NATIONAL PORT USERS' FORUM

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Our Reference
Mr A Norton/96/114

24 February 2003

Mr Jeremy Cronin, MP
Chairperson of the Portfolio Committee on Transport
Parliament of the Republic of South Africa
P O Box 15
CAPE TOWN
8000

Attention : Ms Monwabisi Ngunqu
E Mail : mnguqu@parliament.gov.za

49 PAGES IN ALL

Dear Mr Cronin

PUBLIC HEARINGS ON THE NATIONAL PORTS AUTHORITY BILL [B5-2003]- CALL FOR SUBMISSIONS

Thank you for inviting our submissions on the National Ports Authority Bill ("the Bill").

The membership of the **National Port Users' Forum ("NPUF")** consists of port users and associations whose members are port users. The NPUF was formed in April 2001 in order to communicate with the South African government and other appropriate bodies regarding the concerns of its members in respect of developments in the South African ports. The current membership of the NPUF, in alphabetical order, is as follows :

The Association of Shipping Lines ("ASL") was formed in January 1975. Its membership comprises shipping lines calling regularly at one or more ports on the southern African seaboard in the range Walvis Bay, Nacala and Johannesburg, the last being a port of entry and shipment for containerised cargo. The Association is recognised as being the authoritative mouthpiece representing its members and the

interests of all other Lines calling in the range Walvis Bay, Nacala and Johannesburg.

The Association of Ships' Agents & Brokers of Southern Africa ("ASABOSA") was formed in June 1970. Its membership comprises agents and brokers in Southern Africa, representing local and foreign stakeholders, including the owners, charterers and cargo interests. The scope of involvement covers the commercial and operational interface of these principals in South Africa. It is relevant to note that its members' are currently forced to contract with Transnet Limited as principals

The Island View Leaseholders Association is an association of persons who have land and facilities on lease or sub-lease in the Island View and Fynnlands complexes located in the Durban port area. The association was formed in around 1996 to represent the interests of its members in liasing with institutions which have an impact on their businesses, in particular, the port of Durban.

The Maydon Wharf Leaseholders Association is an association of members of the Durban Chamber of Commerce and Industry who hold leases in the Maydon Wharf and Bayhead areas of the port of Durban. The Association was formed over forty years ago and serves to represent the interests of the members of the Association with regard to the Maydon Wharf and Bayhead areas.

The National Association of Stevedores was established in 1993 with its pre-cursor, the Association of Durban Stevedores, being established in 1985. Its membership comprises *bona fide* stevedores actively engaged in business directly connected therewith, and have valid stevedoring licenses issued to them in terms of Harbour Regulations. It promotes and maintains the interest and welfare of its members and speaks on their behalf on general issues of concern.

The Richards Bay Coal Terminal Company Limited is the operator of the Richards Bay Coal Terminal that, with an annual throughput of about 66 million tonnes of coal, is the largest terminal of its kind in the world. It was formed in 1976. It is a joint venture company, the shareholders of which are the larger coal producers in South Africa.

The South African Association of Freight Forwarders – KZN is the Kwa Zulu Natal Regional Association of the South African Association of Freight Forwarders (“SAAFF”) and is affiliated to the International Federation of Freight Forwarders Assocations (“FIATA”). It was formed in 1896 to further the interests of all freight forwarders, warehousemen and harbour carriers in the Kwa-Zulu Natal region. Today it represents the interests of over 125 firms in the Kwa-Zulu Natal Region.

The South African Shippers’ Council is a non-profit body that represents cargo owners in Southern Africa on strategic matters of principle affecting freight transport and related logistics. Its membership comprises most major shippers from South Africa and is, therefore, uniquely placed to represent the interests of South Africa’s import and export markets. It was formed in 1995 as a mouthpiece for shippers to communicate their concerns to all entities that have an impact on their activities.

The Terminal Operators Association is a loose association of private terminal operators in the port of Durban which was formed in about 1997 in order to give its members a structured voice in the Durban Port Liaison Committee meetings which are convened by the Durban Chamber of Commerce and Industry. It has subsequently also represented its members' interests in other forums dealing with business relevant to that of its members.

We would first like to place on record the fact that certain of our members have been integrally involved in the debate relating to port restructuring for quite some time. In this respect I annex hereto marked "A" a copy of a letter sent to the Minister of Transport on 10 May 2000. That letter sets out the concerns that were then being expressed by port users generally and reflects the background to those concerns. From that letter you will note that the implications to the introduction of the Legal Succession to the South African Transport Services Act, No 9 of 1989 had at the time of its introduction not been fully appreciated either by port users or by government. Almost from the time of such introduction both port users and government have been investigating how best to restructure the ports in the country. To bring our members' involvement in that debate up to date, we should mention that members contributed to investigations by Mr John Arnold and Drs Gustav De Monie, both apparently appointed by the Department of Public Enterprises, and the NPUF also made extensive representations to the National Department of Transport ("NDOT") in respect of the White Paper on National Ports Policy published in Government Gazette Volume 446, No 23715 dated 8 August 2002 as general notice number 1409 of 2002.

We are pleased to say that the Bill is broadly in accord with the structures that our members have long advocated and that it addresses many of the concerns of port users either wholly or in part. For that reason we in the main support the introduction of the Bill.

We do, however, have remaining concerns and queries, both with certain principles inherent in the Bill and with some of its detail. We raise our queries with you not so much to seek answers to them but simply so that you are aware of them and, if you believe them important, are in a position to take them up with the relevant authorities.

It is those concerns and queries to which we now turn and, where appropriate, in respect of which we make submissions. In doing so we will deal with the Bill section by section.

Section 1

The phrase "port repair facilities" as defined does not appear anywhere else in the Bill and, consequently, should be deleted.

Section 10

The ability of the Minister to review, vary or extend the boundaries of ports and to determine new ports has very serious implications for prospective tenderers for concessions within the existing port areas and may well affect the price that persons

are prepared to pay for concessions. If it is open to the Minister, without regard to the capital investment paid by existing concessionaires, to determine a new port or extend existing ports so as to flood the market with competing facilities, tenders for concessions will reflect that risk and will be well below what the National Port Authority ("NPA") would otherwise achieve.

For those reasons we believe that the investments of existing concessionaires and other facility operators should be specifically protected in the process referred to in section 10(2)(b), that the process should be spelled out in more detail, and that the process should also apply to section 10(3).

Section 11(1)(u)

It is not clear to us precisely what asset or assets are envisaged in this sub-section or how it is intended that the NPA will fulfil this function in circumstances where it is not entitled to sell off its own assets as is provided by section 16(4).

Section 11(1)(y)

We understand that currently the NPA plays a pivotal role in co-ordinating search, rescue and salvage operations on the South African coast. They are part of the South African Search and Sea Rescue Organisation ("SASAR") established by section 4 of the South African Maritime and Aeronautical Search and Rescue Act, No 44 of 2002. It seems to us that the discretion given to the NPA in this sub-section as to whether to participate in search and rescue outside of the port jurisdiction is contrary to their obligations as a member of SASAR. We assume that the other members of SASAR will be consulted on this prior to any final decision being made in this respect.

Section 11(2)(c) and (3)

We understood the intention to be that the NPA would not compete with parties to whom it granted concessions but would only act as an operator in circumstances where private enterprise is not prepared to act. We believe that the description of the NPA as "an operator of last resort" in section 11(3) reflects that intention but we do not believe that sub-sections 11(2)(c) and (3) read together go far enough to ensure that the NPA will concession out all that it can.

We would prefer a clear statement in the Bill that the NPA will not compete with any other port operator and that it will concession out all services and facilities that it is reasonably able to.

Section 14

We are concerned that such an important cog in the overall transport chain is subject to the immediate direction of the Minister of Public Enterprises rather than the Minister of Transport. The Minister of Transport may currently only operate a negative influence over the ports by way of the appointment of the Port Regulator in terms of section 31(1)(a) and by way of ministerial direction in limited circumstances in terms of section 58(1). We would prefer to see the Minister of Transport playing a far more active role in the NPA by way of appointment and removal of the Board.

Sections 14(2)

We believe it essential that at least one of the members of the Board, if not more, have knowledge of shipping, ships' agency and clearing and forwarding. The structures in those industries are varied and highly complex and without an in depth knowledge of those structures the Board will not be able to interface effectively with those industries.

Section 16(2)(g) and 16(4)

Section 16(4) should in our view be couched so as to preclude a sale of NPA land by any person rather than encumbering the Board with the obligation to achieve that end.

Furthermore, it is not clear exactly what section 16(2)(g) attempts to achieve. As it currently stands it simply allows the Board to approve "the sale, acquisition and long-term lease of property excluding land in the ports". First, we assume that the intention is to preclude sales, acquisitions and long-term leases without prior Board approval. If so, we support that intention. However, we do not believe that the current drafting reflects that intention.

In addition, the words "… excluding land in the ports" is confusing. We take it that what is intended is that not even the Board can approve a sale of port land. We further take it that it is intended that the Board can approve a long-lease, which most concessions would be. The way in which the sentence is constructed, however, means that sales, acquisitions and long-term leases of port land are excluded from Board approval.

In the circumstances it is submitted that it is clear that these provisions need to be reworked.

Section 18(3)

It is our view that reappointment to the Board should be subject to the same procedure as appointments in terms of section 15(2) and that, as such, the latter section should be amended to read, "Before appointing or re-appointing a member to the Board, the Shareholding Minister must …."

Section 24(1)

We believe that, as with section 18(4), the power should be obligatory and not just discretionary.

Sections 30(1)

We have always understood that it was the intention, bearing in mind the very substantial assets and powers which would devolve upon the NPA under the Bill, that all actions taken by the NPA would be subject to appeal to an independent regulator and, particularly, that it would review the tariff of fees that the NPA would be entitled to levy under sections 50 and 51 against a set of objective criteria. We submit that it is right and proper that these roles be allocated to the Regulator.

Section 30(1)(g)

This section assumes that the Competition Commission has jurisdiction over the NPA. We are aware of the fact that the NPA as currently constituted has denied, in papers before the Competition Tribunal, that the provisions of the Competition Act, No 89 of 1998 are applicable to it. In the circumstances the Bill should be amended to include a specific provision to the effect that the NPA is bound by the Competition Act, No 90 of 1998.

Section 31(1)

Furthermore, to ensure the independence of the regulator we believe that the regulator should be appointed by the Minister in the same manner as we have submitted that members of the board be appointed and that previous and existing employees of Transnet, the NPA and government (the latter due to the relationship between the shareholding minister and the NPA) should be excluded.

Section 31(2) and (3)

We further believe that such persons should cumulatively have an in depth knowledge of port operations and the structure of the shipping, ship's agency and clearing and forwarding industries. Without such knowledge the understanding of the regulator will be severely hampered.

