is lifted or if the vessel is sold¹⁶⁸. The arrest of a vessel may be lifted by the court if the owner of the vessel has paid an amount equal to or to the value of the vessel, or the owner of the vessel has paid bail bond in an amount equal to or to the value of the vessel or if the claimant who has arrested the vessel agrees subject to certain arrangements for the vessel to be released from arrest¹⁶⁹. As in South Africa, the receipt of a letter of undertaking or a bank guarantee from a reputable P&I Club or bank is also accepted in Australia for purposes of lifting the arrest.

For purposes of determining how a vessel which is subject to both admiralty and insolvency proceedings, one needs to understand the nature of security provided in terms of a maritime claim or by a statutory right in an action *in rem*, depending on the circumstances under which the action *in rem* has been commenced. If the claimant has commenced an action *in rem* based on a maritime lien, its claim will be secured prior to the commencement of the arrest of a vessel. This is due to the nature of the maritime lien which was described by the Privy Council in the case of *The Bold Buccleugh*¹⁷⁰ as “a claim or privilege [which] travels with the thing, into whosever’s 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”¹⁷¹. However, this is not the case where a claimant pursues its claim *in rem* by way of a general claim which does not have any privilege or security that exists prior to the commencement of an action *in rem* or upon the arrest of a vessel. The nature of a general maritime claim i.e. a statutory right of action was described by Fry LJ in the case of *The Heinrich Bjorn* in which he held as follows:

“...On the contrary, the arrest of a vessel under the statute...no right in the ship or against the ship is created at any time before the arrest; it has no relation back to any earlier period; it is available only against the property of the person who owes the debt...and the arrest need not be of the ship in question, but may be of any property of the defendant within the realm”.

It is clear from Fry LJ’s description of the nature of statutory rights of action that it differs from a maritime lien by virtue of its substance, as the latter exists prior to the commencement or *in rem* proceedings or an arrest of a vessel, whereas the same cannot be said for the former. In the case of the former it will only exist once *in rem* proceedings are commenced. It is thus important, to bear the

¹⁶⁸ Australian Admiralty Rule 43 – 44.

¹⁶⁹ Australian Admiralty Rule 51(1)(a) – (c).

¹⁷⁰ (1851) 7 Moo PC 267.

¹⁷¹ Ibid at 267.

differences in the nature of security provided in terms of a maritime lien and that in terms of a statutory right *in rem* when determining the timing and commencement of admiralty proceedings either prior to or after the commencement of liquidation, business rescue or winding up proceedings.

4.3.2. Liquidation and Winding Up Proceedings:

Liquidation and winding up proceedings regarding an insolvent company in Australia are mainly regulated by the *Corporations Act 2001 (Cth)* and the clauses relating to these processes are to a certain extent similar to the insolvency legislation in countries such as England and South Africa.

In terms of the *Corporations Act 2001 (Cth)* where the administration of an insolvent company has already commenced, a creditor is prohibited from enforcing its claim against the property of the insolvent company or person unless (s)he has obtained the consent of the administrator to do so¹⁷². The same applies in respect of any insolvent proceedings to be commenced against an insolvent company¹⁷³. In the event that a creditor has instituted a claim against the assets of an insolvent company or person, without the consent of an administrator or the court, whilst the respective company is being liquidated or wound up, the effect shall be that the disposal of those assets shall be void¹⁷⁴. The same shall apply in respect of any assets disposed of in terms of an attachment or sequestration¹⁷⁵.

It is very clear on the interpretation of the above in respect of the *Corporations Act 2001 (Cth)*, that for as long as a company is undergoing winding up or liquidation proceedings, no creditor shall be able to institute any legal proceedings against such company, unless (s)he granted leave by an administrator or the court. However, the *Corporations Act 2001 (Cth)* does provide that if the creditor has a secured right in respect of any of the insolvent company or person's assets, such secured right will remain unaffected by these clauses¹⁷⁶. In terms of the *Corporations Act 2001 (Cth)* a secured creditor as a creditor that has a "debt owing to the creditor... secured by a security interest"¹⁷⁷ and such security interest must be in the form of a "charge, lien or pledge"¹⁷⁸. It is in this regard, where an overlap between admiralty and liquidation proceedings may arise, where a claimant in terms of admiralty proceedings has a claim *in rem* by way of a maritime lien or a secured right *in rem* in respect

¹⁷² Section 440B of the *Corporations Act 2001 (Cth)*.

¹⁷³ Section 440D of the *Corporations Act 2001 (Cth)*.

¹⁷⁴ Section 468 of the *Corporations Act 2001 (Cth)*.

¹⁷⁵ Section 468(4) of the *Corporations Act 2001 (Cth)*.

¹⁷⁶ Section 471C of the *Corporations Act 2001 (Cth)*.

¹⁷⁷ Section 51A of the *Corporations Act 2001 (Cth)*.

¹⁷⁸ Ibid.

of a vessel that is owned by an insolvent company or person that is undergoing winding up or liquidation proceedings. The solution or approach to this is further discussed below.

4.3.3. The commencement of admiralty proceedings *before* the commencement of insolvency, business rescue or winding up proceedings:

Under Australian law, winding up proceedings are deemed to commence when a petition for winding up has been presented to the court. Under these circumstances, there is nothing to prevent the claimant from securing its *in rem* claim against the vessel of an insolvent owner after such winding up petition has been presented to the court. However, once the winding up petition upon presentation has been made a winding up order by the overseeing court, any admiralty proceedings which have been commenced shall be stayed until such time that the insolvent company has been wound up. As noted above, if the claimant seeks to pursue the admiralty proceedings against the insolvent company once a winding up order has been granted, (s)he will have to obtain consent from the court or administrator allowing him or her to do so.

Whereby, the claimant has commenced its *in rem* claim on the basis of maritime lien, (s)he will be deemed a secured creditor prior to the commencement of winding up proceedings. However, this is not the case whereby the claimant has commenced its *in rem* claim by way of a statutory right or interest *in rem* as the claimant must still prove in terms of statute, that the insolvent owner is the beneficial owner of the vessel in terms of which (s)he seeks to lay its claim against. This was discussed in the case of *The Monica S*¹⁷⁹, in which the court had to ascertain whether a claimant, who has issued a writ *in rem* against the vessel, but had not yet served such writ on the vessel, could proceed with its action despite change of ownership thereof¹⁸⁰. In his interpretation of the matter, Brandon J held that there was no reason for a claimant to be unable to proceed with its action *in rem*, despite a change of ownership after the issuing of a writ but prior to its service¹⁸¹. He further stated that there was “*no reason why, once a plaintiff had properly invoked jurisdiction under 1956 Act by bringing an action in rem, he should not, despite a subsequent change of ownership of the res, be able to prosecute it through all its stages, up to judgment against the res and payment out of the proceeds*”¹⁸².

