ADMIRALTY LAW

Admiralty Court Act, 1840 (3 & 4 Vict c 65)

Summary: This Act (3 & 4 Vict c 65) concerns the jurisdiction of the High Court of Admiralty of England.

Applicability to SWA: This Act applied to South West Africa by virtue of section 2(2) of the *Colonial Courts of Admiralty Act, 1890.* (See the entry for that Act below.)

Regulations: Section 18 authorises the Judge of the High Court of Admiralty to make rules, orders, and regulations regarding the procedure in the Court, and the conduct and duties of the officers and practitioners in the Court. Subsidiary enactments that may have been issued pursuant to this authority have not been comprehensively researched, but no mention of any rules issued under this authority has been located in the admiralty law textbooks examined. (*Rules on the practice to be observed in the Vice-Admiralty Courts, 1883*, issued pursuant to the *Vice-Admiralty Courts Act 1863* and surviving in terms of the *Colonial Courts of Admiralty Act, 1890*, are available on the Namibian Superior Courts website here.)

Cases:
Freiremar SA v The Prosecutor-General of Namibia & Another 1996 NR 18 (HC)
Namibia Ports Authority v M V 'Rybak Leningrada' 1996 NR 355 (HC)
International Underwater Sampling Ltd & Another v MEP Systems Pte Ltd 2010 (2) NR 468 (HC)
MV MCP Pachna: Blue Sky Shipping Ltd & Another v Hellenic Bank Public Company Ltd 2019 (4) NR 997 (HC) (parameters of Court's jurisdiction under the Act).

Admiralty Court Act, 1861 (24 & 25 Vict. c. 10)

Summary: This Act (24 & 25 Vict. c. 10) concerns the jurisdiction of the High Court of Admiralty of England.

Applicability to SWA: This Act applied to South West Africa by virtue of section 2(2) of the *Colonial Courts of Admiralty Act, 1890.* (See the entry for that Act below.)

Regulations: The Act makes no provision for regulations.

Cases:
Freiremar SA v The Prosecutor-General of Namibia & Another 1996 NR 18 (HC)
Namibia Ports Authority v M V 'Rybak Leningrada' 1996 NR 355 (HC)
International Underwater Sampling Ltd & Another v MEP Systems Pte Ltd 2010 (2) NR 468 (HC)**.**

Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict c 57), as applied in the Cape of Good Hope as of 1 January 1920

Summary: This Act (53 & 54 Vict c 57) concerns the admiralty jurisdiction of the courts. Section 2(2) of the Act states:

> The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise

such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

It thus applies two statutes from English admiralty law – the *Admiralty Court Act 1840* and the *Admiralty Court Act 1861*.

Applicability to SWA: The Act was applied to South West Africa by virtue of the Administration of Justice Proclamation 21 of 1919.

> See *Freiremar SA v The Prosecutor-General of Namibia & Another* 1996 NR 18 (HC) and *International Underwater Sampling Ltd & Another v MEP Systems Pte Ltd* 2010 (2) NR 468 (HC), 2011 (1) NR 81 (SC).

In South Africa, the *Colonial Courts of Admiralty Act, 1890* was repealed in so far as it relates to prizes by the *Prize Jurisdiction Act 3 of 1968* (RSA GG 2000). This Act was made applicable to SWA by section 6, which states:

> This Act and any amendment thereof shall apply also in the territory of South-West Africa, including the Eastern Caprivi Zipfel referred to in section 3 of the South-West Africa Affairs Amendment Act, 1951 (Act No. 55 of 1951), and in relation to all persons in that portion of the said territory known as the "Rehoboth Gebiet" and defined in the First Schedule to Proclamation No. 28 of 1923 of the said territory.

However, *Act 3 of 1968* never came into force in respect of South Africa or South West Africa.

The *Colonial Courts of Admiralty Act, 1980* was repealed "in so far as it applies in relation to the Republic, except in so far as it relates to prize matters", by the *Admiralty Jurisdiction Regulation Act 105 of 1983* – which was not made applicable to South West Africa.

Section 2(2) of the *Colonial Courts of Admiralty Act, 1890* makes the ***Admiralty Court Act, 1840***, and the ***Admiralty Court Act, 1861*** applicable to Namibia.

