IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN
(Exercising its Admiralty Jurisdiction)

CASE NO: AC24/2011

NAME OF SHIP: **MV "F ELEPHANT"**

In the matter between:

GULF SHEBA SHIPPING LIMITED	Applicant
and	
MV "F ELEPHANT"	First respondent
F ELEPHANT CORPORATION	Second respondent
THE MASTER OF THE MV "F ELEPHANT"	Third respondent

REASONS FOR THE ORDERS
GRANTED ON 4 APRIL 2011

FURNISHED ON 7 APRIL 2011

BLIGNAULT J:

[1] On 18 March 2011 this Court granted an *ex parte* order for the arrest of first respondent, the MV "F Elephant". Second respondent, F Elephant Corporation, subsequently brought an

order for the reconsideration of this order. On 4 April 2011 I granted the following orders:

> *"(1) The application to set aside the arrest of the MV "F Elephant" is dismissed.*
>
> *(2) The arrest of the MV "F Elephant" is confirmed.*
>
> *(3) Second Respondent is ordered to pay applicant's costs."*

My reasons for these orders follow below.

[2] Applicant is Gulf Sheba Shipping Limited, a company incorporated in terms of the laws of Hong Kong. First respondent is presently under arrest in the port of Saldanha pursuant to the order granted on 18 March 2011. Second respondent is the F Elephant Corporation, a Liberian company. It is the owner of first respondent. Third respondent is the Master of the MV "F Elephant".

[3] Applicant brought the application for the arrest of first respondent in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Act") in order to obtain security for a claim which it has against the Great Elephant Corporation ("GEC").

[4] Applicant is the owner of the MV "Gulf Sheba". From about 27 July 2007 applicant chartered it to GEC for a period of three years. For reasons which are not presently relevant, applicant, GEC, and Shell International Trading and Shipping Company Limited ("Shell") entered into a settlement agreement dated 28 October 2009. Further to the settlement agreement applicant and GEC entered into a side letter dated 28 October 2009.

[5] Relevant clauses of the side letter are the following:

> *"This side letter is made in connection with the settlement agreement between Gulf Sheba Shipping Ltd* ***("GSSL")****, Great Elephant Corporation* ***("GEC")*** *and Shell International Trading and Shipping Co Ltd dated 28 October* ***2009*** ***("the settlement agreement")*** *and shall be deemed to be an integral part of the settlement agreement and the words and expressions defined in the settlement agreement shall have the same meanings when used in this side letter and the terms of the settlement agreement shall apply to this side letter.*
>
> *Upon receipt by GSSL of the freight pursuant to clauses 1 and 3 of the settlement agreement, it is mutually agreed as between GSSL and GEC:*
>
> 1. *In consideration of payment of the freight, the time charter shall be terminated as at the date set out at 2 below, and subject to the following terms.*

2. *Hire payable by GEC to GSSL under the time charter is to be calculated as running up to and including the date on which the freight (less STAXCO's costs) is received in cleared funds in GSSL's nominated account. The date on which the freight (less STASCO's costs) is received in cleared funds shall be the date on which the time charter is deemed terminated* ***("the termination date").***

... ...

7. *Upon the expiration of the period of the time charter on 30 June 2010* ***("the date of expiry")****, GSSL shall provide to GEC a statement of account that shall include the following:*

   (i) *The sum of the freight less hire payable up to and including the date of termination;*

   (ii) *Hire earned by the vessel between the date of the termination and the expiry date;*

   (iii) *Hire the vessel would have earned had the time charter remained in force up to the expiry date; and*

   (iv) *All sums due to GSSL under the time charter as at the date of termination, including but not limited to interest on late payment of war risk premiums and hire, and all costs, expenses and losses incurred by GSSL in respect of GEC's non-payment of October hire, the vessel's call at Rotterdam, including but not limited to port dues, penalties and legal costs but not including the sum posted as security for the bunker*

arrests and not including any legal costs paid or payable by GSSL to STASCO, such costs to be deemed solely for GSSL's account.

