



IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN
(EXERCISING ADMIRALTY JURISDICTION)

Case No: A25/2022

In the matter between:

RE: MT *NEW DIAMOND*

INDIAN OIL CORPORATION LIMITED

APPLICANT

and

MV *NEW ENDEAVOR*

ELLY MARITIME SA

PORTO EMPORIOS SHIPPING INC.

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

ORDER

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1. The application for reconsideration of the order of 30 May 2022 for the arrest of the MV *New Endeavor*, in terms of Uniform Rule 6(12)(c) is dismissed.
 2. The respondents are directed to pay the costs of the application.

JUDGMENT

Sibiya J:

Introduction

[1] On 30 May 2022 the applicant brought an urgent application for the arrest of the MV *New Endeavor* ('the first respondent'), as additional security for the applicant's maritime claim against the Porto Emporios Shipping Inc ('the third respondent'), relating to the MT *New Diamond* ('the vessel'). The court duly ordered the arrest of the first respondent, based on it being an associated ship with the vessel.

[2] The present application has been brought by the first respondent, in terms of Rule 6(12)(c), for reconsideration and setting aside of that order of arrest. The reconsideration application is not supported by any affidavit, and follows upon the issuing of a Letter of Undertaking (LoU) on 31 May 2022, in terms of which the first respondent, although still under arrest, has been released from detention.

[3] The reconsideration application is premised on the submission by the first respondent that the applicant failed to establish that the vessel and the first respondent are associated ships as contemplated in section 3(6) and 3(7)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983, as amended ('the Admiralty Act'). According to the first respondent, this aspect is the only issue for determination.

[4] The applicant, in its heads of argument, raises an additional issue for determination, namely whether the reconsideration application is urgent and warrants a preferential hearing date, in the absence of any evidence of prejudice to the first respondent by a hearing in due course. At the hearing of the matter, although this point was not expressly abandoned, no argument was advanced in relation to it and in my view this was correctly done. The applicant accordingly seeks final determination of the application in its favour, together with costs of senior and junior counsel.

[5] In the application for the arrest, the applicant had placed reliance on section 3(7)(a)(iii) of the Admiralty Act for the establishment of the association. This section provides as follows:

'For the purpose of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose —

(i) . . .

(ii) . . .

- (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.'

[6] The onus to show the association in an application for arrest is on the applicant. However, once the arrest has been authorised the association is taken as established, and the onus is on the respondents to show that the ship arrested and the vessel concerned have not been shown to be associated ships.

[7] It is common cause that if the respondents have elected not to file any papers in support of the reconsideration application they are confined to the applicant's papers. Mr *Harpur* SC submitted that the court should draw an adverse inference against the respondents for failing to submit an affidavit and to bring to the fore the truth about the association and control of the ships, as opposed to merely attacking the applicant for the allegations made as establishing association.

[8] In support of this submission, the applicant relied *inter alia* on page 133 of *Shipping Law and Admiralty Jurisdiction in South Africa*, where Hare wrote 'The court is entitled to draw an adverse inference from the silence of a party who has at its disposal facts that could enlighten the court on factual issues relevant to the proving of the essential averments.'¹

Hare refers to *The MV Heavy Metal*² and *The MV Stravoula*³ as instances where such an inference was drawn.

[9] Mr *Harpur* also made specific reference to the *The MV Stravoula*⁴ where the court drew an adverse inference from the silence of the respondent and its failure to rebut the evidence evincing the association. In that case the respondent had not even denied the allegations that the person who was identified as owning the shares owned them, or put up any evidence to the contrary. He also referred to *The MV Heavy Metal* saying that it is just to draw an adverse inference for failing to take the court into their confidence.

¹ J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2ed (2009) at 133.

² *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA).

³ *Hasselbacher Papier Import and Export (Body Corporate) v MV "Stravoula"* 1987 (1) SA 75 (C).

⁴ *Hasselbacher Papier Import and Export (Body Corporate) v MV "Stravoula"* 1987 (1) SA 75 (C).

[10] Both that passage in Hare's book and the cases referred to therein, as well as those referred to by Mr Harpur are not, in my view, applicable to the present circumstances. This is because the respondents are entitled to seek a reconsideration without filing any answering papers.⁵ Unlike the *Saga Welco AS v MV "Guo Shun"*,⁶ none of the cases that Mr Harpur referred to dealt with reconsideration applications, and in most (if not all) of them an answering affidavit had in fact been filed by the respondents.

[11] The high watermark of the respondents' case is that the relevant provision requires that there must be a single *locus* of control, and the introduction of an alternative is fatal to the applicant's claim of association. The *locus* of control must be singular, and common between the vessel concerned and the ship with whom the association is sought to be established. The same person or group must have controlled the vessel concerned at the time the claim arose and the associated ship at the time of the arrest. The respondents argue that alternative controllers, even if there are commonalities among them, do not suffice.