¹⁷⁹ [1967] 2 Lloyd’s Rep 113

¹⁸⁰ Ibid at page 115.

¹⁸¹ Ibid at page 113; 130.

¹⁸² Ibid at page 132.

The position of the secured creditor regarding a statutory right *in rem* was also addressed in the case of *In re Aro*¹⁸³. In this case, the court was faced with the issue of whether a claimant could be considered a secured creditor whereby (s)he had commenced *in rem* proceedings by issuing a writ, however such writ had not been served. The court was of the view that the claimant was a secured creditor if (s)he was in possession of security in the form of a mortgage, charge or maritime lien in respect of the vessel against which it seeks its claim¹⁸⁴. The court bearing in mind the definition of a secured creditor further noted that such security must be “held” by the claimant at the time that (s)he commences *in rem* proceedings against the vessel to recover its claim¹⁸⁵. In applying this to the facts of the case, the court held that “*it is correct to say...that after the issue of the writ in rem the plaintiffs could serve the writ on the Aro, and arrest the Aro, in the hands of the transferee from the liquidator and all subsequent transferees, it seems to us difficult to argue that the Aro was not effectively encumbered with the plaintiff’s claim. In our judgment the plaintiff’s ought to be considered as secured creditors*”¹⁸⁶.

It is thus clear from review of the cases of *The Monica S*¹⁸⁷ and the *In re Aro*¹⁸⁸, that if a claimant has a security interest in the form of a mortgage, charge, maritime lien in respect of the insolvent owner’s vessel, and (s)he commences *in rem* proceedings prior to the winding up or liquidation of said insolvent company, (s)he shall have a secured interest in respect of that claim provided that (s)he has commenced *in rem* proceedings i.e. issued a writ. By a claimant issuing the writ against the said insolvent company, (s)he ensures that security is established and/or created by institution of those proceedings¹⁸⁹.

The above applies in so far as the court has not granted a winding up order against the insolvent company. This is not to say that the claimant shall no longer have a secured right *in rem* or secured interest, provided that (s)he has issued a writ, but merely that (s)he will not be able to pursue its arrest or the *in rem* proceedings any further where a winding up order has been granted by a court. In these circumstances, the *in rem* proceedings shall be stayed, unless if the claimant seeks the court’s permission, and such permission is granted, to pursue the admiralty proceedings.

¹⁸³ [1980] 1 Ch 196.

¹⁸⁴ *ibid* at 207.

¹⁸⁵ *Ibid*.

¹⁸⁶ *Ibid* at 209.

¹⁸⁷ [1967] 2 Lloyd’s Rep 113

¹⁸⁸ [1980] 1 Ch 196.

¹⁸⁹ *The Monica S* [1967] 2 Lloyd’s Rep 113, *The In re Aro* [1980] 1 Ch, *Kim v Daebo International Shipping Co Ltd* [2015] FCA 1170, *Programmed Total Marine Services Pty Ltd v Ships Hako Endeavour, Hako excel and Hako Esteem* [2014] FCAFC 134.

4.3.4. The commencement of admiralty proceedings *after* the commencement of insolvency, business rescue or winding up proceedings:

As noted above, where a claimant seeks to pursue its claim against the vessel of an insolvent owner once winding up or insolvency proceedings have commenced, (s)he will need to obtain permission from the court to do so. Under Australian law, this becomes more complex where upon the court granting a final winding up or liquidation order against the insolvent owner a transfer in the beneficial ownership of the owner's vessel and assets has occurred. The same issue also arises where beneficial ownership of the vessel or any of the insolvent owner's assets are considered to vest in the hands of an administrator, liquidator or trustee who oversees the management of these assets.

The confusion seems to arise from the well-known case of *Ayerst v C & K (Construction) Ltd*¹⁹⁰. This was an English taxation case in which the court had to determine whether the beneficial ownership of a vessel or assets still vested with the company once insolvency proceedings had been commenced against it. In terms of the *Finance Act* of 1954, once a company was under insolvency proceedings, its assets would vest in the hands of the liquidator, once appointed. The court held that where a company is liquidated or wound up in terms of a court order, such order divests the company of beneficial ownership of the assets and these assets are thus held for the benefit of others i.e. creditors. Therefore, a company is will be unable to dispose of its assets for its own beneficial interest. This was substantiated by Lord Diplock's view as he held that "*the proposition that the property of the company ceases upon the winding up to belong beneficially to the company has now stood unchallenged...*"¹⁹¹

The approach held by Lord Diplock seems to not be followed or accepted in Australian case as seen in the case of *Linter Textiles Australia Ltd (in liquidation) v Commissioner of Taxation*¹⁹². In this case, the court decided the contrary to the decision of Lord Diplock. In regard to a company's beneficial ownership regarding its assets, the court in this case was of the view that liquidation or winding up procedures did not transfer the company's beneficial ownership of its assets to another. The only impact that liquidation or winding procedures has on a company's ownership is that with the appointment of a liquidator or administrator, there is a change in the control¹⁹³ of the company's affairs, however, this change does not have an impact on the company's beneficial ownership of its assets. The court reasoned that the concept of administration or management of affairs and beneficial

¹⁹⁰ [1976] AC 167.

¹⁹¹ *Ayerst v C & K (Construction) Ltd* AC 167 at 180.

¹⁹² [2005] HCA 20.

¹⁹³ *Linter Textiles Australia Ltd (in liquidation) v Commissioner of Taxation* [2005] HCA 20 para 54.

of the assets under such management were separate concepts and were to not be confused with one another as there is a difference in the power to deal with an asset and ownership thereof¹⁹⁴.

It would seem that the answer to the debacle created between the respective courts' decisions in the *Ayerst* and the *Linter* is not quite clear in Australian law¹⁹⁵. This is noted decisions where the Australian courts have referred to the decision in terms of the *Ayerst* judgement have been appealed with courts following the reasoning in the *Linter* judgment. For present purposes, the general position remains that if *in rem* proceedings are commenced after liquidation or winding up proceedings against the insolvent owner's vessel or assets, particularly where a liquidation or winding up order has been granted by a court, such *in rem* proceedings can only proceed upon permission being granted by the court. Of course, if the claimant is not a secured creditor prior to the commencement of liquidation or insolvency proceedings, it will face an uphill challenge in being able to proceed with any *in rem* proceedings after the commencement of the former.

One must bear in mind that in as much as Australia and England may have similar legislation and legal processes, the interpretation and application of these will differ as courts have different approaches. The differing approaches specifically in terms of the overlap between admiralty and insolvency proceedings will come to head particularly within cross-border insolvency and shall hopefully be resolved on this dynamic international stage¹⁹⁶.