> See *Trivett & Co, (Pty) Ltd & Others v WM Brandt's Sons & Co Ltd & Others* 1975 (3) SA 423 (A) (quoted in the shaded box below). See also *The Shipping Corporation of India Ltd v Evdomon Corporation & Another* 1994 (1) SA 550 (A) at 559H-560C:
>
> > The next question is whether a South African Court of admiralty did have such jurisdiction prior to 1 November 1983. The jurisdiction of such a Court was governed by the Colonial Courts of Admiralty Act, 1890, a statute of the British Parliament. In terms of s 2(2) of this Act the jurisdiction of a colonial court of admiralty was stated to be '...over the like places, persons, matters, and things, as the admiralty jurisdiction of the High Court of England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty [might] exercise such jurisdiction in like manner and to as full an extent as the High Court in England...'. **It has been authoritatively held that the effect of s 2(2) was that the jurisdiction of a Court of admiralty was governed by the admiralty jurisdiction of the English High Court as it existed in 1890. The sources of such jurisdiction included English statutes passed before 1890, notably the Admiralty Court Act, 1840, and the Admiralty Court Act, 1861, but not subsequent legislation**. (*Beaver Marine (Pty) Ltd v Wuest* 1978 (4) SA 263 (A) at 274C-D; *Malilang and Others v MV Houda Pearl* 1986 (2) SA 714 (A) at 722J-723B at 722J-723B. The suggestion in Joubert (ed) *The Law of South Africa* vol 25 para 114 note 8 that the true date was 1 July 1891 is, in my view, incorrect. According to *The Yuri Maru, The Woron* [1927] AC 906 (PC) at 915, the critical time was 'when the Act passed', which was 25 July 1890; and it does not seem to me that this is affected by the provision in s 16 that generally the Act was to come into force on 1 July 1891.) Furthermore, the proceedings in a Court of admiralty were regulated by the rules in force in 1890 under the Vice-Admiralty Courts Act, 1863 (see *Tharros Shipping Corporation SA v Owner of the Ship 'Golden Ocean'* 1972 (4) SA 316 (N) at 319A).

Regulations: Section 3 of the Act, entitled "Power of Colonial legislature as to Admiralty jurisdiction", reads as follows (emphasis added):

> **3.** The **legislature of a British possession** may **by any Colonial law**,

(a) **declare** any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such court of its jurisdiction under this Act, and limit territorially, or otherwise, the extent of such jurisdiction; and

(b) confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction under such **regulations** and with such appeal (if any) as may seem fit:

Provided that any such Colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty.

Declarations and regulations that may have been issued in terms of this provision have not been researched.

Rules: The *1890 Act* repealed the *Vice-Admiralty Courts Act 1863*, but provided that the rules made under that Act would continue to apply in any British possession until revoked or varied (see section 16(3)):

> See *MV "Jute Express" v Owners of the Cargo Lately Laden on Board the MV "Jute Express"* 1992 (3) SA 9 (A) at 19: "… in South African admiralty practice from the last century until the passing of the Act, the action was commenced by the issue of summons: see Rule 5 of the Rules made in terms of the English Vice-Admiralty Courts Act 1863 (in force in this country by virtue of the Colonial Courts of Admiralty Act 1890)."
>
> See *Namibia Ports Authority v M V 'Rybak Leningrada'* 1996 NR 355 (HC) at 358F-G: "There is no issue between the parties that the Rules relied upon in this application are made under the 1840 and 1861 Acts named the Vice Admiralty Rules."
>
> See *Bourgwells Ltd (Owners of MFV* Ofelia*) v Shepalov & Others* 1998 NR 307 (HC) at 311E-F: "…the Admiralty Proceedings Rules of South Africa do not apply in Namibia. The Rules for the Vice-Admiralty Courts in Her Majesty's Possessions Abroad, 1883, strange as it may seem, still apply."

The full text of the ***Rules on the practice to be observed in the Vice-Admiralty Courts, 1883*** issued pursuant to the *Vice-Admiralty Courts Act 1863* is available on the Namibian Superior Courts website here.

Cases:

Namibia Ports Authority v M V 'Rybak Leningrada' 1996 NR 355 (HC)

Bourgwells Ltd (Owners of MFV Ofelia*) v Shepalov & Others* 1998 NR 307 (HC), 1999 NR 410 (HC)

Green Fisheries Corporation v Lubrication Specialist (Pty) Ltd 2003 NR 50 (HC) (Vice Admiralty Court Rules 29 and 30; basis for an action *in rem*)

International Underwater Sampling Ltd & Another v MEP Systems Pty Ltd 2010 (2) NR 468 (HC); 2011 (1) NR 81 (SC) ("necessaries" in terms of section 5 of the Admiralty Court Act 1840, section 6 of the Admiralty Court Act 1861).