[12] Mr Fitzgerald SC relies on Wallis,⁷ at page 187, where it was stated that the relevant sections do not, as a matter of language, contemplate that an investigation into the question of control would identify more than one controller. Wallis continues that

'Had this been contemplated so that there might be more than one locus of control of the company, one would have expected to find a mechanism for distinguishing between the different sources or giving priority to one over another but there is none. All that the sections require is that in relation to both the ship concerned and the associated ship a 'person' must be identified who 'controls' or 'controlled' the companies in question. The process of comparison that follows upon this identification is intended to be a simple one. The maritime claimant identifies the party who controls the company that owned the ship concerned and identifies the party who controls the company that owns the associated ship that it seeks to

⁵ *Afri Grain Marketing (Pty) Ltd v Trustees for the time being of Copenship Bulkers A/S (in Liquidation)* [2019] ZASCA 67; [2019] 3 All SA 321 (SCA) paras 12 – 13; *Saga Welco AS v MV "Guo Shun"* [2017] ZAKZDHC 43 paras 18 – 20.

⁶ *Saga Welco AS v MV "Guo Shun"* [2017] ZAKZDHC 43.

⁷ MJD Wallis, *The Associated Ship and South African Admiralty Jurisdiction* (unpublished LLD thesis, University of KwaZulu-Natal, 2010) at 259 – 260.

arrest. The result of those exercises is then compared. If they correspond, in the sense that the same person or persons control both companies, then the requisite association is established.’

[13] Mr *Fitzgerald* SC further submitted that in order for the court to reach a conclusion that there is a common controller, the court must be able to identify who that common controller is. Without that, the court cannot say there is a single controller, and the association cannot be said to have been established. It is difficult to fault this reasoning.

[14] The applicant argued that the alternatives identified related to the identity of the single source of control, and not the fact of the existence of a single source of control. It was submitted that the single source is either Adam Polemis, or Adam Polemis and his children or New Shipping Limited (‘NSL’). Whichever person or entity controlled the vessel at the time the claim arose, was the same as the one that controlled the first respondent at the time of its arrest.

[15] The applicant sought to establish the association, in the founding papers, on the basis of ‘the same repository of control’ as follows: the first respondent was owned by the second respondent at the time of the application,⁸ the second respondent is in turn owned or controlled by NSL.⁹ NSL is owned and controlled by Adam Polemis, on his own or with his children.¹⁰ The vessel was owned by the third respondent at the time the maritime claim arose, the third respondent being owned or controlled by NSL.¹¹

[16] The NSL is said to be used, together with the Polembros Shipping Limited (‘PSL’), as vehicles to control the companies, which own the ships in the fleets managed by them.

⁸ Page 44, founding affidavit para 89.1

⁹ Page 45, founding affidavit para 89.4

¹⁰ Page 45, founding affidavit para 89.4

¹¹ Page 44, founding affidavit para 89.2

[17] The association is accordingly based on both the vessel concerned and the first respondent's common link to the third respondent,¹² which in turn was owned and controlled by Adam Polemis on his own, or with his children. The question is whether this common control is borne out by the evidence.

[18] It seems to me that the appropriate starting point is to ascertain the control of NSL, and then work backwards to which ships were owned by NSL. I am aware of the contrary view expressed by the applicant in paragraph 129 at page 58, that this determination was not necessary. The applicant specifically locates the association in the control of NSL, by Adam Polemis either on his own or with his children. It does not make sense to me that the control of NSL would be an irrelevant consideration, given the case advanced by the applicant.

[19] Determining who controls NSL is vital, in my view, to answering the question of whether the *locus* of control is the same. I say so because the case ultimately advanced by the applicant relates to the Polemis family in general and Adam Polemis in particular, in relation to NSL.

[20] I am not convinced that the introduction of alternatives is sufficient to disprove the existence of the single *locus*. If the same alternatives either controlled the vessel concerned or the first respondent, and they are 'associated', that would be sufficient in my view to meet the threshold of a single *locus* of control. I say this mindful of the words of Wallis already referred to earlier.

[21] The respondents referred me to paragraphs 97, 125 and 128 of the founding affidavit, in order to demonstrate that the applicant has failed to identify a single *locus* of control of the company that owned the arrested ship and the company owning the vessel concerned.