4.4 CONCLUSION

It is evident that Australian insolvency and admiralty law share similarities with English insolvency and admiralty law by virtue of its laws, such as those in South Africa, drawing much reference from English insolvency and admiralty. Despite courts having their own interpretation of decided or new judgments, it is clear that both Australian and English courts have adopted a similar approach on how to resolve the overlap or conflict which arises between admiralty and insolvency proceedings whereby the arrested vessel is subject to both proceedings.

Both Australian and English courts have determined that whether admiralty or insolvency law prevails will depend on the timing or order of the respective arrest or attachment under admiralty proceedings and the commencement of insolvency, winding-up or business rescue proceedings. The legal position, shared by

¹⁹⁴ Ibid at para 55,125.

¹⁹⁵ Reyes A, *Cross-Border insolvency and shipping companies* (2016) Lloyd's Maritime and Commercial Law Quarterly.

¹⁹⁶ Maybury D, *When two systems collide – the intersection between cross-border insolvency protection and the admiralty action in rem* (15 April 2014) Mondaq.

both Australian and English courts, appears to be that upon the arrest of a vessel, the maritime claim is secured against the vessel's owner and these proceedings will be overseen by the court in its admiralty jurisdiction and not under insolvency proceedings. In the event that such an arrest was pursued after the commencement of winding-up or insolvency proceedings it would be stayed as the insolvency proceedings would prevail over the admiralty proceedings. For the arrest to not be deemed void, the claimant who wishes to proceed with its *in rem* proceedings prior to the presentation of a winding-up petition would have to apply for leave from the respective admiralty court to do so.

CHAPTER FIVE

INTERACTION BETWEEN INSOLVENCY LAW AND ADMIRALTY PROCEEDINGS IN SOUTH AFRICA

5.1 INTRODUCTION

It is clear from the Australian and English courts' approach that if an arrest or attachment of a vessel has commenced prior to the commencement of any liquidation, winding-up proceedings or business rescue proceedings, preference is given by the courts to these admiralty proceedings. The respective legislations do not contain wording that suggests that if the claimant has successfully secured its claim against a vessel in terms of the countries respective admiralty laws, that those legal proceedings shall be affected by the commencement of insolvency proceedings thereafter, however, this remains dependent on the timing of the admiralty proceedings.

What the position is on the above in South African law is discussed below taking into consideration the relevant sections of the Admiralty Act which address arrest and attachment proceedings on the one hand and the relevant sections of the Companies Act of 1973 and the Companies Act of 2008 which address liquidation, winding-up and business rescue proceedings in on the other.

5.2 The *Companies Act* of 1973: The commencement of admiralty proceedings *before* and *after* the commencement of insolvency or winding-up proceedings:

In the event that a claimant has an *in rem* claim against a vessel owned by a company that is either about to commence or has commenced insolvency, winding-up or business rescue proceedings in respect of its assets, the claimant will need to determine when these proceedings have commenced and thereafter the effect these proceedings shall have on its maritime claim, namely whether (s)he is still able to enforce its *in rem* claim against the company prior to a court granting a final order. The timing at which a claimant enforces or pursues a maritime claim is important as certain transactions, inclusive of admiralty proceedings, shall be barred by the Companies Act of 1873 and Companies Act of 2008 and deemed void.

Section 352 of the Companies Act of 1973 provides for voluntary winding-up procedures whereby winding-up procedures commence when a special resolution authorising the winding-up has been registered in terms of section 200 of the Companies Act of 1973. On the other hand, compulsory winding-up procedures as provided for under section 348 of the Companies Act of 1973 commence at the time that an application in respect of the winding-up of an insolvent company is presented to the Court.

In so far as the Companies Act of 1873 is concerned, sections 358 and 359 therein are important to note. If one interprets these sections, it appears that the best time for a claimant to pursue its *in rem* claim against an insolvent owner would be prior to the commencement of any liquidation or winding-up proceedings under the Companies Act of 1973. Unlike the Australian and English legislation which appeared to support a claimant who sought to pursue its *in rem* claim after the commencement of liquidation or winding-up proceedings, this is not the case in South Africa.

In terms of section 358 of the Companies Act of 1973, provides for the stay of legal proceedings after the presentation of an application for winding-up and prior to the court granting a winding-up order. In terms of this section, a company or creditor thereof may apply to a court to stay any legal proceedings that are pending against the company. This section further provides that a company or creditor thereof, may apply for an order restraining any further legal proceedings being or about to be instituted against the company after an application for winding-up has been presented to the court. Taking the content of section 358 into account, the position of a claimant that seeks to either continue pursuing a pending admiralty matter, proceed with an instituted admiralty matter or to bring a “new” admiralty matter is dire. There is no wording within the Companies Act of 1973 which physically bars a claimant from enforcing its maritime claim in terms of *in rem* proceedings, however, if done post presentation of the winding-up application, it is highly possible for an insolvent company to wish to stay any pending or further legal proceedings against it. This clause is in favour of an insolvent company that seeks to protect the last remaining assets it has in its control prior to them being disposed of for the benefit of its creditors.

The above is further affirmed in section 359 of the Companies Act of 1973 where a court has granted a winding-up order or a special resolution for the voluntary winding-up of a company and it has been registered in terms of section 200 of the Act. Under this section, any attachment or execution against the company’s assets after the commencement of a winding-up shall be void. In these circumstances, a claimant would be unable to arrest or attach a vessel for purposes of obtaining security for its *in rem* claim if the owning company is already under liquidation or winding-up proceedings.

The difficulties of a claimant with an *in rem* claim attempting to pursue admiralty proceedings against an insolvent owner that is the subject of winding-up or liquidation in terms of section 358 and 359 of the Companies Act of 1973 are evident in a few reported legal cases¹⁹⁷. In these cases, the general consensus is that an arrest is an attachment in so far as section 359 of the Companies Act of 1973 is concerned. Therefore, once liquidation or winding-up proceedings have commenced i.e. an application for the company

¹⁹⁷ *The Nantai Princess Line Co Ltd v Cargo Laden on the Nantai Princess* 1997 (2) SA 580 (D); *Rennie NO v South African Sea Products Ltd* 1986 (2) SA 138 (C).

to be wound up had been presented to the court, a claimant will be barred from pursuing any admiralty proceedings against the insolvent company and thus attaching any of its assets¹⁹⁸. Such an arrest or attachment shall be void in terms of section 359 of the Companies Act of 1973¹⁹⁹.