8. *If the vessel's net hire earned (hire earned as per clause 7.(ii) above less all sums due under the charterparty, and costs, expenses and losses as referred to at 7.(iv) above) exceeds the hire that it would have earned under the time charter had it continued to the expiry date (as per clause 7.(iii) above). GSSL shall account to GEC in respect of any excess up to the value of the sum of freight less hire referred to at 7(i) above (plus interest on such sum pro rata at the LIBOR rate).*

9. *If the vessel's net hire earned (hire earned as per clause 7.(ii) above less all sums due under the charterparty, and costs, expenses and losses as referred to at 7.(iv) above) is less than the hire that it would have earned under the time charter had it continued to the expiry date (as per clause 7.(iii) above), GEC shall account to GSSL in respect of the difference."*

[6] The charterparty was terminated on or about 29 October 2009. On 29 July 2010 applicant provided a statement of account to GEC in terms of the side letter. GEC responded with a revised account. Applicant maintains that an amount of USD 4 598 850,90 is due to it by GEC in terms of the side letter.

[7] Relevant provisions of the Act are the following:

"(6) *An action in rem, other than an action in respect of a maritime claim referred to in paragraph (d) of the definition of 'maritime claim', may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.*

(7) (a) *For the purposes of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose-*

(i) *owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or*

(ii) *owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or*

(iii) *owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.*

(b) *For the purposes of paragraph (a)-*

(i) *ships shall be deemed to be owned by the same persons if the majority in number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons;*

(ii) *a person shall be deemed to control a company if he has power, directly or indirectly, to control the company;*

(iii) *a company includes any other juristic person and any body of persons, irrespective of whether or not any interest therein consists of shares.*

(c) *If at any time a ship was the subject of a charter-party the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the subcharterer, and not the owner, is alleged to be liable.*

Applicant's contentions

[8] Applicant contends that it is entitled to arrest first respondent as it is an associated ship of the MV "Gulf Sheba". Its claim in terms of the side letter arose by no later than on the date of the termination of the charterparty. By virtue of the deeming provision

in sub-section (3)(7)(c) of the Act, GEC, as charterer of the MV "Gulf Sheba", must therefore be regarded as its owner for purposes of applying the provisions of sub-section (3)(7)(a) of the Act. Applicant produced evidence to show that GEC and second respondent were, at the time that the maritime claim arose, owned or controlled by the same person, within the meaning of section (3)(7)(a) and (b) of the Act.

[9] Applicant's alternative contention is that even if applicant's claim against GEC arose after the termination of the charterparty, it was nevertheless subject to the provisions of section 3(7)(c) of the Act. This result, according to the argument, follows from a literal interpretation of the words *"If at any time"* at the beginning of section 3(7)(c) of the Act.

Second respondent's contentions

[10] Second respondent's first contention is that applicant's claim against GEC in terms of the side letter arose after termination of the charterparty. It was not a claim following a breach of contract nor one for damages. It was a claim for specific performance of a

contract. For that reason this claim, when it arose, was not subject to the charterparty.

[11] Second respondent's response to applicant's alternative submission is that for purposes of the associated ship provisions of the Act, the effect of sub-section 3(7)(c) is simply to substitute the person of *charterer* for *owner*. It goes no further. It was argued that that to hold that a charterer is subject to the associated ship provisions of the Act for a longer period than that of the owner himself, would be an unnatural and illogical extension of these provisions. As to the words *"If at any time"*, it was submitted that the sole purpose of these words is to rebut the suggestion that the deeming provision only applied in cases where the charter-party had been entered into after the amendment of section 3(7)(c) of the Act in 1992. In this regard reference was made to a statement in the judgment of the Supreme Court of Appeal in *MV Yu Long Shan: Drybulk SA v MV Yu Long Shan* 1998 (1) SA 646 (SCA) at 652 H – 653 B. I shall revert to this statement hereunder.

The first issue

[12] The first issue concerns the meaning of *"arose"* in sub-sections 7(a)(i) and (ii) of the Act as applied to the side letter concluded between applicant and GEC. Counsel for applicant submitted that the claim arose no later than the day when the charterparty was terminated. As from that day it was simply a question of the quantification of the claim.

[13] Counsel for second respondent submitted that the debts in question only arose when the accounting took place on 30 June 2010 ie long after the termination of the charter-party. Until that date the claims were not liquidated. In fact, he argued, it was not even certain that there would be any claims. That would have depended upon the result of the proposed calculations.