MV Palenque 1: GMTC I LCC v Fund Constituted from the Sale of MV Palenque 1 & Others 2019 (4) NR 1142 (HC)

> The Namibian High Court exercising its admiralty jurisdiction derives its jurisdiction from the English Statutes, namely the Admiralty Court Act of 1840, the Admiralty Court Act of 1861 and the Colonial courts of Admiralty Act of 1890. In *Freiremar v The Prosecutor General of Namibia and Others,* the court held that by virtue of s 1(i) of Proclamation 21 of 1919 all statutes which applied in the Province of Cape of Good Hope as at 1 January 1920 were made applicable to the then South West Africa. The Colonial Courts of Admiralty Act 1890 was part of the statute law of the Province of Cape of Good Hope as at 1 January 1890 and accordingly it became part of Namibia. Those English statutes are archaic and Namibia is the only country in the world that still applies the limited jurisdiction conferred by the Colonial Courts of Admiralty Act of 1890. The Colonial Courts of Admiralty Act of 1890 is archaic, outdated and belongs to the colonial era. Its heads of jurisdiction are very limited. Claims relating to or arising out of charter parties, marine insurance, container, which should be dealt with under admiralty jurisdiction are excluded under the Colonial Courts of Admiralty Act of 1890. There is an urgent need for reform and updating of our maritime laws. (para 43, footnote omitted)

Prime Paradise International Ltd v Wilmington Savings Fund Society FSB & Others 2022 (2) NR 359 (SC) (Vice-Admiralty Court Rules, rule 138; Court notes at para 13 that "there is a pressing need to reform and update Namibia's outdated (and indeed antiquated) maritime laws.")

See also *Banco Exterior De Espana SA & Another v Government of the Republic of Namibia & Another* 1996 NR 1 (HC) and *Freiremar SA v The Prosecutor-General of Namibia & Another* 1996 NR 18 (HC) at 27H-28J for further discussion of admiralty law in Namibia.

Commentary: Hilton Staniland, "Theory versus policy in the reform of admiralty jurisdiction", 6 (4) *International Journal of Private Law* 418 (2013).

"Nineteenth admiralty law and jurisdiction – the whole bundle of statutory and inherent jurisdiction, common law, civilian practice and judicial precedent – was confirmed to be part and parcel of the law of the Cape and Natal by the 1890 Colonial Courts of Admiralty Act, which came into effect [in South Africa] on 1 July 1891.

Section 2(1) of the 1890 Colonial Courts of Admiralty Act 1890 provided:

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

The Cape and Natal were British possessions, and their Supreme Courts had original unlimited civil jurisdiction, and so they became Colonial Courts of Admiralty…

Attempts were made to challenge the continuity of application of the 1890 Act and the law that came with it, but in 1975 the Supreme Court of Appeal in *The Waikiwi Pioneer* [1975 (3) SA 423 (SCA)] finally dispelled doubt that the Supreme Court's admiralty pedigree ran back continuously to the 1890 Act, and that it survived Union in 1910, and Republic in 1961."

John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa (2nd Edition),* Juta, 2009 pages 14-15 (footnotes omitted)

"As was correctly found by Levy J the South African Admiralty Jurisdiction Regulation Act, Act 105 of 1983 does not apply to Namibia. However, prior to Act 105 of 1983 Admiralty Jurisdiction was exercised by South African Courts by virtue of the provisions of s 2 of the Colonial Courts of Admiralty Act 1890. (See in this regard *Trivett & Co (Pty) Ltd and Others v Wm Brandt's Sons & Co Ltd and Others* 1975 (3) SA 423 (A).) The provisions of the Colonial Courts of Admiralty Act 1890 was therefore part of the statute law of the Cape of Good Hope when by s 1(1) of Proc 21 of 1919 the law as existing and applied in that province was introduced into the then South-West Africa. (See further *R v Goseb* 1956 (2) SA 696 (SWA). *S v Redondo* 1992 NR 133 (SC) also 1993 (2) SA 528 (NmS) and The Law of Shipping and Carriage in South Africa, 3rd ed by B Bamford, p 4 footnote 27.) In cases such as *Tittel v The Master of The High Court* 1921 SWA 58 and *Krueger v Hoge* 1954 (4) SA 248 (SWA) it was decided that statutes which applied in the Cape as at 1 January 1920 also apply in South-West Africa by virtue of the provisions of Proc 21 of 1919. This was again reaffirmed in the *Redondo* case supra at 150 (NR) and 539I-540B (SA). **Admiralty law as applied by the Colonial Courts of Admiralty Act, 1890, is therefore part of the Namibian law."**