Section 33(3)

We note the prohibition in (c) relating to confidential information and submit that such prohibition should be much wider in that it should prohibit any disclosure of confidential information supplied to the regulator and apply to both the regulator and its staff.

Section 34(1), (4) and (5)

It seems to us that these sections contemplate a public tender procedure in respect of all agreements mentioned. It is submitted that it is only by such procedure that the requirements of sub-section (5) will be met. We support such a procedure and to avoid any doubt on the matter, believe that the section should specifically state that such a procedure should be utilised.

We are also of the view that the tender documents concerned should clearly specify all criteria that need to be met for a successful tender leaving only the sum prepared in contest. In that manner prospective tenderers will know in advance whether they meet all other tender requirements. We believe that this principle is important enough to qualify for inclusion in the Bill.

Section 35 and 45

Both of these sections have the effect of potentially depriving existing Port users of contractually accrued rights. For example, a current lessee in the port areas would have to apply for a license in order to continue to operate its facility (section 43(1)). The NPA is obliged to grant such license only if the applicant is reasonably capable of complying with the terms and conditions of the license (section 43(3)). Such license may include "such other terms and conditions as may be necessary" (section 36(1)(e)). By these sub-sections it is possible that a license may be refused.

The right to operate its facility was, however, granted to a port user by way of the lease that it concluded with Transnet Limited, which rights and obligations will on the enactment of the Bill flow between the lessee and the NPA by section 27(2)(b). Consequently, the refusal to grant a license as permitted in terms of the Bill will result in the expropriation of the leasehold rights of the lessee.

No example needs be given in respect of the manner in which section 45 potentially deprives a lessee of existing contractual rights. The whole import of that section is to do just that.

Maydon Wharf is a good example of why contractual rights should not be expropriated by either of these two methods.

The South African Transport Services, the predecessor of the NPA, originally (in the mid-20th century) granted long leases (in most cases, with rights of renewal, for a century) on attractive terms at Maydon Wharf in order to attract development to that area. Most of those leases have restrictions on the cargo that can be landed and shipped without paying landing and shipping charges and other restrictions.

Over time many of those leases have been ceded to third parties for full market value (paid to the cedent) taking into account the relatively low rentals payable to the NPA and the full terms of the lease, including the various restrictions that contractually apply. Consequently, the various cessionaries have paid full market value for the leases by way of the capital payment in respect of the cession to the cedent and the relatively low rentals payable to the NPA.

The NPA has two difficulties with the Maydon Wharf area.

The first is that it believes that the leaseholders do not pay market related prices for the leases concerned. A further argument is that, as such, the situation on Maydon Wharf will drive down the prices achievable on concessioning other facilities in the port.

Of course, those leaseholders that have purchased their leasehold rights by way of cession of them have paid market related values for them. Indeed, there is the example of a recent sale in liquidation of the leasehold rights of a particular property on Maydon Wharf which was sold for R18 million. Consequently, the argument on the effect on concessioning is incorrect. The fact that such prices are not payable to the NPA in rental is solely because the original lease rights were given at reduced rentals to induce the development of Maydon Wharf.

The second is that there are various leases on Maydon Wharf that are not being used for port purposes and that those that are being used for port purposes are fragmented. Those that are not being used for port purposes are being employed, for example, as storage and distribution or factory space.

The NPA envisages terminating leases that are not being used for port purposes and consolidating the remainder into a number of large terminals. The NPUF agrees that it is necessary for port development for a process of “culling” of those leases not being used for port purposes and consolidation of the rest to take place.

However, the NPA would, in terms of the Bill, not pay any compensation for the termination of leases and, further, would then substantially raise the rentals payable on leases to accord what they believe to be market related rentals. In this respect it has indicated that it is not prepared to take into account the capital payments already made by lessees in respect of the purchase of cessions of leases.

This is unacceptable to us. The reality of the situation is that many of the current port users on Maydon Wharf have paid market value for their leasehold rights. It is our view that those leaseholders’ rights must be respected and any changes to their leasehold rights can only be by way of mutual agreement.

Further, those who are tenants on Maydon Wharf but do not use their premises for port purposes can only have their rights terminated by mutual consent or for full value received.

There are a number of other reasons for not permitting the licensing and Maydon Wharf provisions to be promulgated in the current form.

Firstly, those who the NPA are now trying to attract to develop existing berths by way of concession will be reluctant to tender against the background of a precedent of this nature. The logic will be that if the State is prepared to renege on previous contractual promises made to attract development then it can do it again. The result will be that concession prices will be adversely affected.

Secondly, many of the purchases of leasehold by way of cession are financed through third party financial institutions. There are many different structures available to financiers. They are able to finance on the basis of taking security by way of mortgage bond over the registered long leases, taking cession of the leases concerned or through listed property funds. In the short time available we have confirmed that both the second and the third types of finance have been used on Maydon Wharf and we would be surprised if, given more time, we were not able to confirm examples of the first.

In the circumstances it is not only the rights of the current operators of the leasehold properties being affected but also the rights of financiers (and their shareholders and investors) of the purchase of those leases.

Thirdly, the disruption to trade and the economy of the country cannot be overlooked. The operators of facilities on Maydon Wharf have firm contractual arrangements with customers in place. Obviously those customers have made arrangements based on those contracts and to have those arrangements arbitrarily terminated will necessarily impact on other trading arrangements.

Finally, we have been advised by counsel that such a course of action would infringe the existing users' constitutional rights and would be subject to successful legal attack. In that respect we annex hereto marked "B" a copy of an opinion received from counsel dealing with this issue.

For all those reasons we submit that the provisions of section 35 should not apply to any port users that have existing rights to do business in the ports and that section 45 should be deleted in its entirety.

Definition of port service and port facility in section 35(1) as read with the section 1 and 63(1)(c)

It is an offence under section 63(1)(c) to provide a port service or operate a port facility without a license. We do not believe that what is essentially a commercial matter should be dealt with by criminal sanction and, for that reason, submit that section 63(1)(c) should be deleted.

In any event the current definition of "port services" is unacceptably imprecise. It is, for example, whether read with the definition of "terminal operations" or not, potentially wide enough to cover haulage operations within a port area. There is absolutely no reason why a shipping line or a shipper or receiver of cargo should have his choice of haulage operator limited by the NPA's ability to refuse licences. Indeed, the ability on the part of the NPA to limit the market of potential service providers by refusing licenses constitutes a serious threat to competition and, consequently, to overpricing of those services.

For that reason we submit that it is necessary that rather than giving a general definition of "port service" and none of "port facility" the actual industries that are sought to be covered by those definitions be set out and debated at this time.

In this respect the definition of “port services” as including “any other services provided within a port which are designated as such by the Authority by publication in the Gazette” in our view gives the NPA an inappropriate ability to extend its influence without reference to any other authority or the sector designated.

This arbitrary power should not be given to the NPA and should be deleted in its entirety. At the very least any such designation should only be after a transparent process with reference to the Minister and the Port Consultative Committees against the backdrop of stated criteria (in the Bill) to determine whether there is a necessity for making such a designation.

Section 35(6)

We believe that the reasonable period envisaged should be determined in the legislation in order to avoid litigation to determine that issue.

Section 36(1)(c)

We note that it is intended that the NPA charge a license fee. We are most concerned that licensing will simply be seen as a method of raising revenue for the NPA rather than for any other purpose.

It is our view that persons not renting space within the harbour area that have legitimate business in that area should be entitled to access that area to conduct their business without having to pay for a license to do so. Furthermore, those renting space within the harbour area pay sufficient in rental and should not in addition pay a license fee.

In any event, the ability to charge a license fee without any criteria as to how it will be set is extremely dangerous. At the very least we believe that fee should only cover the cost of administering the license.

Section 41

We are concerned that the confidentiality of information obtained by this section is respected and submit that it is appropriate that a clause be added to this effect.

Section 42

As the section currently reads it is arguable that the Shareholding Minister is entitled to act in the event of industrial unrest, strike or lock out regardless of whether it gives rise to an emergency which creates a real and imminent threat to the national interest of the Republic or public safety. We believe that is not the intention and that the section should be re-worded to make it clear that the industrial unrest, strike or lock out must also give rise to an emergency which creates a real and imminent threat to the national interest of the Republic or public safety, before such Minister is entitled to act.

Section 43(7)

In the event that such condition is mistakenly not included we would prefer this sub-section to read –

> "7) Any licence granted to Transnet pursuant to an application contemplated in subsection (6) is subject to the condition that such licence will terminate in the event that a third party is authorised to provide the relevant services in terms of a concession, public-private partnership or licence granted, concluded or issued under this Chapter."

Section 48

We believe the closure of a port to be of such a serious nature as to warrant parliamentary debate rather than simply cabinet approval.

Sections 50 and 51(3)

These provisions raise the issue of the subsidisation of one port over another and the subsidisation of one port user over another by the NPA. Although this section does not deal with government or other parastatal (for example, Spoornet) subsidisation we will raise such subsidisation in dealing with this section.

We do not agree with subsidisation as a matter of principle. For business to flourish the one fact that is beyond debate is that the playing field must be clearly established in advance. Otherwise economic players factor risks into prices to accommodate uncertainties.

For that reason the NPA will not achieve the capital investment in the port infrastructure it otherwise would if statutory guarantees were given that neither the NPA, the state nor any other parastatal would favour one port or port user over another.

If such statutory guarantee is not given, persons who are tendering for concessions will have to consider the risk of a competitor port or a competitor facility being substantially favoured, thereby adversely affecting return on investment. The result will be that the NPA will not achieve nearly what it could by way of return on assets.

For that reason alone we believe that a guarantee that there will be no different treatment between ports, customers and facilities ought to be written into the Bill. In those circumstances the NPA will achieve maximum return on its assets.

Section 51(6)

The matters that this section deals with are commercial matters that are covered by ordinary contractual principles. If a party promises something and does not perform and the other contracting party suffers damages they are recoverable in the ordinary course. It is our view that this principle does not require to be dealt with statutorily.

It would be equally inappropriate that a section providing relief in respect of contractual rights in favour of parties contracting with the NPA be included in the Bill to protect those parties, for example, that if the NPA were to withdraw a promise to render a service it would have to pay the damages resulting from the breach.

We submit, in the circumstances, that commercial matters ought to be left to contracting parties to be dealt with in terms of the ordinary rules of contract and that there is no justification whatsoever to statutorily entrench what is effectively an ordinary claim for damages for breach of contract.