Sections 358 and 359 of the Companies Act of 1973 are clear when interpreted independently of the Admiralty Act, however the interpretation of these sections becomes complicated if the claimant has commenced admiralty proceedings in a court exercising its admiralty jurisdiction prior to the commencement of any winding up, liquidation or insolvency proceedings, as section 10 of the Admiralty Act comes into question. Section 10 of the Admiralty Act affords claimants in admiralty proceedings special protection as any vessel, attachment of property or security furnished by the insolvent owner shall not vest in the hands of a trustee in an insolvency nor shall it be form part of the assets to be administered by a liquidator or a judicial manager²⁰⁰. There are no judgments which specifically address the interface between these sections of the Companies Act of 1973 and section 10 of the Admiralty Act, but it would appear that in terms of the latter section, property arrested in terms of admiralty proceedings prior to the commencement of any winding up, liquidation or business rescue proceedings will not form part of the insolvency estate. Under such circumstances, the claimant would be able to proceed with its admiralty proceedings against the insolvent owner of the arrested vessel despite a stay or moratorium on other legal proceedings by the Companies Acts.

Sections 358 and 359 of the Companies Act of 1973 are clear when interpreted independently of the Admiralty Act, however the interpretation of these sections becomes complicated if the claimant has commenced admiralty proceedings in a court exercising its admiralty jurisdiction prior to the commencement of any winding up, liquidation or insolvency proceedings, as section 10 of the Admiralty Act comes into question. Section 10 of the Admiralty Act affords claimants in admiralty proceedings special protection as any vessel, attachment of property or security furnished by the insolvent owner shall not vest in the hands of a trustee in an insolvency nor shall it be form part of the assets to be administered by a liquidator or a judicial manager (Section 10 of the Admiralty Act, South Africa). There are no judgments which specifically address the interface between these sections of the Companies Act of 1973 and section 10 of the Admiralty Act, but it would appear that in terms of the latter section, property arrested in terms of admiralty proceedings prior to the commencement of any winding up, liquidation or business rescue proceedings will not form part of the insolvency estate. Under such circumstances, the claimant would be able to proceed with its admiralty proceedings against the insolvent owner of the arrested vessel despite a

¹⁹⁸ *The Nantai Princess Line Co Ltd v Cargo Laden on the Nantai Princess* 1997 (2) SA 580 (D).

¹⁹⁹ *Ibid.*

²⁰⁰ Section 10 of the *Admiralty Jurisdiction Regulation Act* 108 of 1953.

stay or moratorium on other legal proceedings by the Companies Acts. In terms of South African admiralty law, where a vessel is sold in order to settle creditors' claims under admiralty proceedings, if there are funds remaining once all admiralty claims are settled, these remaining funds shall be vested in the owner's insolvent estate and considered by the administrator or liquidator under insolvent proceedings.

5.3 The *Companies Act of 2008*: The commencement of admiralty proceedings *before and after* the commencement of business rescue proceedings:

Further to sections 358 and 359 of the Companies Act of 1973 discussed above, one must also consider section 133 of the Companies Act of 2008 in terms of which no legal proceedings may be commenced against a company during business rescue proceedings. A claimant may only do so if it has obtained the written consent of a practitioner²⁰¹ or it has obtained leave from the court to do so²⁰². Thus, it appears that a claimant is prevented from commencing any admiralty proceedings against a company once business rescue proceedings have commenced and may only do so under the exceptions discussed.

In the same manner that the sections of the Companies Act of 1973 are clear when interpreted independently from the Admiralty Act, the same applies between section 133 of the Companies Act of 2008 and section 10 of the Admiralty Act. However, unlike the limited availability of judgments which address this overlap as seen above, there has been a recent judgment, *Southern African Shipyards (Pty) Ltd v mfv "Polaris"*²⁰³ (*"the Polaris Judgment"*), which provides welcome clarity on the issue. This judgment and the clarification of the overlap between any liquidation, winding-up and particularly business rescue proceedings are discussed below.

5.3.1 *The Polaris Judgment*

In this case, the Western Cape High Court was faced with resolving the interface created by the interpretation of section 10 of the Admiralty and section 133 of the Companies Act of 2008. Prior to the judgement regarding the mfv *"Polaris"*, (*"the Vessel"*) the interface created by these specific clauses of the above acts had not received much treatment from any South African court.

In this case, the applicant, Southern African Shipyards (Pty) Ltd, had conducted various ship repairs to the vessel during the period of February 2016 and March 2016. As a result of the owner of the vessel failing to pay the incurred ship repair costs to the Applicant, the latter threatened to commence arrest proceedings against the vessel. In order to avoid an arrest of the vessel, representatives of

²⁰¹ Section 133(1)(a) of the *Companies Act* of 2008.

²⁰² Section 133(10)(b) of the *Companies Act* of 2008.

²⁰³ (AC42/2017; AC48/2017) [2018] ZAWCHC 48; [2018] 3 All SA 219 (WCC).

Yellow Star Trading 1114 (Pty) Ltd (the “Third Respondent”) entered into an Acknowledgment of Debt with the applicant whereby the vessel would be released in order to procure fish oil and the debt would subsequently be settled. Due to the third respondent failing to make payment in terms of the Acknowledgment of Debt, the applicant arrested the vessel together with its equipment, furniture, stores, bunkers and lubricating oils.

As a result of the vessel being arrested by numerous creditors, and a concern that the condition of the vessel would deteriorate, the applicant sought leave to sell the vessel with its equipment, furniture, stores, bunkers and lubricating oils in terms of section 9 of the Admiralty Act. An answering affidavit was not filed by the respondents within the necessary timelines of submission on the basis that they had entered into business rescue proceedings in terms of the Companies Act of 2008 and as a result such proceedings had placed an automatic moratorium on all legal proceedings against the third respondent. In their condonation application to the High Court, the respondents were of the view that section 10 of the Admiralty Act conflicted with sections 128 to 155 of the Companies Act of 2008, as section 133 of the latter Act places an automatic moratorium on the pending application. The respondent argued that it was evident that the Companies Act of 2008 prevailed as envisaged in section 5(4)(b)(ii). It was further argued by the respondent that if the Admiralty Act were to take precedence over the Companies Act of 2008, the former Act would have been included in the list of national legislation provided under section 5(4) of the Companies Act. In the respondent’s view, if the Admiralty Act were to be deferred to in matters where business rescue proceedings were involved, the legislature would have included such within the wording of the Admiralty Act to avoid any conflict between the two acts.

It was further contended by the respondents that the intention of the legislature was clearly expressed within section 7(k) of the Companies Act of 2008 which provides that the purpose of the Companies Act is to “provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders. The respondents further dismissed the applicant’s application on the ground that the applicants had relied on the principles applicable to judicial management, a business rescue process under the Companies Act of 1973, which has since been repealed and replaced by business rescue as per the Companies Act of 2008. In responding to the respondent’s contentions, the applicant argued that section 133 of the Companies Act of 2008 was not applicable to the current matter and that the order for the sale of the vessel could proceed in terms of section 10 of the Admiralty Act which expressly excludes all property that is arrested in respect of a maritime claim.