Freiremar SA v The Prosecutor-General of Namibia & Another 1996 NR 18 (HC) at 27H-28D (emphasis added)

"On 10 July 1974 the Natal Provincial Division, purporting to sit as a Colonial Court of Admiralty in terms of sec. 2 (1) of the Colonial Courts of Admiralty Act, 1890 (53 and 54 Vict. C. 27), granted, at the instance of the first respondent, an order, with costs against certain of the defendants, appointing a commissioner for the examination of such claims against the proceeds of the sale of the ship, Waikiwi Pioneer, sold by order of Court, as may be lodged with him, and for the determination of their nature and the amounts thereof, to enable the Court to decide their proper order of preference.

The application for the order was resisted on the ground that the Republic of South Africa having ceased to be a "British possession" within the meaning of that expression in sec. 2 (1) of the Colonial Courts of Admiralty Act, 1890, the several Provincial and Local Divisions of the Supreme Court of South Africa were no longer Colonial Courts of Admiralty with the jurisdiction conferred upon such Courts by the said Act, and that the order prayed for could, therefore, not properly be made by the Natal Provincial Division sitting as a Colonial

Court of Admiralty under the Act of 1890. The Court *a quo* held, however, that the Colonial Courts of Admiralty Act, 1890, was a law in force in the Union of South Africa immediately prior to the commencement of the Republic of South Africa Constitution Act, 32 of 1961, and that sec. 107 of the latter Act accordingly provided for its continuation in relation to the Republic until repealed or amended by competent authority. The appellants now appeal to this Court against the order of the Court a quo.

Sec. 2 (1) of the Colonial Courts of Admiralty Act, 1890, provides as follows:

> "(1) Every Court of law in a British possession, which is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole judicial authority, the expression 'Court of law' for the purposes of this section includes such Governor."

The expression "British possession" is by sec. 18 (2) of the Interpretation Act, 1889 (52 and 53 Vict. C. 63) defined as:

> "Any part of Her Majesty's Dominions exclusive of the British Islands, and of British India, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession."

The expression "unlimited civil jurisdiction" is defined by sec. 15 of the Colonial Courts of Admiralty Act, 1890, as -

> "civil jurisdiction unlimited as to the value of the subject-matter at issue, or as to the amount that may be claimed or recovered".

No Court of law in South Africa has, in terms of sec. 2 (1) as read with sec. 3 (a) of the Colonial Courts of Admiralty Act, 1890, been declared to be a Colonial Court of Admiralty, but the several Divisions of the Supreme Court in South Africa became Colonial Courts of Admiralty by virtue of their having unlimited civil jurisdiction in a British possession as envisaged by the said sec. 2 (1). (Tharros Shipping Corporation S.A. v Owner of the Ship "Golden Ocean", 1972 (4) SA 316 (N) at pp. 318-319).

The jurisdiction of Colonial Courts of Admiralty are prescribed as follows by sec. 2 (2) of the Colonial Courts of Admiralty Act, 1890:

> "The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations."

It is clear that the four British Colonies which in 1910 became the Union of South Africa in terms of sec. 4 of the South Africa Act, 1909 (9 Edward VII, C. 9) were British possessions within the meaning of that expression in sec. 2 (1) of the Colonial Courts of Admiralty Act, 1890, and that every court of law which in those Colonies had unlimited civil jurisdiction, became, in terms of that section, a Colonial Court of Admiralty with the jurisdiction conferred by the 1890 Act.

The Union of South Africa was clearly also a British possession within the meaning of that expression in sec. 2 (1) of the 1890 Act and it is, therefore, also clear that the several Divisions of the Supreme Court of the Union of South Africa also became Colonial Courts of Admiralty in terms of the said sec. 2 (1), for they were Courts of law which had unlimited civil jurisdiction in a British possession.