Section 52

We realise that section 34(3) permits the NPA to contract out any service it is obliged to provide in terms of the Bill. However, we would in any event prefer sub-sections 52(1)(d) and (e) to be amended to reflect that the NPA must "provide or procure the provision of" the services concerned so that there is no doubt that the NPA is entitled to contract for a private operator to undertake those services.

Sections 54 and 55

Sections 54 and 55 are effectively a repeat of the current provisions relating to pilotage in South African law. The effect of those provisions is the decision in the Supreme Court of Appeal judgement in the matter of the "Stella Tingas", a copy of which is annexed marked "C".

That judgement confirms that if a vessel collides into a stationary vessel moored alongside due to the negligence of a pilot, the stationary vessel has no right to recover her damages.

We are of the view that this is an unsatisfactory situation.

Furthermore, in the light of the fact that the NPA will have the right to license an independent third party to conduct pilotage services in the ports there is absolutely no reason to further protect such services in the manner in which section 55 does.

Section 56

The South African Maritime Safety Authority ("SAMSA") is the body that deals in all respects with the competency of seafarers and is the interface between the NDOT and the International Maritime Organisation on such matters. Consequently, it is that body that has the necessary experience to license pilots. For that reason we believe that the licensing of pilots ought to be dealt with by that body rather than the NPA.

Section 56(3)

If that last submission is accepted then this provision should fall away. If it is not accepted, then, at the least, this provision should be mandatory rather than discretionary.

Section 57(2)

We would have thought that notification to SAMSA would not be sufficient. To cease operating a lighthouse or other aid should in our view require the agreement of that body.

Section 60

We are of the view that it is absolutely necessary that a national Committee be established to consult to the Minister from time to time in addition to each port committee.

We are further of the view that it should be specified that representative bodies of those groups mentioned in 60(1)(b) and (d) be entitled to appoint their own representatives to those bodies.

Section 60(3)

In our view there should be an obligation to consult with the Port Consultative Committees on the introduction of port regulations either by the Minister or by the NPA and port rules.

Section 64

In terms of the amendment intended to be made to the Institution of Legal Proceedings against Certain Organs of State Act, No 40 of 2002, by this section persons with claims against the NPA will be precluded from instituting proceedings against that body unless notice of a claim has been given within six months from the date on which the debt became due.

Transnet Limited has now operated its Portnet division for some fourteen years without such protection and has not been hampered by it. Furthermore, with the NPA concessioning out and licensing its various operations it is not expected that it will be the subject of many claims in the future. For that reason as well we submit that there is no necessity to provide the NPA such protection.

Transparency

With the ability these days to establish an internet site with an e-mail reporting feature on changes to the site at relatively low cost it is our view that transparency is now easily achievable. There are many issues on which we believe that it is essential that the NPA and other bodies dealt with in the Bill be transparent. They include :

- the matters discussed in section 11(1)(b);
- tenders for the matters discussed in section 11(1)(i);
- the matters discussed in section 11(1)(z);
- the matters discussed in section 11(2)(b);
- the matters discussed in section 13(2);
- the matters discussed in section 16(2);

- the matters discussed in section 18(6);
- the matters discussed in section 19;
- the matters discussed in section 21;
- the matters discussed in section 22(1) and (4);
- the matters discussed in section 30(1)(g);
- the matters discussed in section 31(5);
- the terms of concessions and licenses to be granted;
- the matters discussed in section 50(1);
- the matters discussed in section 59; and
- the representatives on the Port Consultative Committees.

In the circumstances we believe that the Bill should be amended to include an obligation to publish these and other matters.

You will appreciate that there are, consequently, a number of matters that remain of concern to our members.

In conclusion, we thank you for this opportunity to provide you with our comments and confirm that we now wait to hear from you as to whether you require evidence to be tendered at the Portfolio Committee hearings scheduled for Wednesday, 26 February and Tuesday and Wednesday, 4 and 5 March 2003.

Yours faithfully

TONY NORTON
CHAIRPERSON
NATIONAL PORT USERS' FORUM

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Annexure "A"

10 May 2000

The Minister of Transport
The Honourable Dr A M Omar
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0001

Private Bag X9129
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Dear Sir

PORTNET

We are the Association of Shipping Lines. We were formed in January 1975. Our membership comprises of shipping lines calling regularly at one or more ports on the southern African seaboard in the range Walvis Bay, Nacala and Johannesburg, the last being a port of entry and shipment for containerised cargo. We are recognised as being the authoritative mouthpiece representing shipowners. We are the forum for raising all matters relating to the effective operation of the ports of southern Africa. We address you out of concern for the restructuring of the ports of South Africa. In this respect it may be of value to you to be appraised of the history leading to your current port policy and to set out our understanding of that policy. In the light of that background our concerns may be more understandable.

THE LEGAL SUCCESSION TO THE SOUTH AFRICAN TRANSPORT SERVICES ACT

On 1 March 1989 the Legal Succession to the South African Transport Services Act, No. 9 of 1989 was enacted. In terms of that Act the Minister for Economic Co-ordination and Public Enterprises floated a public company named Transnet Limited, the shares of which were then and still are wholly owned by the State. Also in terms of that Act Transnet on 1 April 1990 assumed as a going concern the whole of the commercial enterprise of the State previously operated by the South African Transport Services ("SATS"). All harbour land formed a part of that take-over.

There were a number of legal consequences that flowed from those changes, none of which were immediately noticed.

- Ownership of Harbour Land

  Prior to 1 April 1990 the recognition of harbour land as being a national asset was paralleled by its legal status as *res publica*. By being classified as *res publica* (public land) the public user was, unless legislation specifically prohibited access to it, automatically entitled to unrestricted access.

  Harbour land was in terms of the old South African Transport Services Act, No. 65 of 1981 held by the State in the interests of the public.

  With the transfer of harbour land to Transnet the status of the land changed to one of private ownership with all the usual consequences of private ownership :

  - Access to Harbour Facilities - The right of the public to access to harbour areas was reversed.

  - Disposal of Harbour Assets - Transnet was and is entitled to sell or let national assets to anyone at any price rather than trading fairly.

  - Construction and Closure of Harbours and Harbour Facilities - Transnet now has absolute control over these issues.

- Dualistic Role of Harbour Authorities

  Prior to 1 April 1990 the potential conflict between the function of harbours as providing both a public service and constituting a source of revenue was balanced by the fact that :

  - SATS, being a commercial enterprise of the State, was ultimately answerable to the general public through Parliament;

  - in terms of the SATS Act SATS was administered "on business principles with **due regard to the economic interests and total transport needs of the Republic**" (see Section 7(1) of the SATS Act);

  - in terms of the SATS Act the profit motive driving SATS was limited to necessitating only that "so far as may be possible, the total earnings of the South African Transport Services [were not more than] sufficient to meet the necessary outlays for exploitation, capital costs, and contributions to a revenue reserve" (see Section 7(2)(A) of the SATS Act);

  - the views of the transport industry generally and harbour users in particular were expressed through the SATS Board (see Sections 4 to

6 of the SATS Act) and the Harbour Advisory Boards (see Section 28 of the SATS Act) respectively; and

- decisions of SATS were subject to judicial review in terms of South African administrative law principles.

In that context there was little need for legislation to ensure the provision by SATS of less profitable and, if necessary, even unprofitable facilities and services essential for the operation of the ports under its control.

Transnet Limited is under no legislative obligation in respect of harbour safety and its main object in terms of clause 2 of its Memorandum of Association is

> "to conduct transport and harbour operations and to carry on business in all aspects and branches of transport and harbour operations, including the control, management, establishment, maintenance and exploitation of railways, railway services, road motor services, air services, pipelines, harbour and harbour services"

Thus the only present inducement to Portnet to provide the services of a port authority is the attainment of profit therefrom.

That leaves obvious problems in that harbour safety functions and other unprofitable or comparatively less profitable harbour commercial functions are not profit making areas. Indeed, against this background one can well understand the motivation behind the changing of the whole nature of certain harbour areas to more commercial ventures such as property developments.

- Monopolistic Operation of South African Harbours

Prior to 1 April 1990 SATS had a monopoly on harbour and rail facilities (including the rail-commuter facilities) in this country as well as a substantial interest in the country's roads and airfreight industries.

However, the same factors which balanced the potential conflict between the function of harbours as providing both a public service and constituting a source of revenue prior to that date served to restrain monopoly abuse by SATS.

On 1 April 1990 the whole of the commercial enterprise of SATS save for rail-commuter facilities was transferred to Transnet Limited as a going concern (see section 3(2) of the Legal Succession Act).

Consequently, Transnet Limited assumed the same monopoly on harbour and rail facilities (excluding the rail-commuter facilities) in this country as well as a substantial interest in the country's roads and airfreight industries.

However, Transnet, unlike SATS, is motivated solely by profit.

Against that background there are a few relatively easy methods of increasing profits. They are :

- raise the harbour tariff. There are no competitive constraints in this regard;

- limit the quantity of particular services available, thereby artificially increasing the value of those services;

- impose unreasonable contractual terms which, for example, unduly limit its contractual or delictual liability to harbour users without accepting fair and reasonable reciprocal limitations on the contractual or delictual liability of those users;

- advantage one harbour user over another for the purposes of its own ultimate advantage (e.g. providing preferred rates or facilities to its other divisions, for example, its road transport division which trades as Autonet and/or to joint venture partners);

- use the profits made in a monopoly sector of our business to cross-subsidise the losses incurred in a non-monopoly sector of our business in order to drive competitors out of business (SAA and Flightstar and the Competitions Board Report)

- venture into competition with existing harbour users and compete unfairly in that respect by, for example, attracting the business of the principals/clients of those users by offering discount rates on harbour tariffs or preferent access to harbour facilities and services

- use the information necessarily made available to a port authority for the smooth operation of the port to tout for work for other harbour related businesses into which it might venture in competition with existing harbour users or undercut the fees of such users; and/or

- use the information necessarily made available to a port authority for the smooth operation of the port to enable its other divisions, for example, its road transport division and/or joint venture partners to tout for work for which they compete with other harbour users or undercut the fees of such users.

- advantage Portnet and other trading divisions or joint venture partners by denying access to harbours to any other competing parties

- There were also attitudinal changes on the part of the new Portnet - the major being that "WE ARE NOW A BUSINESS AND ARE HERE TO MAKE MONEY AND RUN EFFICIENTLY". With that change in attitude it is obviously extremely tempting to make use of the legal changes to assist in the making of profit.

DEVELOPMENTS

The Department of Transport and the Harbour Sub-Committee

It was the Marine Division of your department that first realised that certain consequences of the Legal Succession Act had not been fully considered. It was particularly concerned that Portnet, as a division of a public company, was under few legislative obligations in respect of duties usually associated with a port authority.