[14] In my view it is important to note first that the word *arise* has a wider meaning than *due*. See *MV Forum Victory: Den Norske Bank ASA v Hans K Madsen CV and Others (Fund Constituting the Proceeds of the Sale of the MV Forum Victory)* 2001 (3) SA 529 (SCA) para [14]:

"It follows that, in my view, a reading of s 11(4)(c) together with s 10A(4)(a) strongly suggests that the expression 'a claim which arose' in s 11(4)(c) is to be understood as referring to a claim which came into existence, and not to a claim which became enforceable. Such a construction is moreover supported by the recognition in our law of a distinction between a claim coming into existence or, as it is frequently said, a claim arising, on the one hand and a claim which is due and payable on the other. The distinction was explained by Miller J in Apalamah v Santam Insurance Co Ltd and Another 1975 (2) SA 229 (D) at 232E - G as follows:

> *'Although it is true that in many cases the date upon which a debt "becomes due" might also be the date upon which it "arose", that is obviously not true of all cases. There is a vital difference in concept between the coming into existence of a debt and the recoverability thereof. There can be little doubt, if any, that the purpose of the Legislature in enacting s 12(1) of the new Prescription Act was to crystallise that difference; thenceforth prescription in terms of that Act began to run not necessarily when the debt arose but only when it became due.'*

(See also List v Jungers 1979 (3) SA 106 (A) at 121C - E; The Master v I L Back and Co Ltd and Others 1983 (1) SA 986 (A) at 1004D - G.) The distinction is hardly one which would have been unknown to the Legislature. If the construction which the respondents would place on s 11(4)(c) is indeed the one intended, it is difficult to imagine why the Legislature would not have used words such as 'which became due' rather than 'which arose', particularly having regard to the provisions of s 10A(4)(a)."

[15] An indication of the meaning of *arise* is found in the Afrikaans version of the Act where the word *"ontstaan"* is used. I quote the Afrikaans version of section 3(6) below:

> *"(6) 'n Aksie in rem, uitgesonderd 'n aksie ten opsigte van 'n maritieme eis bedoel in paragraaf (d) van die omskrywing van "maritieme eis", kan ingestel word deur die inbeslagneming van 'n geassosieerde skip in plaas van die skip ten opsigte waarvan die maritieme eis ontstaan het*
>
> .

[16] In *MV Cape Courage Bulkship Union SA v Qannas Shipping Co Ltd and Another* 2010 (1) SA 53 (SCA) Farlam JA held that a claim pursuant to a breach of contract arises when the breach occurs and not when the resulting damage is suffered. He pointed out, *inter alia,* that the judgment of Scott JA in *MV Forum Victory: Den Norske Bank ASA v Hans K Madsen CV and Others (Fund Constituting the Proceeds of the Sale of the MV Forum Victory), supra,* the Court was dealing with section 10(4)(1) of the Act and not with the meaning of *arise* in section 3(6) of the Act. This is undoubtedly so but his analysis is nonetheless helpful.

[17] I revert to the terms of the side letter in the present case. It is clear that the claim against respondent in terms thereof was

subject to a suspensive condition, namely the payment of the freight by Shell. Upon the occurrence of that event the charterparty would have terminated. Until that date GEC remained the charterer and as such subject to the provisions of section 3(7) of the Act. The side letter was entered into on 28 October 2009 and the funds were received from Shell on 3 November 2009.

[18] The question that arises is whether a conditional claim is one that has *arisen*. I have not been referred to any authority in the field of maritime law. Having regard to the general principles of the law of contract, however, it seems to me that it should qualify as such. It is settled law that a claim arising from contract comes into existence upon conclusion of the contract in question. See for example Christie *Law of Contract 5th edition* 141.

[19] The fact that some of the claims still had to be quantified on the date of expiry mentioned in the side letter, does not, in the light of the judgment of Farlam JA in *MV Cape Courage Bulkship Union SA v Qannas Shipping Co Ltd and Another, supra,* refute the conclusion that they arose when the suspensive condition was fulfilled. Nor does the fact that some of the claims might, upon quantification, be subject to set off against some or more of the

counterclaims, destroy their existence in the meantime. Such claims would only have terminated when the set off takes place.

[20] It is my view therefore that applicant's claim against GEC came into existence no later than the date of the conclusion of the side letter. GEC did not cease to be a charterer before the charterparty was terminated.

[21] On the first issue I therefore upheld applicant's contention.

The second issue

[22] The second issue concerns the interpretation of the words *"at any time"* in section 3(7)(c) of the Act.

[23] The following factors, in my view, support applicant's contention:

(i) The word *"any"*, it has often been said, is *"a word of widewide and unqualified generality."* See, for example, Innes CJ in *R v Hugo* 1926 AD 268 at 271; *Body Corporate*

of Greenacres v Greenacres Unit 17 CC and Another 2008 (3) SA 167 (SCA).

(ii) Second respondent's interpretation of the sub-section would render the words in question redundant, which is in conflict with the presumption that the legislature does not intend such a result. See *Case and Another v Minister of Safety and Security; Curtis v Minister of Safety and Security*1996 (3) SA 617 (CC) para [57].