The jurisdiction exercised by them as Courts of Admiralty in the Union of South Africa being prescribed by the Act of 1890, that Act accordingly applied in the Union. It was accordingly not necessary to provide for its continuation in the Union of South Africa by sec. 135 of South Africa Act, 1909, and it probably never was the intention to do so. Sec. 135 was concerned more with the continuation of existing Colonial laws in the respective Provinces of the Union, and not with the 1890 Act which, by reason of the definition of British possession, was applicable to the whole of the Union as a single British possession.

The application in the Union of South Africa of the Colonial Courts of Admiralty Act, 1890, was recognised by sec. 6 of the Statute of Westminster, 1931 (22 Geo. 5 C. 5), as read with sec. 3 of the Status of the Union Act, 69 of 1934, and by the proviso to sec. 106 of the South Africa Act, 1909, and it was common cause that immediately prior to the commencement of the Republic of South Africa Constitution Act, 32 of 1961, the 1890 Act was in force in the Union of South Africa.

Act 32 of 1961, however, introduced important constitutional changes in South Africa which in terms of that Act became a republic and accordingly ceased to be a British possession. **For its contention that the Colonial Courts of Admiralty Act, 1890, nevertheless continued to be in force in the Republic of South Africa, the respondent relied mainly upon sec. 107 of Act 32 of 1961 which reads as follows:**

> **"Subject to the provisions of this Act, all laws which were in force in any part of the Union of South Africa, or in any territory in respect of which Parliament is competent to legislate, immediately prior to the commencement of this Act, shall continue in force until repealed or amended by the competent authority."**

These are words of wide import no doubt employed to ensure the continuation in the Republic of all laws in force in the Union of South Africa immediately prior to the coming into existence of the Republic, except those expressly repealed by the Act, until such time as they are repealed or amended by the authorities competent to do so under the Act.

This would accord with the general policy of the Act of 1961 as it appears clearly from the provisions of, inter alia, secs. 24, 80, 94 and 112, namely, that, except for the fact that the Union of South Africa became a Republic in terms of the Act and therefore ceased to be a British possession, and that the Crown, or the Queen or the Governor-General was replaced by the State President, everything was to continue as before, including all statutory institutions which operated in the Union of South Africa. In terms of sec. 24 (2), for instance, the Senate and the House of Assembly, as constituted for the Parliament of the Union of South Africa, and in existence immediately prior to the coming into existence of the Republic, were deemed to have been duly constituted for the Parliament of the Republic, and any person elected or nominated as a member of the Senate or House of Assembly, and holding office immediately prior to the coming into existence of the Republic, was deemed to have been duly elected or nominated to the Senate or House of Assembly established by Act 32 of 1961. See also secs. 24 (4), 24 (5) and 24 (6) which provide, inter alia, for the disposal by the Parliament of the Republic of matters partly dealt with by the Union Parliament.

Having regard to these considerations, there can be no doubt that the Colonial Courts of Admiralty Act, 1890, which was a law in force in the Union of South Africa immediately prior to the coming into existence of the Republic, was intended by the Legislature to be included within the ambit of sec. 107 of Act 32 of 1961. The argument on behalf of the appellants that, because by Act 32 of 1961 the Union of South Africa ceased to be a British possession, the words "subject to the provisions of this Act" in sec. 107 have the effect of excluding from its ambit laws which were in force in the Union of South Africa by virtue of the fact that it was a British possession, cannot be sustained. It was precisely by reason of the constitutional changes brought about by Act 32 of 1961 that the enactment of sec. 107 thereof became necessary, and it would be strange indeed if the constitutional change of the Union of South Africa from a British possession to a republic was to have the effect of rendering sec. 107 inoperative in relation to a law which was in force in the Union of South Africa by virtue of its having been a British possession.

The more difficult question is whether, even if the Colonial Courts of Admiralty Act, 1890, continues in force in the Republic by reason of the provisions of sec. 107 of Act 32 of 1961, that Act can operate to confer upon Courts of law in the Republic the status and jurisdiction of Colonial Courts of Admiralty. It is clear that sec. 2 (1) of the 1890 Act in terms confers such status and jurisdiction only upon Courts of law in a British possession, and counsel for the respondent was constrained to concede that, unless that section of the Act as extended to the Republic by sec. 107 of Act 32 of 1961 is construed to refer to Courts of law in the Republic, it cannot be read as conferring upon such Courts the status and jurisdiction of Colonial Courts of Admiralty.