In order to investigate the situation your department constituted a committee named "The Committee on the Operation and Safety of Ports, Harbours, Lighthouses, etc.". At the second meeting of that committee held in Pretoria on 23 November 1990 it was resolved to constitute a sub-committee to consider the legal framework governing Portnet's obligations in respect of the operation and safety of ports, harbours and lighthouses ("the Harbour Sub-committee"). The Harbour Sub-Committee met on six occasions from May 91 to June 92 (10 May 1991 in Pretoria, 29 August 1991 in Johannesburg, 20 September 1991 in Cape Town, 6 November 1991 in Pretoria, 10 January 1992 in Durban and 25 June 1992 in Pretoria). All five meetings were attended by representatives of your department, Portnet, and, at the invitation of your department, the South African Shipowners Association ("SASOA") and the Association of Ship's Agents and Brokers of Southern Africa ("ASABOSA") with whom we have a close relationship. The last two meetings were also attended by a representative of the Policy Unit for Public Enterprises and Privatization and ourselves.

Industry and the Standard Trading Conditions

Although concerns were then being expressed by industry regarding the unrestrained powers which had accrued to Portnet it had not at that time considered the extent of that power and, consequently, did not fully appreciate the dangers inherent in it. As was inevitable, an issue materialised which forced industry to properly apply our minds to the situation.

On 24 July 1991 Portnet advised ASABOSA and us that it intended to replace the existing harbour regulations and to conclude conditions of trade with all harbour users. Portnet then arranged a meeting with ASABOSA and us on 15 August 1991. At that meeting Portnet tabled "final recommended" drafts dated 14 August 1991 of, *inter alia*, "Port Regulations", "Portnet : Standard Conditions of Trade" and "Contractual Agreement - Ship's Agency".

Those documents had wide-reaching implications for industry and forced both ASABOSA and us, amongst other organisations to properly consider the rights and obligations of Portnet.

Industry and the Harbour Sub-Committee

In the interim the Harbour Sub-committee met on 29 August 1991 for the second time. The ASABOSA representatives at that meeting raised the issue of the draft Port Regulations and proposed that the issues raised by those regulations should be investigated and dealt with by the committee. At the third meeting of the committee (20 September 1991) that proposal was accepted. Comment was provided to the consultants employed by your department who sat on the committee and their proposals were debated at the fourth and fifth meetings of the committee. At the sixth meeting of the committee held in Pretoria on 25 June 1992 a Harbour Bill was presented for consideration. The Bill provided for the transfer of all harbour property back to the State and provided the State with the right to accept tenders for the operation of commercial harbours and to let the necessary harbour property to the successful tenderer.

Industry and the Committee of Inquiry into a National Maritime Policy for the Republic of South Africa

On 16 April 1992 the then Minister of Transport had appointed THE COMMITTEE OF INQUIRY INTO A NATIONAL MARITIME POLICY FOR THE RSA. The membership of the committee comprises Messrs B C Floor (Chairman), W Kempen, H E Kramer, Adv. D J Shaw and Capt. R H Harm. The committee had not really become seized of the Portnet issue. SASOA then recommended that a national policy for ports be formulated so as to compliment the national maritime policy then being investigated by the committee. The Minister agreed to that proposal.

Industry then generally made proposals to the Committee and in doing so raised the problems created by :

- the ownership of harbour land;
- the dualistic role of Portnet; and
- the monopolistic operation of the harbours.

After the submission to the Minister of a confidential preliminary report the Committee published its final report on 31 August 1993.

The Report Of The Committee Of Enquiry Into A National Maritime Policy For The Republic Of South Africa ("The Floor Report")

The stated goal of the National Maritime Policy was to achieve the optimum in the development and utilisation of all national marine assets for the benefit of the nation. In that context the committee viewed the primary role of the commercial ports as being to promote the growth of the economy by enabling the export of cargo to proceed efficiently at minimum cost. It was against that background that the report considered the various matters raised by industry. It distinguished between the responsibility for the maintenance and development of the basic port infrastructure on the one hand (ie. dredging, breakwaters, etc.) and the supply of port services or operation of port facilities and terminals on the other. It recommended that the former be undertaken by the port authority and the latter, wherever possible, by private enterprise under the regulation of the port authority. It

recommended that the charges of the port authority be subject to the pricing principles applicable to public utilities or state enterprises - cover cost inclusive of long term development. It recommended that increases in those charges and the charges of private enterprise, where not subject to competitive constraints, be subject to an appeal. The appeal authority was envisaged as being a government body. It supported the establishment of subsidiary port authorities for each port responsible for leasing port land, minor infrastructure development, possibly marine services, tariff regulation and the business strategy of the port

The committee then considered the following matters raised by Transnet :

- that the transfer of R3 000 m assets would constitute a restructuring permitting of foreign loans to be recalled;

- that Transnet might not be able to finance its other operations without the cross-subsidisation afforded by Portnet;

- that Transnet will require compensation for the land assets; and

- that the financing of the underfunding of the Transnet Pension Fund would need to be resolved.

Consequently, the Committee proposed the following interim solution :

- that a national Port Authority would be established with a Board of Directors responsible to Parliament;

- that the Board of Directors would be appointed by the Government from the private sector but that persons with a direct or indirect financial interest in the port industry would be excluded from appointment;

- that the harbour assets (land) would remain the property of Transnet Limited;

- that Portnet be divided into two business units :

    - Port Management which would administer harbour land by fulfilling the landlord function which would subsequently be assumed by the Port Authority but that any dealings in those assets would require the approval or authorisation of the Port Authority; and

    - Port Operations which would continue to provide port operations at a profit until the policy of introducing more private enterprise and competition is commenced;

- that the Port Authority would have the following responsibility :

    i) To exercise control over the sale or lease of all land and basic infrastructure in the ports, including the approval of selling prices and rentals;

ii) To devise a strategic plan for the long term development of South Africa's ports;

iii) To approve of the appropriation of the profits of Portnet by Transnet;

iv) To ensure that adequate provision is made by Transnet in the appropriation of the profits of Portnet for the accumulation of reserves for the development of the basic port infrastructure;

v) To arrange loans or other finance on behalf of Transnet for the development of the basic infrastructure of the ports;

vi) To define the structure of tariffs for the use of the basic port infrastructure and to regulate the tariffs applied in the ports, where competition is inadequate to ensure efficient pricing;

vii) To regulate competition within the ports and between ports, when such competition would result in the inefficient use of resources;

viii) To prescribe all the public obligations of Portnet and to ensure that these are fulfilled; and

- that subsidiary regional port authorities would be established to facilitate the function of the national Port Authority in matters affecting only individual ports. The boards of directors of these authorities would comprise representatives of port users and operators and would be appointed by the National Port Authority

The Maritime Transport Policy Working Group and National Maritime Policy White Paper

Your department then followed up the Floor Report with a Maritime Transport Policy Working Group that was to feed its findings into a National Maritime Transport Policy in the form of first a Green Paper and then a White Paper. ASOBOSA again made representations and the section on Ports in the White Paper of 20 August 1996, which now guides government policy, reads –

"**Port operations and administration**
Issue
Ports play a crucial and strategic role in the facilitation of seaborne trade. Ports are strategic assets serving the nation as a whole. The real estate of South African ports is currently owned by Transnet Limited. The port authority function is delegated to Portnet, an operating arm of Transnet, and services within the ports are provided either by Portnet or by private enterprise. At present, Portnet provides the majority of services. There is at present no external port regulatory and monitoring authority. Portnet (through Transnet) enjoys a natural and legally structured monopoly and acts also as its own regulator. Within its quasi-government though legal corporate structure, Portnet also operates in direct competition with private operators offering various services within SA ports.

The vagaries of international shipping, the profound changes flowing from the displacement of breakbulk cargoes by containerisation, and trade sanctions, have left a legacy in SAs ports characterised by a predominance of casual dock labour over an ever dwindling permanent dock labour force. Any re-structuring of ownership or operation of SA ports will need to take the interests of organised and unorganised dock labour into account.

Policy

A port authority (or authorities) with specific responsibilities for the maintenance and development of port infrastructure will be established.

Although the intention is that an independent port authority (or authorities) be established at national level, there is no reason why a port authority should not be devolved to provincial or metropolitan levels.

The port authority will have the function of administering the port infrastructures, ensuring the long-term development of the ports to meet the needs of the economy, regulating the operations in the ports by controlling tariffs and service standards where this is necessary in a monopolistic situation, and providing, on a cost recovery basis, essential port services not willingly taken on by private enterprise.

Since it will itself be a monopoly, the port authority will be regulated by an independent regulator.

The port authority will be independent of any port operating entity (or entities).

In order to promote low costs, high level of service, and shipper choice in the port operations, a competitive environment will be created by enabling private enterprise to offer port services.

All stakeholders, including all levels of government, will be consulted in the planning of ports."

<u>Moving South Africa</u>

Since then you have completed work on your department's twenty-year strategic planning exercise, Moving South Africa. The Interim Findings were apparently launched on 7 September 1998 for stakeholder consultation and further stakeholder feedback was then assimilated before the final document resulting from that process – Moving South Africa – The Action Agenda – was launched by you on 13 May 1999. Although we were not aware of and did not provide input into the process by which that document was created we note that one of your key targets is the establishment of a National Ports Authority and an Independent Port Regulator. We also note the comment in that document to the effect that –

"… the reality of South Africa's port system is such that the strategic imperative to make decisions about the scope of the system requires an

> institutional mechanism to manage the national ports system as an integrated whole. Key aspects requiring integrated management will be the co-ordination and control of large infrastructure investments, co-ordination of future concessioned or competing terminal operations and ensuring that the port system responds to both customer needs and national objectives. The policy as set out in the White Paper – that the ports system should be managed by a single landlord-type National Ports Authority, with independent and privatised port operations – is confirmed. To the extent that the National Ports Authority is a monopoly infrastructure and/or service provider, it will be regulated by an independent regulatory body."

We also record that one of your freight system performance objectives is to decrease the distorting effects of cross-subsidisation and in this respect the MSA Action Agenda provides the following example:

> "Cross funding occurs when the proceeds of a profitable business activity are used to artificially fund a less profitable business activity. For example, certain parastatal business units are not sustainable as currently structured but they are sustained through cross funding from other monopoly parastatal businesses. Cross funding serves to distort price signals to customers and cost signals to providers as some customers and providers end up funding non-related, unprofitable business activities that benefit others. For example, government has inherited a legacy where within the Transnet Group, Portnet wharfage charges historically contributed the major portion of Transnet's profits (when there was a profit) and continued funding of Transnet debt-servicing, while long term capital expenditure at the ports is currently 65% underfunded. Transnet restructuring is in part designed to unwind this legacy…."

