

# MSC Susanna: naval vessels and right to limit liability

**Bowmans | Shipping & Transport - South Africa**



JEREMY PRAIN

- › [Introduction](#)
- › [Facts](#)
- › [Issue](#)
- › [Tonnage limitation](#)
- › [Opposition to joinder](#)
- › [Owners' submissions](#)
- › [Decision](#)
- › [Comment](#)

## Introduction

On the morning of 10 October 2017, a sudden and violent storm ripped through Durban, causing widespread destruction, loss of life and momentary chaos in the port.

Numerous ships broke their moorings and collided with others and with port infrastructure. In one incident, the MSC Ines ran aground perpendicular to the entrance to the port, blocking the entrance for some time. Unsurprisingly, a number of these incidents gave rise to litigation on multiple fronts, many of which are still making their way to trial in the South African courts.

Against this background, the Supreme Court of Appeal recently handed down a judgment in *MSC Susanna: The Owners and Underwriters of the MSC Susanna v Transnet (SOC) Limited*.

## Facts

In brief, the MSC Susanna broke its moorings during the storm and, while drifting in the port, collided with several vessels, including the FNS Floreal, a French naval vessel under the control of the French Ministry of Armed Forces (the Ministry). The MSC Susanna also collided with cranes and other infrastructure owned by the National Ports Authority of South Africa (NPA).

As a result of these events, the NPA and the Ministry brought claims for damages against the owners of the MSC Susanna (the owners). In response, the owners commenced a limitation action against the NPA, contending that their total liability for damages arising out of the events on 10 October 2017 should be limited in terms of the provisions of the Merchant Shipping Act (MSA). Moreover, the owners sought to join the Ministry to the action, with a view to invoking limitation in respect of the Ministry's claim as well.

## Issue

The issue for determination before the Supreme Court of Appeal was whether the owners were entitled to join the Ministry to the limitation action given that, on the face of it, naval vessels are excluded from the MSA's scope.

## Tonnage limitation

The essence of a ship owner's right, under South African law, to limit liability in an action for damage to property, on the basis of the tonnage of its ship, is encapsulated in section 261(1)(b) of the MSA, which reads as follows:

*The owner of a ship, whether registered in the Republic [of South Africa] or not, shall not, if . . . any loss any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity . . .*

*(b) . . . be liable for damages in respect of loss of or damage to property or rights to an aggregate amount exceeding 66,67 special drawing rights for each ton of the ship's tonnage.*

## Opposition to joinder

The Ministry resisted the application seeking to join it to the limitation action on the grounds that, as the owner of a foreign naval vessel, the right to limit was excluded by the provisions of section 3(6) of the MSA: "The provisions of this Act shall not apply to ships belonging to the defence forces of the Republic [of South Africa] or of any other country."

Therefore, the Ministry contended that the FNS Floreal was part of the French navy and the French defence force. It followed, in its submission, that the tonnage limitation provisions in section 261 did not apply in relation to its claim against the owners.

## Owners' submissions

In the argument before the Court, the owners contended that the tonnage limitation provisions of the MSA conferred an internationally recognised right upon them to limit their liability and that they were invoking limitation against the Ministry as the party making a claim against them, not against the FNS Floreal. They submitted that the right to limit is conferred in relation to claims to loss as regards loss of life or personal injury, or any loss of or damage to any property of any kind, whether movable or immovable. Therefore, the effect of the Ministry's contention was to introduce an unwarranted qualification to the broad and unqualified words "any property of any kind" by adding "save a naval vessel owned by the defence force of any nation".

## Decision

At the outset, the Court noted that this case was entirely novel to South Africa, and it hinged on the proper interpretation of section 261(1)

(b) and 3(6) of the MSA. The process of interpretation started with the interpretation of the words in the legislation.

The Court found that the words of the legislation as regards tonnage limitation were clear and comprehensive. The right to limit is given to the owner of the vessel, in respect of all loss or damage to any property or rights of any kind, whether movable or immovable. That language encompasses all types of property, without qualification, and is clearly wide enough to include loss or damage embodied in the Ministry's claim.

When analysing the scheme of the legislation as a whole, the Court noted that all of the provisions in the MSA that deal with liability are concerned with ship owners' liability to third parties, and claims against or between ship owners. In the Court's view, the fact that the claims of this nature arise out of the operation of ships is incidental. The focus of the language of the legislation is on the legal liability of ship owners and, in the case of limitation claims, it extends to other parties such as charterers, managers and ship operators. These are purely commercial matters, concerning the rights and obligations of ship owners.

The tonnage limitation language in the MSA may be contrasted with section 3(6) (as regards ships belonging to defence forces). This provision deals with exclusions of the MSA's applicability, insofar as the legislation relates to ships themselves. Section 3(6) does not state that the provisions of the act will not apply to the ship owners. In addition, it does not state that the MSA does not apply to defence forces, so as to preclude merchant ship owners from invoking its provisions by, for example, seeking:

- an order for the division of loss after a collision;
- a contribution to the damages arising from jointly caused personal injury; or
- an order limiting their liability.

The important distinction is that, on the one hand, the provision in the MSA that deals with tonnage limitation is concerned with the liability of a ship owner, while, on the other hand, section 3(6) of the MSA is directed at excluding naval ships from the provisions in the act insofar as they deal with matters concerning the operation of a ship itself.

In support of its finding, the Court noted that, among other things:

- limitation of liability exists as a matter of policy and none of the international conventions on limitation exclude its invocation in respect of claims arising from damage done to or by naval vessels; and
- section 261 deals with three situations – namely:
  - an occurrence that causes loss of life or personal injury;
  - an occurrence that causes loss or damage to property or rights; and
  - an occurrence that causes both loss of life or personal injury and loss or damage to property or rights.

Had the incident giving rise to this case resulted in loss of life or injury to naval personnel on board the FNS Floreal, they and the dependents of anyone killed could have brought an action against the owners to recover damages. There is nothing in section 3(6) of the MSA which suggests that the officers and crew of the FNS Floreal would enjoy a special exemption from the application of limitation. Therefore, it seems incongruous to say that the Ministry, as the FNS Floreal's owner, can do what its officers and crew cannot, and escape the application of limitation.

#### **Comment**

This case is a welcome addition to what is a rather limited body of South African jurisprudence on the right to limit liability under section 261 of the MSA. The outcome of the claims on the merits arising from this incident are awaited with interest.

*For further information on this topic please contact [Jeremy Prain](mailto:Jeremy.Prain@bowmanslaw.com) at Bowmans by telephone (+27 21 480 7800) or email ([jeremy.prain@bowmanslaw.com](mailto:jeremy.prain@bowmanslaw.com)). The Bowmans website can be accessed at [www.bowmanslaw.com](http://www.bowmanslaw.com).*