The Colonial Courts of Admiralty are the successors to the Vice-Admiralty Courts which were abolished by sec. 17 of the Colonial Courts of Admiralty Act, 1890, but subject to the provisions of that Act. The Vice-Admiralty Courts exercised the judicial functions of the Lord High Admiral by whom they were established in the United Kingdom and its dependencies. (*Crooks & Co. v Agricultural Co-operative Union Ltd*., 1922 AD 423). The jurisdiction exercised by the Vice-Admiralty Courts was commonly that of the High Court of Admiralty (*The Yuri Maru: The Woron*, 1927 A.C. 906 at p. 912), which exercised concurrent jurisdiction with Vice-Admiralty Courts abroad (*The Peerless*, (1860) 30 Lush. 167 E.R. 16). All Admiralty Courts administer English Admiralty law. (*Currie v McKnight*, 1897 A.C. 97 at p. 101, and *Crooks & Co.*'s case, supra at pp. 429-430, 432 et seq.).

Having regard to these features and to the origin and historical development in general of Admiralty Courts as sketched in the judgments in *Crooks & Co*'s case, supra, and the cases cited therein, it seems clear that Colonial Courts of Admiralty were by their very nature primarily intended to operate only in British possessions. The

existence of such Courts administering English Admiralty law in a foreign country, such as the Republic of South Africa, would therefore be an anachronism; an anachronism which, however, seems to be perpetuated, in part, by the Admiralty Jurisdiction Regulation Act, 5 of 1972, of the Republic of South Africa. That Act which, we are informed, has not yet come into operation, provides for the repeal of the Colonial Courts of Admiralty Act, 1890, in so far as it applies in relation to the Republic. Sec. 1 of the Act provides that:

> "The powers and jurisdiction of the courts of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890 (53 and 54 Victoria, C. 27) of the United Kingdom shall, as from the commencement of this Act, and notwithstanding the repeal of that Act by this Act, vest in the provincial and local divisions of the Supreme Court of South Africa."

It follows from this, I think, that the powers and jurisdiction thus conferred upon the several Divisions of the Supreme Court will still have to be determined by reference to the Act of 1890.

In enquiring whether the Colonial Courts of Admiralty Act, 1890, applies in relation to the Republic, no regard can be had to the assumption made by Parliament in Act 5 of 1972 that it does, for, if the assumption is erroneous in law, it cannot alter the law (*Ex parte Swirsky*, 1930 T.P.D. 370 at p. 372), and, in enquiring whether the assumption is correct, the assumption itself cannot be of any assistance.

It obviously never was the intention of the British Parliament, in enacting the Colonial Courts of Admiralty Act, 1890, that the status and jurisdiction of Colonial Courts of Admiralty be conferred on Courts of law in any country other than a British possession, and it is indeed difficult, if not impossible, to apply some of the provisions of the 1890 Act, such as secs. 8 and 9, in relation to any country which is not a British possession. We are, however, not here concerned with the intention of the Parliament at Westminster in enacting the 1890 Act, but with the intention of the Parliament of the Union of South Africa in extending to the Republic the provisions of the 1890 Act by sec. 107 of Act 32 of 1961, for since South Africa ceased to be a British possession and became a Republic it is by the will of the Union Parliament, and not of the British Parliament, that the 1890 Act applies in relation to the Republic.

The 1890 Act would have ceased to apply in relation to South Africa when the Union became a Republic and ceased to be a British possession. What then was the intention of the Union Parliament in providing by sec. 107 of Act 32 of 1961 for the continuation in the Republic also of the 1890 Act?

In seeking an answer to this question, the general policy of Act 32 of 1961 cannot be overlooked. As already indicated that **policy was that, subject to the specific exceptions mentioned, everything was to continue exactly as before, and that all statutory institutions which operated in the Union of South Africa immediately prior to the commencement of the Act, were to continue to operate in the Republic**. **If that was the intention of the Union Parliament it would be going against that intention to hold that Parliament did not intend to provide for the continued functioning in the Republic of Courts of Admiralty under the provisions of the Colonial Courts of Admiralty Act, 1890**. If Parliament did not, in extending to the Republic the provisions of the Colonial Courts of Admiralty Act, 1890, contemplate the continued functioning in the Republic of Admiralty Courts under the provisions of that Act, and if the words "every court of law in a British possession" in sec. 2 (1) of that Act are to be given their literal meaning, the extension of the Act to the Republic would be meaningless and a nullity. In Salmon v Duncombe, (1886) 11 App. Cas. 627 at p. 634, Lord HOBHOUSE, in the Privy Council, said:

> "It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftman's unskillfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used."