<u>Minister of Public Enterprises briefing to Parliamentarians</u>

The last word of government that we have been able to find on the restructuring of Transnet Limited appears in a briefing to Parliamentarians by the Honourable Mr J T Radebe. In that address he said :

> "A major constraint in the restructuring of Transnet is the debt that the company has - at the end of the 98/99 financial year in March, Transnet debt stood at R27.185 billion. This debt is made up of these principal components: the core debt which constitutes the biggest slice of the debt, the pension fund debt and provisions for pensioners' post-retirements benefits. The Pension fund debt resulted from the corporation of the then SATS to the company Transnet in 1990. At the time the pension fund for SATS employees was only around 22% funded and Transnet management decided to issue the T11 bond to ameliorate the fund's financial position to 64%. The coupon rate for the T11 bond was 16.5% and proved quite onerous for the company which had to issue more debt just to service the T11 interest payments. Management has since, through additional contributions and more debt, improved the pension fund's funding level to around 90%. This has resulted in more debt for Transnet.

> In restructuring Transnet then debt is a key issue and government has decided to deal with the debt on a case by case basis i.e. as the different entities are privatised. This was the case with SAA. On corporatisation of the business unit SAA it was apparent that SAA could not sustain the debt attributable to it. Hence Transnet and Government decided to adopt a burden sharing approach. Government has directed the Transnet management to explore further options for resolving this impasse."

In this regard we stress that over the past decade we have contributed to four different government enquiries relating to, inter alia, port authority structure. Although we did not participate in the investigations leading to your MSA action agenda, on each occasion the consultants or committee employed by your department, presumably at not inconsiderable expense, came to similar conclusions in respect of the structure of the port authority.

Furthermore, the difficulties raised by the Minister of Public Enterprises to which we have referred were taken into account by the last three investigations commissioned by your department and the recommendations made by those investigators accommodate them.

Our Concerns

We are concerned that it appears as if government policy is being left to Transnet Limited to implement. With respect, that company cannot be left to implement a policy that has so severe an impact on its own operational capacity. To us it appears as if the result has been that Transnet Limited has made overtures at carrying out government policy (the letting out of operational parts of ports) but more often than not balks at carrying through those negotiations to finality. We do not know whether this is because the result of those negotiations would have the effect of reducing its own operational capacity or because it is simply too nervous to commit without clear government guidelines.

Furthermore, in the few circumstances where Transnet Limited has committed to the letting out of an operational part of the port the negotiations have not always, indeed, to our knowledge, have never been conducted in a transparent manner subject to recognised tender procedures. As can be imagined, this is causing no small amount of consternation in an industry that relies on the use of particular berths. Our members fear that they may well wake up tomorrow to find that crucial berths have been leased to competitors without any restriction on how those competitors are to run those berths.

In addition, we have become aware of complaints of unfair competition being made against Transnet Limited in the exercise of its port authority function in the recent past. Indeed, we understand that the port authority is either involved in litigation in respect of one of these issues or will shortly become so involved. There are other examples in the recent past that have resulted in litigation.

Government policy on the question of port structure has been clearly expressed over the past half decade. The fact that no positive steps have been taken to implement it is, in our view, because it is being left to Transnet Limited to do so. The

reasons for the need to restructure the South African port authority are clear. Government has accepted those reasons and has made it policy that the South African port authority be restructured. It is now self-evident that Transnet Limited either does not have the will or the means to restructure itself.

In the circumstances it is our respectful submission that government ought to take the lead in providing legislative guidance for the restructuring of the port authority and the establishment of a regulatory authority in terms of government policy and provide a timetable within which such is to be conducted. In accordance with government policy we suggest that all relevant role players be included in the process of preparing such legislation and setting such timetable. We strongly recommend that draft legislation be prepared and published in bill form for comment as soon as possible.

We are well aware of the fact that the legislative process takes time. In the meantime we would recommend that a committee consisting of all role players be established. The role of that committee would be to act as the body to whom any proposed restructuring on the part of the port authority would be made transparent. That committee would also serve as a conduit to the Minister of Public Enterprises and you in respect of any issues that the restructuring of the port authority is intended to overcome. We refer in particular to issues arising out of :

- the ownership of harbour land;
- the dualistic role of Portnet; and
- the monopolistic operation of the harbours.

If necessary, the committee could call upon the Minister of Public Enterprises to act in terms of section 17 of the Legal Succession to the South African Transport Services Act, No 9 of 1989. For your information that section provides –

> "Strategic or Economic Interests of Republic.—Without in any way derogating from the provisions of section 15, should the Company act in a manner contrary to the strategic or economic interests of the Republic of South Africa, the Minister may direct the Company, by means of a written notice or by any other means that he may deem desirable, to discontinue such activity within a reasonable period, which shall be stipulated in the notice or other means of communication employed."

Should our suggestions be heeded we have no doubt that this will result in more certainty within the port environment with the consequent ability of all concerned to take firm decisions. This will in turn lead to a better functioning port environment.

Should you have any queries relating to these matters we would be more than happy to arrange for representatives of our association to meet with you to take the matter further.

We now wait to hear from you at your convenience.

Yours faithfully

M J LLOYD
SECRETARY
ASSOCIATION OF SHIPPING LINES

cc The Minister of Public Enterprises
The Honourable Mr J T Radebe
Private Bag X15
HATFIELD
0028

Private Bag X9079
CAPE TOWN
8000

cc The Chief Executive Officer
South African Maritime Safety Agency
Captain Brian Watt
P O Box 13186
Hatfield
PRETORIA
0028

cc The Chief Executive Officer
Transnet Limited
Mr S J Macozoma
Transnet Park
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2193

ANNEXURE "B"

EX PARTE: **NATIONAL PORT USERS' FORUM**

IN RE: **NATIONAL PORTS AUTHORITY BILL**

O P I N I O N

Consultant is the National Port Users' Forum, the membership of which consists of port users and associations whose members are port users. These port users include, amongst others, shipping lines, ships' agents and brokers, the holders of leases in ports, stevedoring businesses, freight forwarders, terminal operators and shippers of cargo.

I have been asked to give an opinion on the constitutionality or otherwise of section 45 of the Bill which is headed "Restructuring and Reform in Maydon Wharf Area". In brief, this section provides as follows:

(a) The National Ports Authority Limited ("the Authority") may determine the use to which any land or immovable property within the Maydon Wharf area may be put.

(b) The Authority may direct that the existing use of any immovable property within the Maydon Wharf area must be altered to a new use.

(c) The Authority may stipulate that any lease that is inconsistent with the new use to which immovable property must be put shall be invalid from a stipulated date.

(d) The Authority may direct that a particular lease of immovable property which was entered into prior to the provision in the Bill commencing must be renegotiated "if the terms of such lease are unrelated to market conditions".

(e) If such a direction is given, the Authority and the lessee must endeavour to negotiate the terms of a new lease.

(f) If agreement is not reached the Authority must declare that the lease is invalid.

At the outset it is worth mentioning that the phrase "Maydon Wharf area" is not defined anywhere in the Bill. The use of that expression is accordingly likely to be found to be void for vagueness, particularly since the provisions in the Bill in relation to that area are not even restricted to immovable property currently owned by Transnet Limited and which will in terms of the Bill be transferred to the ownership of the Authority.

However, assuming that what is intended to be referred to is the immovable property currently belonging to Transnet Limited within the Maydon Wharf area of the port of Durban, it is necessary to consider the constitutionality of the provisions in relation to that area.

The area in question is subject to several registered long leases granted by the South African Transport Services on attractive terms to port service providers. This was done as part of a State strategy at that time to attract development in the area for the better functioning of the port. The leases have restrictions on the cargo that can be landed and shipped without paying landing and shipping charges.

I am instructed that over time many of the leases have been ceded to third parties for full market value paid, in each case, to the cedent. Many of the cessions, which obviously required capital payment, were financed through third party financial institutions which have in turn taken cessions of the leases *in securitatum debiti* (as security for the loans).

It would accordingly appear that current lease holders in the Maydon Wharf area are in the following position:

(a) they have long term contractual rights to the use of the leased property for specified purposes;

(b) they have paid market related prices for these rights, although the rentals which they are obliged to pay Transnet Limited are well below market levels;

(c) they have structured their businesses, including making capital investments, in reliance on these rights;

(d) they may have ceded these rights as security for loan obligations which they have incurred to third parties;

(e) they may have long term contractual obligations to their clients to handle and/or store cargo on the leased property;

(f) they have employed employees and made other long-term commitments in anticipation of continuing to run their businesses in reliance on the leasehold rights.

Section 45 of the Bill envisages that the National Ports Authority may, in effect, unilaterally terminate any of the Maydon Wharf leases by:

(a) directing that the property concerned must be put to a new use and stipulating that any lease that is inconsistent with the new use shall be invalid (sub-sections (2)(a) and (3)); and

(b) directing that a particular lease must be renegotiated and declaring that that lease is invalid if agreement is not reached in those negotiations (sub-sections (4) and (6)(a)).

The constitutional provision which comes into play in these circumstances is the right to property as set out in section 25 of the Constitution. The immediately relevant provisions of section 25 are as follows:

"(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application:

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

…

(4) For the purposes of this section –

(a) …

(b) property is not limited to land."

The first question that arises is whether the rights enjoyed by the lease holders amount to "property" protected by this section. This is usually referred to as "constitutional property".

It is important that section 25(4)(b) makes it clear that property is not limited to land. However, just what the bounds of constitutional property is has not yet been decided. The Constitutional Court has held that the right of ownership in corporeal movables is protected by section 25(1) but that it is practically impossible to furnish, and judicially unwise to attempt, a comprehensive definition of constitutional property.[1]

Further, the Court of Appeal of Lesotho in a judgment by Mahomed P, the former Chief Justice of South Africa, has held that the unilateral revocation of leases constituted a

violation of the "right to property" protected by section 9 of the Lesotho Human Rights Act.[2]

In my view constitutional property encompasses at least the real rights recognised by the law of property. Rights such as ownership, mortgage, lease, servitude, mineral rights and liens.[3]

Since no compensation is contemplated by section 45, it does not really matter whether the action by the authority which results in the termination of a Maydon Wharf lease is classified as a deprivation of property or as an expropriation. Clearly all expropriations amount to deprivations, but not *vice versa*.[4]

If the Authority was to act in such a way as to result in the termination of an existing long-term lease at Maydon Wharf it would, in my view, be depriving a person of constitutional property.

The next question which calls for an answer is whether the Bill, if passed into law, constitutes "a law of general application" as contemplated by section 25(1). In my view it does not because it targets a particular group of lease holders and does not apply

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1 *First National Bank of SA Ltd v Commissioner, South African Revenue Service* 2002 (4) SA 768 (CC) paragraphs 51-56.