In attempting to resolve the predicament created by the interface between the Admiralty Act and the Companies Act in order to determine whether the vessel could be sold as per the Applicant's application, the High Court had to carefully interpret the applicable clauses in conjunction with past admiralty judgments on the issue.

In the case of *Rennie NO v South African Sea Products Ltd*²⁰⁴, the court reasoned that the purpose of the Admiralty Act “was, inter alia, to afford assistance to creditors with claims constituting maritime claims in obtaining full satisfaction therefor and also – to put it in simple terms – to have their minds set at rest when contracting with a shipowner a long distance away from the seat of his business, lest they be doing so in ignorance of his or its sequestration or liquidation.” It is evident that the court was of the view that maritime claims were generally treated separately from the laws of sequestration or liquidation. The ringfencing of maritime claims by courts exercising their admiralty jurisdiction in South Africa was further highlighted in the case of *Gendor Holdings Ltd v City Fishing Holdings (Pty) Ltd; Bremond Trust (Intervening Party)*²⁰⁵. In this case, the court was of the view that any property which was the subject of a maritime claim would not vest with either a trustee, liquidator or judicial manager. The court held that “when arrest or attachment is followed by the establishment of a fund in court, the Admiralty Act envisages an orderly sequence for proof of claims against funds in court after ringfencing them from other claims. This procedure is set out in section 10 as read with section 10A (2) and 11 (13). Sections 10 and 11 (13) provide that the property arrested does not vest in a liquidator except after all claims have been paid in accordance with the preferences codified in sections 11 (5) and 11 (11)”²⁰⁶.

The ringfencing of maritime claims, as created by section 10 of the Admiralty Act, was noted by the Supreme Court of Appeal in the case of *Commissioner, South African Revenue Service v Van der Merwe NO and others*²⁰⁷ which dealt with a company that had been wound up by reason of failing to pay its outstanding debts. In interpreting the *Customs Act* No 91 of 1964 and the *Insolvency Act* No 24 of 1936 and whether or not these statutes allowed for the exclusion of any goods subject to a lien, from insolvency proceedings, the court noted that “there is nothing in either the Customs Act or the Insolvency Act which expressly (or by necessary implication) provides that goods subject to a lien in favour of SARS do not fall to be dealt with under the laws of insolvency. This is to be contrasted with section 10 of the Admiralty Jurisdiction Act 105 of 1983 which excludes the vesting of certain

²⁰⁴ 1986 (2) 138 (CPD).

²⁰⁵ (2007) 3 All SA 400 (C).

²⁰⁶ Ibid.

²⁰⁷ [2017] 2 All SA 335 (SCA).

property in the trustee on insolvency and section 90 of the Insolvency Act in terms of which the Land Bank retains its powers in relation to any property belonging to an insolvent estate. Such property is expressly excluded from the provisions of the Insolvency Act”²⁰⁸.

Upon further interpretation and examination of section 10 of the Admiralty Act, it appears that the section specifies when the property must be arrested in order for it to be excluded from any sequestration, liquidation or winding-up proceedings. In terms of section 10, property must be arrested any time prior to a company or the owner thereof commencing liquidation or winding-up proceedings. In the case of *The Nantai Princess Line Co Ltd v Cargo Laden on the Nantai Princess*²⁰⁹, it was stated that it was “apparent upon grammatical analysis of the language in which that section is couched, that applicability of the section is limited to pre-winding-up arrests. Thus, arrested property shall not form part of the assets to be administered by a liquidator”. The court went on to further state that “this view is reinforced when one has regard to the position where the insolvent debtor is a natural person, for the section provides that the arrested property shall not vest in his trustee, a state of affairs which presupposes that no vesting has yet taken place, whereas in law such vesting takes place immediately following the trustee’s appointment”²¹⁰.

Although the overlap created by the Admiralty Act and the Companies is not substantially dealt with in the above cases, it appears that the courts were of the view that if property of a maritime claim was arrested prior to any winding-up proceedings, it would be exempt from any sequestration or liquidation proceedings and would enjoy special treatment under the Admiralty Act. In analysing the same cases in the judgment of the mfv “*Polaris*”, Boqwana J found that “one can...safely conclude...that the Courts interpreted the provisions of the 1973 Companies Act, the prevailing insolvency law and those of AJRA in such a manner that they could exist alongside each other without one trumping the others”²¹¹.

5.3.2 Western Cape High Court’s Interpretation of section 10 of the *Admiralty Act* and section 133 of the *Companies Act* of 2008

In the case before the Western Cape High Court, Boqwana J was faced with the following two arguments:

²⁰⁸ Ibid.

²⁰⁹ 1997 (2) SA 580 (D).

²¹⁰ Ibid.

²¹¹ *Southern African Shipyards (Pty) Ltd v MFV "Polaris" and Others* [2018] 3 All SA 219 (WCC) at paragraph 42.

- (a) The Applicant argues that firstly, despite the wording of section 10 of the Admiralty Court not including the terms “business rescue practitioner” or “business rescue”, the clause incorporates such proceedings. Secondly, it was possible for the Admiralty Act to run parallel to the Companies Act of 2008, without conflict, due to section 5(4)(a) of the Companies Act of 2008. In addition, maritime claims are ringfenced and not subject to other proceedings if such maritime claim arises prior to the commencement of business rescue proceedings.
- (b) The Respondent argues that section 10 of the Admiralty Act and section 133 of the Companies Act of 2008 are in conflict. It was further argued that section 10 was not applicable to due to exclusion of the words “business rescue practitioner” and “business rescue”, which was indicative of the legislature’s intention for this section to not apply to business rescue proceedings. It further argued that if it was found by the court that section 10 was applicable, section 133 would be supersede this section and the moratorium would remain in place.

In attempting to ascertain whether it was the court’s intention to read section 133 in conjunction with section 10 of the court and whether due to the inclusion of the words “business rescue practitioner” and “business rescue” in the Admiralty Act, it was intended that business rescue proceedings were thus applicable to admiralty proceedings, the court had to embark on an interpretation of the sections, including an understanding of these judicial processes. The court’s starting point was to look at the effect of “business rescue” on proceedings, which is to generally to provide a business with breathing space so as to properly restructure its affairs and liabilities. This was reaffirmed in the case of *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank*²¹², where the Court held that “it is generally accepted that a moratorium on legal proceedings against a company under business rescue, is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs. This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process”²¹³.