If sec. 3 of the Act 32 of 1961, which provides for the construction of pre-Republican laws, had included a provision that any reference in any law in force in the Union of South Africa immediately prior to the commencement of Act 32 of 1961 to a "British possession" shall be construed as a reference to the Republic, the matter would have been clear. It would, however, be a serious matter to hold that the extension to the Republic of the Colonial Courts of Admiralty Act, 1890, by sec. 107 of Act 32 of 1961 should be reduced to a nullity where, though the intention of the Legislature is clear, the necessity for such a provision as aforesaid was overlooked. (Cf. also R. v Vasey, (1905) 2 K.B. 748, and R. v Ettridge, (1909) 2 K.B. 24). The necessity sometimes to modify or vary the words of a statute to give effect to the clear intention of the Legislature was referred to by DE VILLIERS, J.A., in Principal Immigration Officer v Hawabu and Another, 1936 AD 26 at p. 31, where the learned Judge of Appeal said:

> "It is true that, even where the words of an Act are capable of one meaning only, there is an exceptional class of extreme cases in which courts of law have felt themselves compelled to 'modify' or 'cut down' or 'vary' the words used by the Legislature. In a sense this might be called amputation rather than interpretation. This

process has been applied to statutory enactments in a few cases, such as Storm & Co. v Durban Municipality, 1925 AD 49 at p. 55; Brown v Brown, 1921 AD 484; R. v Venter, 1907 T.S. 910."

In Venter's case, supra, INNES, C.J., stated the principle thus -

"that when to give the plain words of the statute their ordinary meaning would lead to an absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified to take into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the Legislature".

Applying these principles to the case before us, **it seems to me that we are bound to construe the words "every court of law in a British possession" in sec. 2 (1) of the Colonial Courts of Admiralty Act, 1890, in its application in relation to the Republic, as a reference to "every court of law in the Republic". That being so, sec. 2 (1) of the Colonial Courts of Admiralty Act, 1890, as extended to the Republic by sec. 107 of Act 32 of 1961, does operate to confer upon the several Divisions of the Supreme Court of South Africa the status and jurisdiction of Colonial Courts of Admiralty.**

For these reasons the appeal fails and is dismissed with costs, including the costs of two counsel, such costs to be paid by the appellants jointly and severally, the one paying the others to be absolved."

Trivett & Co, (Pty) Ltd & Others v WM Brandt's Sons & Co Ltd & Others
1975 (3) SA 423 (A) (emphasis added)

**Admiralty Jurisdiction Regulation Act 5 of 1972*,* as amended in South Africa to November 1979

Summary: This Act (RSA GG 3406) requires the High Court, when sitting as a court of admiralty, to refer to the law of England. **Note that it was never brought into force in respect of either South Africa or South West Africa.**

Applicability to SWA: Section 5 of this Act states "This Act and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel." Section 6 states "This Act shall be called the Admiralty Jurisdiction Regulation Act, 1972, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*." No such Proclamation was issued, meaning that the Act was never in force in South West Africa or in independent Namibia.

Transfer of administration to SWA: The administration of this Act was transferred to South West Africa by the Executive Powers (Justice) Transfer Proclamation (AG 33/1979), dated **12 November 1979**, as amended. The Act was repealed in its entirety in South Africa by the *Admiralty Jurisdiction Regulation Act 105 of 1983* (RSA GG 8891), which was not made applicable to SWA.

In terms of section 3(1) of the Executive Powers Transfer (General Provisions) Proclamation, AG 7 of 1977, a reference to the Republic is to be construed as a reference to the territory of South West Africa. However, section 3(1)(r) of the transfer proclamation excluded sections 1 and 2 of this Act from the operation of section 3(1) of the General Proclamation. Thus, in those sections, prior to Namibian independence, "Republic" retained the meaning of the Republic of South Africa while in sections 3 and 4, "Republic" was to be construed as referring to South-West Africa**.**

Cases:
Euromarine International of Mauren v The Ship Berg & Others 1984 (4) SA 647 (N) at 665E
Freiremar SA v The Prosecutor-General of Namibia & Another 1996 NR 18 (HC) at 28.

See also **SHIPPING.**