2 *Attorney-General of Lesotho v Swissbourough Diamond Mines (Pty) Ltd* 1997 (8) BCLR 1122 (Lesotho CA) at 1130B-1133G.

3 This is the view of the authors of *The Bill of Rights Handbook* (4th edition, 2001) by De Waal, Currie and Erasmus.

4 *First National Bank supra* at paragraph 57.

generally.[5] In this respect it may also be in conflict with the quality provision in section 9 of the Constitution.

The next issue which calls for consideration is whether section 45 permits the "arbitrary" deprivation of property. The Constitutional Court has held that the word "arbitrary" in this context is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of section 36.[6]

It seems to me that the provisions of sub-sections (4), (5) and (6) of section 45 do permit the arbitrary deprivation of property in as much as they allow the Authority to direct that any particular lease must be renegotiated and failing agreement (it being entirely within the power of the Authority to ensure that there is no agreement) the relevant lease will be invalid. No requirements are laid out for the identification of a particular lease which must be renegotiated and the Authority is placed in a position to cause any particular lease to become invalid by being able to refuse to agree the terms of a new lease. This is arbitrary.

It follows that in my view section 45 as it is currently cast is constitutionally invalid. For the position to be otherwise the effect would be that no one could enter into a contract with the State with any security against the State at any time merely legislating

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5 See *The Bill of Rights Handbook supra* at 420.

to override or nullify the contract. In an era where the State is increasingly governing by contract this is clearly untenable.

Aside from the provisions specifically in relation to Maydon Wharf, I have been asked to consider whether it would be unconstitutional for the authority to refuse to renew the licence of a lease holder offering port services in circumstances where that lease holder:

(a) has a long lease with Transnet Limited;

(b) has committed itself to its clients to provide the service in question;

(c) has structured its business and made other commitments in reliance on being able to continue to operate its business in terms of the existing lease.

In my view the refusal of a licence in those circumstances, unless it was based on justifiable requirements unrelated to the lease (such as safety requirements), would constitute an unconstitutional deprivation of property in terms of section 25 of the Constitution.

A M STEWART

Chambers
DURBAN

20 February 2003

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[6] *First National Bank of South Africa supra* at paragraph 65.

TO: **Garlicke & Bousfield Inc**
(Ref: AN/96/114)

THE *STELLA TINGAS* **ANNEXURE "C"**
TRANSNET LTD v THE *STELLA TINGAS*
SCOTT JA (HEFER JA, FARLAM JA, CONRADIE JA and LEWIS AJA concurring)
SUPREME COURT OF APPEAL
26 NOVEMBER 2002

Scott JA:

[1] Shortly after midnight on 17 June 1997 the *Atlantica*, a bulk carrier, 224 metres in length and displacing some 65 000 metric tons, collided with the *Stella Tingas* in Durban harbour. At the time the latter vessel was alongside loading cargo at Island View berth 3. The *Atlantica* was in the process of entering theIsland View Channel and was headed for berth 7 where she was to take on bunkers. Durban harbour is a compulsory pilotage port. The pilot navigating the Atlantica, Captain Peter Buffard, was an employee of the harbour authority, Transnet Limited, which is the present appellant. Both vessels were damaged in the collision. The owners of the *Stella Tingas*, the first respondent, (to whom I shall refer as the plaintiffs) instituted action in the Durban and Coast Local Division against the *Atlantica*, as first defendant (now the second respondent), and against Transnet, as second defendant, the action against the former being in rem and against the latter in personam.

[2] The claim against the *Atlantica* was founded on two grounds. The first was that the collision was caused by the negligence of the master and crew. The second was that it was caused by the negligence of the pilot for whose negligence the owners of the *Atlantica* were liable by reason of section 35 of the United Kingdom Pilotage Act of 1983 which, it was alleged, was applicable by virtue of the provisions of section 6(1) of the Admiralty Jurisdiction Regulation Act (No 105 of 1983) ('the Act').

[3] With regard to the claim against Transnet, the principal ground and the only one relied upon in this court, was that the collision was caused by the gross negligence of the pilot. The reason for the allegation that the negligence was gross was an attempt to avoid the exemption of liability afforded to both Transnet and the pilot by subpara 10(7) of the First Schedule to the Legal Succession to the South African Transport Services Act (no 9 of 1989) ('the Succession Act'). The subparagraph reads: 'The Company and the pilot shall be exempt from liability for loss or damage caused by a negligent act or omission on the part of the pilot.' The company referred to is Transnet, the company established in terms of section 2 of that Act. Another ground upon which the plaintiffs sought to hold Transnet liable was the negligence on the part of the master and crew of each of the two tugs in attendance at the time of the collision. However, this ground was formally abandoned during the course of the trial.

[4] In addition to denying liability, the *Atlantica* caused a Third Party notice to be issued citing Transnet and the pilot as third parties and claiming from them inter alia damages in respect of the damage caused to the *Stella Tingas*.

[5] The court a quo (Booysen J) was asked to decide only the question of liability. The learned judge found that the pilot had been grossly negligent and that Transnet was accordingly liable to the plaintiffs for their damages. As to the claim against the *Atlantica*, he found that negligence on the part of the master had not been established and that the provisions of section 35 of the United Kingdom Pilotage Act of 1983 were not applicable in South Africa. The *Atlantica* was accordingly held not to be liable to the plaintiffs. No order was apparently sought in terms of the Third Party notice, nor was one granted. The judgment of the court a quo has been reported: *Owners of the mv Stella Tingas v mv Atlantica (Transnet Ltd t/a Portnet, Third Parties)* 2002 (1) SA 647 (D). Transnet now appeals against the order holding it liable to the plaintiffs. The plaintiffs, in turn, appeal against that part of the judgment in which the *Atlantica* was held not to be liable to the plaintiffs. This appeal is conditional on Transnet's appeal succeeding. Both appeals are with the leave of the court a quo.

[6] Subsections 6(1) and (2) of the Act provide as follows:

> '6(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall (a)with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied; (b)with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.
>
> (2)The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection.'

The plaintiffs' claims relate to 'damage done by a ship'. Accordingly, and by virtue of section 7 of the English Admiralty Courts Act of 1861, a court of admiralty in South Africa would have had jurisdiction to entertain the claims immediately before the commencement of the Act on 1 November 1983. It follows that in terms of section 6(1)(a) the law to be applied is the law which the 'High Court of Justice of the United Kingdom' would have applied. (The reference to that court is presumably intended to be a reference to the

Supreme Court of England and Wales as constituted by the Supreme Court Act 1981. See *Brady-Hamilton Stevedore Co v mv Kalantiao* 1987 (4) SA 250 (D) at 253 D.) It is clear that regard is to be had to the law as it existed on 1 November 1983. (See *Transol Bunker BV v mv Andrico Unity* 1989 (4) SA 325 (A) at 334 H.) Subsection 6(1) of the Act is, however, subject to subsection 6(2). Paragraph 10 of the First Schedule to the Succession Act contains detailed provisions relating to compulsory pilotage harbours and in particular any negligent act or omission on the part of a pilot. These provisions are clearly provisions within the meaning of subsection 6(2) of the Act and the former must accordingly prevail over what for convenience may simply be referred to as the English admiralty law. Paragraph 10 is, of course, part of a South African statute and must be construed as such, despite the provisions of section 6(1) of the Act. It follows that for the purpose of determining what is 'a negligent act or omission on the part of the pilot' within the meaning of subpara 10(7) (quoted above) or whether an act or omission amounted to gross negligence so as not to enjoy the benefit of the exemption conferred by subpara 10(7), regard must be had to the South African law.

[7] I shall assume, without deciding, that the exemption would not apply if the pilot were found to have been grossly negligent. Gross negligence is not an exact concept capable of precise definition. Despite dicta which sometimes seem to suggest the contrary, what is now clear, following the decision of this court in *S v Van Zyl* 1969 (1) SA 553 (A), is that it is not consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. (See also *Philotex (Pty) Ltd v Snyman* 1998 (2) SA 138 (A) at 143 C - J.) This must be so. If consciously taking a risk is reasonable there will be no negligence at all. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances. (*Van Zyl*'s case, supra, at 557 A - E.) If, of course, the risk of harm is foreseen and the person in question acts recklessly or indifferently as to whether it ensues or not, the conduct will amount to recklessness in the narrow sense, in other words, dolus eventualis; but it would then exceed the bounds of our modern-day understanding of gross negligence. On the other hand, even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence (*Van Zyl*'s case, supra, at 559 D - H.) It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross. The Roman notion of culpa lata included both extreme negligence and what today we would call recklessness in the narrow sense or dolus eventualis. (See Thomas *Textbook of Roman Law* at 250.) As to the former, with which we are presently concerned, Ulpian's definition, D 50. 16.

213. 2, is helpful: ‘culpa lata is extreme negligence, that is not to realise what everyone realises’ (culpa lata est nimia neglegentia, id est non intellegere quod omnes intellegunt). Commenting on this definition, Lee in *The Elements of Roman Law* 4 ed at 288 describes gross negligence as being ‘a degree of negligence which indicates a complete obtuseness of mind and conduct’. Buckland in *A Textbook of Roman Law* 3 ed at 556 suggests that what is contemplated is a ‘failure to show any reasonable care’. Dicta in modern judgments, although sometimes more appropriate in respect of dolus eventualis, similarly reflect the extreme nature of the negligence required to constitute gross negligence. Some examples are: ‘no consideration whatever to the consequences of his acts’ (*Central South African Railways v Adlington & Co* 1906 TS 964 at 973); ‘a total disregard of duty’ (*Rosenthal v Marks* 1944 TPD 172 at 180); ‘nalatigheid van ’n baie ernstige aard’ or ‘’n besondere hoë graad van nalatigheid’ (*S v Smith* 1973 (3) SA 217 (T) at 219 A - B); ‘ordinary negligence of an aggravated form which falls short of wilfulness’ (*Bickle v Joint Ministers of Law and Order* 1980 (2) SA 764 (R) at 770 C); ‘an entire failure to give consideration to the consequences of one’s actions’ (*S v Dhlamini* 1988 (2) SA 302 (A) at 308D). It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of dolus eventualis, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorized as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.

[8] Against this background, I turn to the facts. It was common cause that ships entering Durban harbour bound for a berth in Island View Channel follow more or less the same route. After proceeding through the harbour entrance channel and upon entering the area known as Basin B they steer several degrees to starboard to keep clear of the coal berths along the Bluff on the port side, then alter back to port before steering again to starboard in order to line up with the leading lights and proceed up Island View Channel. The leading lights are placed beyond the channel and indicate its centre line. Because there are berths on the port side of the channel it is usual for ships to proceed up the channel slightly to the starboard of the centre line. The distance between the entrance to Basin B and the entrance to Island View Channel was not given in evidence, but from other distances given it would appear to be in the region of just under a sea mile.