(iii) A third factor is that the next phrase *"if a ship was the subject matter of a charterparty"* is expressed in the past tense. It seem to me that the present tense, *"is"*, would have been used had it been the intention to confine the ambit of the provision to a current charterparty.

(iv) The Afrikaans wording of section 3(7)(c) of the Act also supports this meaning. I quote it below:

> *" (c) Indien 'n skip te eniger tyd die voorwerp was van 'n vragkontrak, word die bevragter of onderbevragter, na gelang van die geval, by die toepassing van subartikel (6) en hierdie subartikel geag die eienaar*

> *van die betrokke skip te wees ten opsigte van 'n relevante maritieme eis waarvoor, na beweer word, die bevragter of onderbevragter, en nie die eienaar nie, aanspreeklik is."*

[24] Counsel for second respondent, on the other hand, placed much reliance on the statement of Marais JA in *MV Yu Long Shan: Drybulk SA v MV Yu Long Shan supra* at 652 H – 653 B. I shall revert to this statement hereunder.

> *"The question is whether or not Parliament must be taken to have so intended. I can find nothing expressly said in the amending Act which can be said to lend support to such an interpretation. Counsel for plaintiff pointed to the words "If at any time a ship was the subject of a charter-party" in section 3(7)(c) and emphasised the words "at any time", suggesting that they showed that the legislature intended that no distinction should be drawn between causes of action arising before or after the amendment in the application of the deeming provision in the subsection. I do not think that inference is justified. Those words are there, so it seems to me, simply to rebut any suggestion that the deeming provision is to apply only in cases where the charterparty has been entered into after the amendment. Non constat that they were also meant to convey that the deeming provision was to be applicable even if the cause of action arising from a charterparty had arisen prior to the amendment. The mere existence of a charterparty gives no cause of action; it is a failure to perform the obligations under it or other unlawful conduct relating to it which gives rise to a cause of action. At best for plaintiff the words relied*

upon are equivocal in that particular regard and therefore provide no sure guide to an intention to impose by legislative decree liability ex post facto for the consequences of certain conduct or events where no liability existed at the time when they occurred."

[25] The precise import of the application of the words in question is, with respect, not clear to me. It was, however, submitted by counsel for second respondent that I am bound by precedent to follow this decision.

[26] In terms of our law of precedent a decision of a higher court binds a lower court. There are, however, exceptions to this rule. One of these exceptions is where the decision in question does not form part of the *ratio decidendi* of the judgment. The following statement of Schreiner JA in *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 317 is regarded as authoritative in this regard:

> *"It may be that the contrast between a reason and the ratio depends mainly on the meaning attached to those words in their context by the users. As I understand the ordinary usage in this connection, where a single judgment is in question, the reasons given in the judgment, properly interpreted, do constitute the ratio decidendi, originating or following a legal rule, provided (a) that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, (b)*

> *that they were not merely a course of reasoning on the facts (cf. Tidy v Battman (1934, L.J.K.B. 158 at p. 162)) and (c) (which may cover (a)) that they were necessary for the decision, not in the sense that it could not have been reached along other lines, but in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons."*

[27] In my view the present case is one where the decision in question falls into the ambit of the exception numbered (a). The main principle on which the judgment was based is that the arbitral award did not have retrospective effect when the underlying claim arose before the amendment of the Act. His decision was in the main reached on the basis of the normal rules of retrospectivity. the passage under consideration Marais JA was not advancing the principal reasons for his judgment. He was merely responding to a subsidiary argument put forward by counsel. I am therefore not bound to follow the statement in question in the *Pretoria City Council* judgment.

[28] I would agree with the submission of second respondent's counsel that the meaning contended for by applicant does not fit comfortably into the general scheme of the associated ship provisions of the Act. That, however, is not a reason to deviate

from the ordinary meaning of the words used. Some absurdity or repugnancy or inconsistency is required before a court is entitled to deviate from the ordinary meaning of the words. See *Ngcobo and Others v Salimba CC; Ngcobo v van Rensburg* 1992 (2) SA 1057 (CC). In the present case the phrase in question does not meet any of these requirements.

[29] I therefore upheld applicant's contention on the second issue as well.

[30] In the result, the arrest of the MV "F Elephant" was confirmed. Second respondent's application to set aside the arrest was dismissed. Second respondent was ordered to pay applicant's costs.

A P BLIGNAULT