In clarifying the dispute between the clauses, the court referred to section 5(4) of the Companies Act of 2008 which provides as follows:

²¹² 2015 (3) SA 438 (SCA).

²¹³ Ibid.

“(4) If there is an inconsistency between any provision of this Act and a provision of any other national legislation-

(a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

(b) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second –

(i) any applicable provisions of the –

(aa) Auditing Profession Act;

(bb) Labour Relations Act, 1995 (Act No. 66 of 1995);

(cc) Promotion of Access to Information Act, 2000 (Act No. 2 of 2000);

(dd) Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);

(ee) Public Finance Management Act, 1999 (Act No. 1 of 1999);

(ff) Securities Services Act, 2004 (Act No. 36 of 2004);

(gg) Banks Act;

prevail in the case of an inconsistency involving any of them, except to the extent provided otherwise in sections 30(8) or 49(4); or

(hh) Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003); or

(ii) Section 8 of the National Payment System Act, 1998 (Act No. 78 of 1998).

(ii) the provisions of this Act prevail in any other case, except to the extent provided otherwise in subsection (5) or section 118(4)”.

It is clear from the above clause, that it clearly states how the courts must interpret statutes or give understanding them in relation to the Companies Act, in cases where it is faced with an inconsistency between with a particular act and the Companies Act. Section 5(4) therefore provides

clarity on how courts can refer to the inconsistent provisions of the statutes and for them to apply concurrently to the extent possible without one contravening the other.

In applying the rationale of section 5(4) of the Companies Act of 2008 to the matter before the court, Boqwana J found that it was possible to interpret section 10 of the Admiralty Act and section 133 of the Companies Act of 2008 concurrently. In his assessment of these provisions, Boqwana J held that the key in determining which statute the court had to refer to in determine the issues at hand, lay “in the timing of the events sought to be protected by each of the statutes.”²¹⁴ Thus the court reviewed section 10 of the Admiralty Act in parallel to section 133 of the Companies Act of 2008, as it was argued by the respondent that section 10 of the Admiralty Act was not applicable it excludes the words “business rescue”.

Section 133 of the Companies Act of 2008 provides the following:

“(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except —

- (a) with the written consent of the practitioner;*
- (b) with the leave of the court and in accordance with any terms the court considers suitable;*
- (c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;*
- (d) criminal proceedings against the company or any of its directors or officers;*
- (e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or*
- (f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.*

(2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with

²¹⁴ At paragraph 67.

leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

- (3) *If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings”.*

As evident in the above section, a moratorium is placed over a company on the commencement of any business rescue proceedings. The moratorium is effective on the company's property, assets and to a certain extent the rights of a creditor to claim from the company until such time that the business rescue proceedings to be finalized. This entails all legal proceedings and, enforcement of actions being suspended until such time that business rescue is finalized. A moratorium has been designed in such a manner as to provide a company with breathing space so as to properly restructure its affairs and liabilities.

On the other hand, in terms of the vesting of property of a company undergoing business rescue proceedings in the hands of a trustee, liquidator or judicial manager, section 10 of the Admiralty Act provides the following:

“Any property arrested in respect of a maritime claim or any security given in respect of any property, or the proceeds of any property sold in execution or under an order of a court in the exercise of its admiralty jurisdiction, shall not, except as provided in section 11 (10), vest in a trustee in insolvency and shall not form part of the assets to be administered by a liquidator or judicial manager of the owner of the property or of any other person who might otherwise be entitled to such property, security or 11 proceeds, and no proceedings in respect of such property, security or proceeds, or the claim in respect of which that property was arrested, shall be stayed by or by reason of any sequestration, winding-up or judicial management with respect to that owner or person.”

It is clear from the wording of the above clause that any property which has been arrested in respect of a maritime claim is exclusively ringfenced from insolvent proceedings and from forming part of the assets subject to be administered by a liquidator or judicial manager. Section 11(10) of the Admiralty Act seems to evidence the special treatment of property arrested in respect of maritime claims as it only provides for the distribution of the balance of these maritime claims to a trustee,

judicial manager or liquidator once all maritime claims under section 11(1)(a) to 11(1)(e) are paid. In order to ascertain the applicability of section 10 to insolvency proceedings, the court considered judgements faced with similar issues regarding this particular clause.

On closer interpretation of both Acts, the provisions are similar in that they both require for a company's assets to be treated in a particular manner once the respective proceedings commence. Arrested property in terms of section 10 falls under the jurisdiction of the Admiralty Act and is not subject to any other subsequent proceedings. The same is practiced in terms of section 133 of the Companies Act of 2008 which places a moratorium on legal proceedings and the company's assets fall under the administration of a judicial manager and/ or vest in the hands of a trustee. Both provisions thus exclude assets from third parties i.e. creditors. Boqwani J's view in the *Polaris* case was that, taking the above into consideration, section 10 of the Admiralty Act applies to the arrest of vessels which has occurred prior to the commencement of any business or liquidation proceedings against the owning company. An arrest of a vessel which has occurred after the commencement of any business or liquidation proceedings would not be "ringfenced" as per this provision and therefore not stayed by the South African courts. Boqwani J further stated that such "ringfencing" does not apply to assets or property that are not classified as maritime property, therefore such property would still be subject to business rescue or liquidation proceedings.

In the case of *The Nantai Princess Line Co Ltd v Cargo Laden on the Nantai Princess*²¹⁵, the court dealt with the interpretation of section 10 of the Admiralty Act. In this case an action *in rem* was instituted against the cargo laden on board the vessel, the *MV Nantai Princess* on 24 January 1990 by Nantai Line ("the Applicant"). On 24 April 1990, the applicant applied for an order authorising the sale of the vessel and her cargo in terms of section 9 of the Admiralty Act. The sale of the vessel was opposed to by Two Way Clothing ("the Respondent") on grounds that when the arrest of the vessel had taken place, winding-up procedures of the respondent had commenced. The respondents argued that the sale application must be dismissed. It argued that in terms of sections 348 and 359 of the Companies Act of 1973, the applicant had no right to execute on the assets of Two Way Clothing as a winding-up application had already been presented to the court. The court held that despite the arrest of the vessel and the cargo being an attachment in nature and not an execution, such attachment remained void as the assets which were subject to such action, were part of the winding-up proceedings. The court found that in such circumstances the sale application was void.

²¹⁵ 1997 (2) SA 580 (D).

In addressing the issue in the case of the *Nantai Princess*, Levisohn J first questioned whether an arrest of a vessel is an attachment in terms of the definition of winding-upas per section 359 of the Companies Act of 1973. It was found by Levisohn J that this definition was inclusive of an arrest being an attachment of assets, as the judge was in agreement with Berman AJ’s reasoning in the case of *Rennie NO v South African Sea Products Ltd*, where he held as follows:

“Firstly, the section speaks of any “attachment...against the assets of a company”, and the word “any” is a word of the widest import and significance. It seems to me that the language of the section is wide enough to cover each and every restraint which may be imposed upon an asset of a company after liquidation has supervened, including the arrest of a vessel...”