[9] By the time the trial commenced the pilot, captain Buffard, had died. Nonetheless, from his statement made shortly after the incident, his evidence at a subsequent inquiry, the *Atlantica*’s logs and a transcript of the conversation between the pilot and the masters of the two tugs in attendance, it is possible to obtain a fair idea as to both the route taken by the *Atlantica* and the events in the critical period immediately preceding the

collision. I pause to mention that these documents, if for no other reason, were admissible in terms of section 6(3) of the Act. (*Cf* C*argo Laden and Lately Laden on Board the mv Thalassini Avgi v mv Dimitris* 1989 (3) SA 820 (A) at 842 B - D.)

[10] It appears that whether as a result of a misunderstanding between the pilot and the helmsman or otherwise, the *Atlantica* on entering Basin B proceeded further to starboard than is usual and had to alter back to port a correspondingly further distance. Just what the extent of the deviation was is not clear. Ultimately its consequence was that the angle at which the vessel approached the mouth of Island View Channel was different from the usual and, in turn, required a harder turn to starboard in order to proceed up the channel. According to the pilot (as appears from the transcript of his evidence at a subsequent fact-finding commission), by the time he had steadied the ship following the turn back to port, she was abeam of coal berth 2 on the Bluff and heading in the direction of Island View berth 2. A reference to a chart of the harbour suggests that the deviation had been corrected and the ship set on course for the channel when still some distance from its mouth. The pilot said he maintained this course until he was ready to turn to starboard into Island View Channel, by which time the starboard bow was approaching buoy I1. This was then positioned off the point and adjacent to the starboard side of the channel. The *Stella Tingas*, as I have said, was moored at Island View berth 3 on the port side of the channel. According to the duty officer who was standing on the starboard side of that vessel, he saw the *Atlantica* rounding buoy I1 and approaching at an angle of about 25 degrees.

[11] On the face of it, there would appear to be nothing untoward about the manoeuvre the pilot sought to execute. Indeed, there was evidence to the effect that ships coming from other parts of the harbour would not infrequently approach the channel at a similar angle before steering to starboard and proceeding up the channel to take on bunkers.

[12] In the event, the *Atlantica* failed to respond to the helm and sheered to port. The duty officer on the *Stella Tingas* saw that a collision was imminent and fled. The *Atlantica* struck the *Stella Tingas* a glancing blow before proceeding up the channel.

[13] The experts were agreed that the sheer to port was caused by phenomena referred to respectively as ‘squat’ and ‘bank effect’, both of which were related to speed. The former can occur in shallow water and particularly in a narrow channel. I interpose that what is shallow or narrow is, of course, related to the ship’s size and draft. A ship displaces its own weight in water. Simply put, as it moves forward it leaves a void behind which has to be filled. In a confined area the flow of water to fill the void is retarded by the bulk of the ship and this, in turn, as it was said, plays havoc with the steerage. The

'bank effect' in the instant case would have been caused by water displaced by the ship, as she entered the channel and rounded the starboard point of the so-called island, pushing up against the bank, which presumably shelves steeply, and then returning to create pressure on the bow forcing it to port. As it appears that the sheer to port commenced as the *Atlantica* was in the process of entering Island View Channel, it would seem likely that the cause of the sheer, at least initially, was the 'bank effect', rather than the 'squat'.

[14] Much of the evidence by the experts, mainly former pilots, related to the question of the *Atlantica*'s speed as she proceeded through the entrance channel of the harbour and across Basin B. It is necessary to mention at this stage that the only witness at the trial who was on board the *Atlantica* at the time was the master. Admittedly he was not in control of the navigation of the ship and may not have paid as much attention to what was happening as he would have had the pilot not been in charge. Nonetheless, he was familiar with Durban harbour; he said that the speed seemed reasonable to him and that he had entered the harbour before at the same speed. The master impressed the court a quo as a good witness.

[15] Prior to the *Atlantica* entering the harbour the fuel supply was changed from heavy to diesel oil. The latter would have enabled the ship to achieve a speed of approximately 9 knots. According to the 'engine room movement book' ('the engine book') and the 'deck bell book' ('the bell book'), as the *Atlantica* approached the harbour entrance she proceeded at full speed ahead for some 8 minutes. The speed of the engine was then reduced to half speed ahead and then almost immediately thereafter to slow ahead. This was some 10 minutes before the vessel, according to the ship's log, passed the breakwater light. A change in the engine speed would not have had an immediate effect on the speed of the ship through the water, particularly having regard to her size and displacement. Much of the debate in the evidence related to the extent to which the ship would have lost headway while proceeding through the harbour entrance and across Basin B. The engine book and the bell book reflect several changes from slow ahead to half ahead, then back to slow ahead. The pilot's report confirms that these were made not so much to increase or reduce the speed of the ship through the water but rather to maintain control of the steering. Indeed, after the initial period of full ahead the ship would have been steadily losing headway. The engine changes in relation to when the ship entered the port and when the collision occurred are, in any event, far from clear. The reason is that not only were the clocks on the bridge and in the engine room not synchronised but some of the entries were presumably not made immediately so that the time difference between the two logs is not constant. In addition, entries in the engine book are not always recorded in the bell book.

[16] Based on the engine speed of full ahead for eight minutes prior to the *Atlantica* entering the entrance channel, Captain Dominy, who testified on

behalf of the plaintiffs, estimated that the ship proceeded through the entrance channel at a speed of about 9 knots. Captain McGregor, who testified for Transnet, thought that the speed was more likely to have been in the region of 7 knots. Both estimates are little more than guesses. Captain Martin, another of the plaintiffs' witnesses, noted that according to the ship's log the vessel passed the breakwater light at 00h21 and collided with the *Stella Tingas* at 00h35, ie a difference of 14 minutes. Although the actual times differed, the port record similarly showed a difference of 14 minutes between the time the ship 'crossed into port' and the collision. Captain Martin assumed the reference to the breakwater light to be the light on the south breakwater and measured the distance between that light and where the collision occurred to be 1,69 sea miles. This gave him an average speed of 7,24 knots. If the measurement was taken from the light on the north breakwater he arrived at an average of 6,3 knots. No evidence was led as to the point at which the port authority regarded the ship as having crossed into port. Captain Dominy did a similar exercise, but measured the distance between the south light and the point where the collision occurred at 1,67 sea miles, which gave him an average of 6,7 knots. However, counsel for Transnet pointed out, correctly I think, that because the times, 00h21 and 00h35 were recorded to the nearest minute, there could have been a difference of up to one minute between the two points in time; in other words, it could have taken the ship closer to 15 minutes to cover the distance in question. In view of the short time involved, he argued, this could have made a considerable difference to the calculation of the average speed. In this regard, it is not without significance that the master rejected the suggestion that the ship covered the distance in question at an average speed of as much as 7,24 knots. Finally, with regard to the actual speed of the *Atlantica*, it was recorded in the log that her speed 'as per GPS [Global Positioning System] during the collision' was 3,4 knots. No attempt was made to explore when the system was activated or over what distance the speed was measured. Captain Martin conceded that he was unable to dispute that when the collision occurred the speed of the *Atlantica* was 3,4 knots.

[17] The evidence of what would have been an appropriate speed in the circumstances is also somewhat contradictory. Captain Martin expressed the view that a reasonable speed, if the ship had followed the usual route, would have been about 5 knots. The *Atlantica*'s expert, Mr Fiddler, on the other hand, regarded it not unreasonable for the ship to have proceeded through the entrance channel at 7,5 knots. Both Captain Martin and Captain Dominy testified that ships normally proceed up Island View Channel at a speed of approximately 3 to 4 knots, but that, of course, was the speed registered on the GPS when the collision occurred at a point close to the mouth of the channel.

[18] On the basis of the aforegoing, I am unpersuaded that the evidence establishes that the *Atlantica* proceeded through the harbour entrance and

across Basin B at a speed which would have been excessive had the ship followed the usual route. I am also unpersuaded that the angle at which the *Atlantica* approached Island View Channel or the turn to starboard which the pilot proposed to execute was shown to have been so untoward as to give rise to an inference of negligence on his part. On the other hand, the very fact that the ship was unable, whether as a result of the 'squat' or 'bank effect' or both, to execute the turn to starboard safely is indicative of a speed which was excessive for the manoeuvre contemplated. For this the pilot must take the blame; he was accordingly guilty of negligence.

[19] The plaintiffs' experts expressed the view that once the pilot became aware of the deviation, he should have stopped the ship by putting the engine astern and then with the assistance of the tugs manoeuvred the ship to port so as to enable her to enter Island View Channel in the usual way. This, of course, was a view expressed with hindsight and strikes me as perhaps requiring a standard of excellence which is not reasonably required. But it is nonetheless clear that when approaching the channel at the angle he did, the pilot by whatever means should have ensured that the ship was proceeding at a slower speed and if necessary maintained steering control by using what was described as 'short kicks on the engine'.

[20] The question remains whether the pilot's negligence amounted to gross negligence. In finding that it did, Booysen J said the following: 'He knew that he was about to enter a narrow and shallow channel where the danger of a sheer caused by the suction effect or the banking effect, or both, was always present if he went too fast. He knew that in the event of a sheer he would have very little time and space to avoid a collision. He knew that the consequences of a collision in the harbour involving a vessel of the size of the *Atlantica* would be considerable. It does seem that he had somewhat of a dare-devil attitude. The pilot knew that he was going too fast; he knew that he was not aligned with the leading lights; he knew that he was about to enter a narrow, shallow channel with a huge ship; he knew that in the event of a sheer there was likely to be a collision, yet in true dare-devil spirit he tried to perform a manoeuvre which had little chance of success. I find pilot Buffard's actions [not] to have been reckless but at least grossly negligent in the circumstances.'

[21] This finding appears to attribute to the pilot a conscious taking of a risk in circumstances which would amount to dolus eventualis. The judge says, for example, the pilot 'in true dare-devil spirit' attempted 'to perform a manoeuvre which had little chance of success'. In my view, there is no justification for such a finding on the evidence. The passage quoted contains a number of misdirections. The statement that the pilot knew that he was going too fast is presumably based on the fact that in his evidence before the fact-finding commission he appears to have understated his speed. But, by then, of course, he had the advantage of hindsight. The actual speed of the

ship as she approached the mouth of the channel is unknown. All we do know is that it was excessive to the extent that it contributed to the 'squat' and 'bank effect' which, in turn, caused the sheer to port. Indeed, there is nothing to suggest that in the absence of the sheer the speed was such that the ship would not have completed the turn to starboard and proceeded up the channel without mishap. I can see no justification for the conclusion that the pilot knew in advance that he was going too fast. The master certainly did not get the impression that the speed was excessive. Nor, as I have said, was there anything to suggest that the pilot in a dare-devil spirit was attempting to perform a manoeuvre which had little chance of success.

[22] Much was made in evidence of the phenomena of 'squat' and the 'bank effect'. But it was not a common occurrence and would not necessarily have been at the forefront of the pilot's mind. No doubt he ought to have foreseen this as a possibility. But it is clear that he did not. This much appears from the transcript of the conversation between the pilot and the masters of the tugs. When the *Atlantica* failed to respond to the helmsman's turn to starboard, the pilot's first reaction was to assume that the aft tug was 'up against' the port quarter. This, it was explained, would have caused the tug to serve as a rudder and to force the ship to port. The pilot immediately ordered that tug 'to take the weight off the ship's back'. It was only when the tug master responded that he was not touching the ship that the pilot would have realised that there was something else causing the sheer. It was at this stage that he announced that things were 'going wrong'. In the event, the tugs were unable to arrest the sheer and the forward tug, which was attempting to 'push in' the port bow, had to abandon the attempt and move to the stern in order to avoid being crushed.

[23] The trial judge's observation that the pilot knew that he was not aligned with the leading lights also requires comment. It is true that because of the deviation the ship did not follow the route usually followed by vessels coming into port to berth in Island View Channel. But there was nothing untoward, as such, about the angle at which the *Atlantica* approached the mouth of the channel. As previously mentioned, there was evidence that ships moving from elsewhere in the harbour would approach the channel at a similar angle.

[24] A further point raised in argument was that the pilot erred or demonstrated a lack of caution by electing to bring the *Atlantica* in at night, having regard to the size of the ship, the fact that she was 22 years old with a single propeller and was not fitted with bow-thrusters to facilitate lateral movement. The short answer to this is that at all times there were two tugs in attendance and there is nothing in the evidence to suggest that darkness played a role or that the collision would not have occurred had the *Atlantica* been brought into harbour in daylight.

[25] There can be no doubt that the evidence establishes that the pilot was negligent. In my view, however, the plaintiffs failed to discharge the burden of showing that the pilot was negligent to such a degree that his conduct constituted gross negligence.

[26] In passing I should mention that the pilot was also criticised for not adopting one or more other measures to combat the sheer once it had begun. These included putting the engine astern and dropping the port anchor. Counsel for the plaintiffs conceded, correctly in my view, that the evidence did not establish that any of these measures would have had the desired effect of preventing the collision. In any event, the failure of the pilot to adopt one measure rather than another to combat the sheer would not in the circumstances have amounted to gross negligence.

[27] It follows that Transnet's appeal against the judgment of the court a quo in favour of the plaintiffs must be upheld.

[28] It accordingly becomes necessary to consider the plaintiffs' conditional appeal against the finding of the court a quo that the *Atlantica* was not liable to the plaintiffs for the latter's damages. The principal ground upon which it was contended that the *Atlantica* was so liable, shortly stated, is the following. The maritime claim in question relates to damage done by a ship. In terms of section 6(1) of the Act, English admiralty law is therefore applicable. Section 35 of the United Kingdom Pilotage Act of 1983 (which became law prior to 1 November 1983) imposes liability on the owner of a vessel under compulsory pilotage for damage caused by the vessel or by the fault of the navigation of the vessel in the same manner as the owner would be liable if the pilotage were not compulsory. Accordingly, so it was argued, the *Atlantica* is liable for the damage caused by the negligence of the pilot.

[29] Subsections 6(1) and 6(2) of the Act are quoted in para 6 above. I shall return to them later but it is first necessary to say something about the English admiralty law relating to compulsory pilotage. At common law a shipowner is liable for the negligence of a pilot voluntarily engaged just as it would be liable for the negligence of the master. Where, on the other hand, the pilotage is compulsory, the shipowner would not be liable for the negligence of the pilot. The reason for the distinction was explained by Dr Lushington in *The Maria* (1839) 1 W Rob 95 at 99 [166 ER 508 at 510]. Simply put, in the case of compulsory pilotage the master is compelled to take the pilot on board and the owners are not liable for the acts of a person over whom they have no control and whom they are compelled to employ. A voluntary pilot, by contrast, is employed in the discretion of the master and is considered a servant of the owners. The immunity of owners for damage caused by the fault of compulsory pilots was furthermore reinforced by various statutes in the 19th century, including the Merchant Shipping Act of 1894. This immunity was abolished with effect from 1 January 1918 by the

Pilotage Act of 1913 following the International Collisions Convention signed at Brussels in 1910. (For details of the Convention and its implementation, see *Owners of the Steamship Towerfield v Workington Harbour and Dock Board [*1949] P 10 at 22 - 23, 46 - 47. See generally McGuffie *Marsden on the Law of Collisions at Sea* 10 ed 246 - 248.) Section 15(1) of the 1913 Act was repeated in identical terms in s 35 of the Pilotage Act of 1983 which repealed the earlier Act. Section 35 reads: 'Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory.' The effect of the section is to render the shipowner liable for loss or damage caused by the fault of a compulsory pilot in the same way as the shipowner would be liable at common law for loss or damage caused by a voluntary pilot. For the purpose of the present case it is important to emphasize that the basis of such liability is that a voluntary pilot (and now by statute a compulsory pilot) is regarded as the servant of the shipowner. This is, and has been for many years, the basis of the shipowner's liability. It was expressly confirmed to be so by the House of Lords in *Esso Petroleum Co Ltd v Hall Russell & Co Ltd [*1989] AC 643 (HL) at 683 C - 685 H, [1989] 1 All ER 37 (HL) at 58 f - 60 g.

[30] As previously indicated, the provisions of para 10 of the First Schedule to the Succession Act are provisions within the meaning of section 6(2) of the Act and must prevail over the English admiralty law. For convenience I quote para 10 in full. '(1) The harbours of the Company are compulsory pilotage harbours with the result that every ship entering, leaving or moving in such a harbour shall be navigated by a pilot who is an employee of the Company, with the exception of ships that are exempt by statute or regulation. (2) It shall be the pilot's function to navigate a ship in the harbour, to direct its movements and to determine and control the movements of the tugs assisting the ship under pilotage. (3) The pilot shall determine the number of tugs required for pilotage in consultation with the Port Captain, whose decision shall be final. (4) A master shall at all times remain in command of his ship and neither he nor any person under his command may, while the ship is under pilotage, in any way interfere with the navigation or movement of the ship or prevent the pilot from carrying out his duties except in the case of an emergency where the master may intervene to preserve the safety of his ship, cargo or crew and take whatever action he deems necessary to avert the danger. (5) Where a master intervenes, he shall immediately inform the pilot thereof and, after having restored the situation, he shall permit the pilot to proceed with the execution of his duties. (6) The master shall ensure that the officers and crew are at their posts, that a proper look-out is kept and that the pilot is given every assistance in the execution of his duties. (7) The Company and the pilot shall be exempt from liability for loss or damage caused by a negligent act or omission on the part of the pilot. (8) For the

purpose of this item, “pilot” shall mean any person duly licensed by the Company to act as a pilot at a particular harbour.’ It will immediately be observed that the pilot is expressly stated to be an employee of the Company, ie Transnet, (subpara 1). In terms of subpara 2 the pilot is to navigate a ship in the harbour. Subparagraph 4 prohibits the master, who is the shipowner’s agent, from in any way interfering with the navigation or movement of the ship or preventing the pilot from carrying out his duties while the ship is under pilotage except in a case of emergency. These provisions are wholly inconsistent with the position in England where the pilot, whether voluntary or compulsory, is pro hac vice the shipowner’s servant. Expressed differently, to hold the shipowner liable for the negligence of a compulsory pilot would be contrary to the provisions of para 10. Indeed, if the shipowner were vicariously liable, subpara 10(7), to the extent that it exempts the Company, would be unnecessary.

[31] It follows that the effect of section 6(2) of the Act, read with para 10 of the First Schedule to the Succession Act, is to preclude the application of section 35 of the 1983 Pilotage Act in South Africa. The plaintiffs’ first ground of appeal must therefore fail.

[32] The further ground on which it was contended that the *Atlantica* was liable to the plaintiffs was that the master was negligent for failing to take steps to prevent the collision. In terms of subpara 10(4) of the Schedule quoted above, the master was in effect prohibited from interfering in the navigation or movement of the ship until such time as there was an emergency. The evidence of the master was that he had full confidence in the pilot and believed that with the assistance of the tugs the ship would be able to execute the turn to starboard and proceed up Island View Channel; it was only when the forward tug abandoned the attempt to push the bows around to the starboard that he realised that there was going to be a collision. It was common cause that by then a collision was inevitable. The master denied having heard the pilot say to the tug masters that things were ‘going wrong’. But even if he had, I do not think he can be held to have been negligent for failing to intervene. The words in question were uttered no more than some three minutes before the collision. The pilot was then heavily engaged in issuing commands to the tugs in order to retrieve the situation. No doubt there were various options available in the attempt to avoid a collision, but in my view the master was entitled to assume that the pilot knew what he was doing. As a master of a ship he would have appreciated the dangers of wrongly interfering with the conduct of the pilot. Nearly a century ago Lord Alverstone CJ in *The Tactician [*1907] P 244 (CA) at 250 said the following: ‘The cardinal principle to be borne in mind in these pilotage cases, that raise difficult questions of law, and very often difficult questions of fact, is that the pilot is in sole charge of the ship, and that all directions as to speed, course, stopping and reversing, and everything of that kind, are for the pilot; and I entirely agree, if I may say so, with great respect, with the opinions of

the very learned judges, from Dr Lushington downwards, to which attention has been called, as to the danger of a divided command, and the danger of interference with the conduct of the pilot; and that if anything of that kind amounts to an interference or a divided command serious risk is run of the ship losing the benefit of the compulsory pilotage.' I readily endorse these views. In my view the collision was not caused by any negligence on the part of the master. On this ground, too, the appeal must therefore fail.

[33] In the result the following order is made.

(a) The appellant's appeal against the judgment of the court a quo in the first respondent's favour is upheld with costs.

(b) The first respondent's appeal against the dismissal by the court a quo of the first respondent's claim against the second respondent is dismissed with costs.

(c) The order of the court a quo is altered so as to read as follows:

    (i) The plaintiffs' claim against the first defendant is dismissed with costs, such costs not to include the costs incurred in consequence of the first defendant's Third Party Notice.

    (ii) The plaintiffs' claim against the second defendant is dismissed with costs.