From the above, it is evident that the judges, in their respective cases, were of the view that an attachment is inclusive of an arrest. Despite finding that the arrest of the vessel did in fact constitute an attachment in terms of section 359 of the Companies Act of 1973, Levisohn AJ found that as a result of the arrest of the vessel and its cargo having taken place only after winding-up proceedings had commenced, it was not valid and held that “the section applies to a state of affairs before the commencement of the winding-up. In passing it may be observed that perhaps the Legislature in framing section 10 did not go far enough in the sense that it apparently ignored the far-reaching effect of the retrospective operation of winding-up orders. It may well be that given the special nature of the protection afforded to the holders of maritime claims, there is a strong argument for saying that an action *in rem* instituted by arrest prior to the making of a winding-up order should not be hit by the retrospective operation of a concursus creditorum”.

In applying the above findings to the conflict between section 10 of the Admiralty Act and section 133 of the Companies Act of 2008, the conflict is seemingly resolved. The courts in the *Nantai Princess* and *Rennie NO* seem to clarify that essentially any maritime claim must be dealt with within the ambit of the Admiralty Act and will be excluded from any other proceedings. Boqwani J confirms this view in the *Polaris* judgement stating that “it allows section 133 to continue in respect of all conventional claims instituted against the company and those other claims excluded from the operation of section 10...whilst recognizing that maritime assets under arrest and maritime proceedings falls within the purview of section 10 of AJRA and outside of section 133 of the 2008 Companies Act”²¹⁶

²¹⁶ *Southern African Shipyards (Pty) Ltd v MFV "Polaris" and Others* [2018] 3 All SA 219 (WCC) at paragraph 71.

5.5 CONCLUSION

It is evident that on the one hand, the Admiralty Act seeks to protect the rights of a claimant with a maritime claim *in rem* against the vessel of an insolvent owner, whilst on the other hand, the Companies Acts attempt to protect an insolvent owner who is the subject of liquidation, winding-up or business proceedings from further legal proceedings against it in an attempt to afford it an opportunity to restructure its financial affairs. In as much, as these pieces of legislation mean well, both the Admiralty Act and Companies Act have not been drafted or amended with the other in mind thereby creating an overlap between the proceedings stemming therefrom. In order to overcome the overlap between the two laws, a claimant who wishes to enforce its claim *in rem* against the vessel or property of an owner in South Africa must do so prior to the commencement of any insolvency proceedings preferably prior to the presentation of a winding-up application or before the court granting a liquidation or winding-up order.

It is evident that section 10 of the Admiralty Act treats the rights and interests of maritime creditors separately to those of creditors under insolvency proceedings as it enables the arrested vessel or property to be ringfenced, however, this special treatment is only applicable to property arrested by the claimant prior to insolvency proceedings. Even such special treatment may be met with contention by creditors under insolvency proceedings as it does favour maritime creditors. However, if one considers the confusion created by the overlap between admiralty and insolvency proceedings, perhaps this is the preferable approach as section 10 of the Admiralty Act provides, in doing so, much needed clarity in terms of the overlap between both laws by doing so. In fact, the separation of maritime creditors from insolvency proceedings is further embedded by section 10 of the Admiralty Act as it only permits the remainder of the funds from a fund to be disbursed to a liquidator once all maritime claims have been settled prior to the insolvency claims.

With all considered the above seems fair as section 10 limits the special treatment granted to maritime creditors regarding its claim against an arrested vessel or property prior to any insolvency proceedings having commenced against the solvent or insolvent owner. Whereas, in English and Australian law, one will recall that the courts have the discretion to allow admiralty proceedings to proceed despite the commencement of any insolvency proceedings. This principle does not apply under South African admiralty law. Therefore, if the claimant were to enforce or pursue its *in rem* claim after a winding-up application has been presented to the court or an order has been granted by the court, s/he cannot expect that the vessel against which its claim lies will be ringfenced and dealt with separately from the owners other assets which fall within its insolvent estate.

CHAPTER SIX

CONCLUSION

6.1. INTRODUCTION

This dissertation sought to understand the overlap which is created between admiralty law and insolvency laws whereby a vessel against which a claimant has a maritime claim against is subject to both legal proceedings by virtue of the vessel's owner or company undergoing winding up, liquidation and business rescue proceedings. As evident in the discussion throughout this dissertation, the differences between the rights and procedures offered to a claimant under admiralty proceedings on the one hand; and the rights and procedures offered to an insolvent owner or company under winding up, liquidation or business rescue proceedings on the other hand does lead to various conflicts when a claimant seeks to enforce its maritime claim under one legal proceeding but the insolvent owner having entered insolvency proceedings.

In order to ascertain the overlap between admiralty and insolvency laws, the dissertation examined the rights and procedures under the Admiralty Act, the Companies Act of 1973 and Companies Act of 2008. In doing so, it was important to also consider and examine the effect which winding up, liquidation and business rescue proceedings have on any admiralty proceedings either enforced or to be instituted by a claimant against the insolvent owner or company. It was also necessary for this dissertation to consider the legal approach which has been adopted and/or practiced by other countries in their jurisdictions. In order to do this, the admiralty and insolvency laws of Australia and England were referred to as South Africa's legislation shares many similarities and influences with English law, which Australian law does as well. Following therefrom, a comparative analysis was utilised to ascertain what the current approach is in South Africa in accordance to its own domestic admiralty and insolvency laws, as well as taking into consideration, recently reported judgements such as that of the Western Cape High Court in the *Polaris* in 2018.

After an in-depth examination and discussion of the above aspects, it appeared that in order to ascertain the overlap between admiralty and insolvency proceedings in South Africa, one would need to consider the commencement of admiralty and insolvency proceedings in relation to one another. The two main questions which arose were:

- a) Whether a claimant that has a maritime claim in terms of the Admiralty Act may enforce or pursue its claim either by way of an action *in rem* or an action *in personam* against a vessel prior to or after

winding up, liquidation or business rescue proceedings have commenced against the owner of such vessel; and

- b) Whether a claimant that has a maritime claim in terms of the Admiralty Act may enforce or pursue its claim either by way of an action *in rem* or an action *in personam* against a vessel whereby winding up, liquidation or business rescue proceedings once a court has granted a winding up or liquidation order against the owner of such vessel.

In determining the above, it also became evident that the nature of a claimant's maritime claim i.e. a maritime lien or statutory right *in rem* or statutory interest may have an influence on the timing at which a claimant decides to enforce its maritime claim *in rem* against an owner subject to winding up, liquidation or business rescue proceedings.

6.2. FINDINGS

The main findings in this dissertation can be broadly categorised as follows:

6.1.1 The timing or commencement of admiralty and insolvency proceedings in relation to one another

As previously discussed in this dissertation, taking into account the writings of various scholars on this subject, with reference to cross-border proceedings, it appears that the solution in determining whether admiralty or insolvency law prevails will depend on the timing or order of the respective arrest or attachment under admiralty proceedings and the commencement of insolvency, business rescue or winding up proceedings. The timing or order of these legal proceedings can be broadly categorised as follows:

- a) the commencement of arrest or attachment under admiralty proceedings before the commencement of insolvency, business rescue or winding up proceedings; and
- b) the commencement of arrest or attachment under admiralty proceedings after the commencement of insolvency, business rescue or winding up proceedings.

Under Australian and English law, the position appeared to be that if an arrest or attachment of a vessel has commenced prior to the commencement of any liquidation, business rescue or winding up proceedings, preference will be given by the courts to the admiralty proceedings. There are no clauses in these countries' legislations to suggest that if the claimant has successfully secured its claim against a vessel in terms of the countries' respective admiralty laws, that those legal

proceedings shall be affected by the commencement of insolvency proceedings thereafter. On the other hand, where a claimant seeks to pursue its claim against the vessel of an insolvent owner once winding up or insolvency proceedings have commenced, (s)he will need to obtain permission from the court to do so.

In South Africa, sections 358 and 359 of the Companies Act of 1973 and section 133 of the Companies Act of 2008 are important to note. In terms of these section 359, any attachment or execution against the company's assets after the commencement of a winding up shall be void. In these circumstances, a claimant would be unable to arrest or attach a vessel for purposes of obtaining security for its *in rem* claim if the owning company is already under liquidation or winding up proceedings. Section 358 of the Companies Act of 1973 also leaves a claimant in admiralty proceedings with limited choice as company or creditor thereof, may apply for an order restraining any further legal proceedings being or about to be instituted against the company after an application for winding up has been presented to the court.

It was also affirmed that in South Africa, similar to Australia and England, a claimant who wishes to pursue its *in rem* claim after the commencement of winding up or liquidation proceedings must take note to do so prior to a court granting a winding up order. Once the court has granted a winding up order, a claimant shall not be able to enforce or pursue any pending or instituted admiralty proceedings against the vessel or marine property of an insolvent owner or company.

In so far as the interaction of admiralty proceedings is concerned to the above, the *Polaris* judgement confirmed that any maritime claim must be dealt with within the ambit of the Admiralty Act and will be excluded from any other proceedings, provided that such admiralty proceedings were commenced prior to the commencement of any winding up, liquidation or business rescue proceedings. Therefore, if the claimant were to enforce or pursue its *in rem* claim against an owner after a winding up application has been presented to the court or an order has been granted by the court, it cannot expect that the vessel against which its claim lies will be ringfenced and dealt with separately from the owners other assets which fall within its insolvent estate.

6.1.2 Nature of the maritime claim

The nature of the maritime claim, whether it is a maritime lien or a statutory claim *in rem* or a statutory interest *in rem* was important under Australian and English law for purposes of a claimant that sought to obtain leave from the court in order to pursue its admiralty proceedings. However, in South Africa, this is not as relevant as a claimant would not be able to pursue any admiralty

proceedings against as our admiralty and insolvency laws only allow such if the claimant commenced admiralty proceedings prior to the insolvency proceedings.

Therefore, what is of importance in South Africa, is that the claimant has successfully enforced admiralty proceedings *in rem* or *in personam* for a maritime claim as per section 1 of the Admiralty Act or a maritime lien prior to the commencement of winding up, liquidation or business rescue proceedings. It is in this case, the vessel shall be ringfenced from insolvency proceedings and the claimant may pursue its admiralty claim *in rem* or *in personam* against the vessel or owner thereof.

8.3 RECOMMENDATIONS

Taking the above into consideration, there are two recommendations which may be proposed in so far as the overlap between admiralty and insolvency proceedings are concerned.

The first recommendation is in respect of an amendment of either the Admiralty Act or the Companies Acts. As seen in the dissertation, the Companies Act of 1973 was amended with the introduction of the Companies Act 2008 which introduced the new insolvency proceedings of business rescue in order to alleviate the harsh impact of insolvency proceedings such as winding up and liquidations under the Companies Act. However, as the case is with the Companies Act of 1973, the Companies Act of 2008 did not take admiralty proceedings, in particular the special treatment or preference enjoyed by maritime claimants, into mind. Under such circumstances, the inclination would be to propose a further amendment of these Acts, however proposing such may be met by contention by those in the maritime industry who would not want the special treatment or preference they enjoy under admiralty proceedings to be affected.

The above thus leads to the second recommendation which is that one needs to interpret the Admiralty Act and the Companies Acts in parallel to one another as was seen in the *Polaris* judgment. The basis of this recommendation stems from applying the rationale of section 5(4) of the Companies Act of 2008. In the *Polaris* judgment, Boqwana J found that it was possible to interpret section 10 of the Admiralty Act and section 133 of the Companies Act of 2008 concurrently. In his assessment of these provisions, Boqwana J held that the key in determining which statute the court had to refer to in determine the issues at hand, lay in the timing of the events sought to be protected by each of the statutes. Thus, the court reviewed section 10 of the Admiralty Act in parallel to section 133 of the Companies Act of 2008. Therefore, in terms of the *Polaris* judgment, when interpreting the winding up, liquidation and business rescue proceedings in terms of the Companies Act of 1973 and Companies Act of 2008, one must also bear in mind the special protection provided to vessels and any other maritime property arrested in terms

of admiralty proceedings. In doing so, one must determine the point at which either legal proceedings commence and establish which legal proceedings commenced first in order to ascertain how the vessel must be disposed of.

Therefore, if the second recommendation is followed as per the *Polaris* judgement, it may be possible for both Acts to co-exist alongside one another without any amendments to either thus diffusing the overlap between admiralty and winding up, liquidation and business rescue proceedings. However, it must be noted that with this approach there will always be “a race to the courthouse” between claimants under admiralty and insolvency proceedings so as to ensure that its claim against an arrested vessel is given priority before the commencement of the other competing legal proceeding. Nevertheless, it remains important for the courts to determine the commencement and timing of these proceedings in order to resolve the overlap between both legal proceedings. Ultimately, this overlap may be resolved once a harmonious approach has been adopted, not only in South Africa, but internationally, on how to best resolve it as ships continue to be one of the most elusive assets one can own in the global maritime sector.

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