[22] In paragraph 97 the applicant states
'it is evident ...that PSL and NSL are not mere ship-management companies but are used as vehicles to control the companies which own the fleets managed by them . . . It is evident that

¹² Page 48, founding affidavit para 98

PSL and NSL exercise control over [single-purpose vehicles who own the ships], not only in the sense of day-to-day management but the control of their ultimate fate and destiny¹³ . . . PSL and NSL make strategic decisions to expand and contract their fleets from time to time¹⁴ . . . the Polemis family beneficially owns and controls the fleet of ships which it has acquired over the years¹⁵ . . . although the Polemis family owns the ships through vehicles of separate companies, it controls the companies through . . . NSL (Adam and family).¹

[23] In my view, the allegation in this paragraph is that control of the third respondent resides in NSL, and control of NSL resides in Adam Polemis, either on his own or with his children. Management of the third respondent by NSL started in May 2014 and ceased on 31 December 2020.¹⁶

[24] Before dealing with paragraph 125, it is necessary to set out the relevant background to that submission. The case of the applicant is largely based on the contents of the Gray Page report, attached to the papers as annexure N. The report was done in 2021. The report did not investigate the ownership of the first respondent, but other ships that are managed by NSL. It did, however, identify the first respondent as one such ship¹⁷ and in paragraph 98 of the founding affidavit the submission is made that the first respondent and the vessel are both ships within the NSL stable.

[25] Further investigations were conducted by Gray Page with specific reference to the first and second respondents, as reflected in paragraphs 115 to 124 of the founding affidavit. There is no report that contains the findings in this regard, and the applicant has attached the supporting documents from which the conclusions in relation to the alleged association were drawn as annexures S1 to S6 and T. The applicant contends that the similarities in the ownership and management structure of the first and second respondents is similar to those of the seven entities specifically investigated and reported on in annexure N. The beneficial owner of the first respondent is reflected as Adam Polemis.¹⁸

¹³ Para 97 at page 48 of the indexed papers

¹⁴ Para 97.1, page 48 of the indexed papers

¹⁵ Para 97.3 page 48 of the indexed papers

¹⁶ Page 51, founding affidavit para 108 and 109.

¹⁷ Page 254 – 255, para 53 to 55 of annexure N

¹⁸ New Endeavor Vessel report, annexure S1, page 297

[26] The applicant lists the companies for which, with Eftstratios Gogis acts as the company secretary, and Antonis Stellas as the president, including NSL, in paragraph 121 and 122. At paragraph 124 the applicant highlights, that one of the similarities in these companies is the prefix 'new' to their names, as is the case with NSL, and that they all bear the same logo on their funnel.

[27] In paragraph 125 the applicant makes the submission, having dealt with the results of the further investigation by the Gray Page report in the paragraphs immediately preceding it, that it is more probable than not that the first respondent is an associated ship to the vessel, and particularly that the companies that owned the vessels at the relevant times are ultimately owned and controlled by the same person or persons being NSL, which is in turn controlled by Adam Polemis on his own or with his children.

[28] In paragraph 128 the applicant says both the Gray Page report and the affidavit 'state that the ship-owning companies in question are controlled by Adam Polemis through the vehicle of NSL and that Adam has brought his children into the business, who will one day succeed him as owner. Whether and to what extent Adam Polemis is assisted by his children is irrelevant to the inquiry. The identical repository and manner of control applies to each ship-owning company.'

[29] The applicant's heads of argument contend that in fact the *locus* of control is exercised through NSL, relying on the reasoning in *The MV Heavy Metal* as authority for the proposition that it is not necessary to go beyond NSL to establish control.

[30] The applicant then goes on to rely on family control as being common in Greek families, but that was not the basis of its application. Mr *Harpur* places reliance on *Koch Shipping v MV Alpha*¹⁹ where the court accepted that the head of the family (Mr Ghandour) was deemed to control the relevant companies that owned the ships 'because he yields power through his wife and daughters who are recognised in the eyes of the law to possess authority over those companies through their shareholding.'

¹⁹ *Koch Shipping PTE Ltd v MV Alpha* (5 July 2022) SCOSA B656 (WCC) at B663 A-B

[31] I am not convinced that the contradictions and confusion contended for by the respondents actually exist. While it cannot be disputed that the applicant has made the statements in paragraphs 97, 125 and 128, and that these statements could have been framed better, these should not be read in isolation.

[32] The applicant in his argument on 'association' reiterates what its case is, in the following words: both the third respondent, at the time the claims arose, and the second respondent, at the time of the first respondent's arrest, were controlled by New Shipping Ltd which in turn is controlled by Adam Polemis, either himself as head of his family or together with his children.²⁰ The applicant then goes on to explain family control as being sufficient to found association, with reference to Wallis.²¹

[33] In my view, the issue of whether Adam Polemis exercised control on his own or with his children does not make a difference to the question of a single source of control, provided that he is shown to be in control in both scenarios. To answer the respondents' statement that the court must identify the single source of control, I am satisfied that on a balance of probabilities Adam Polemis controls NSL, and that he exercises such control personally. I do not agree that the introduction of his children precludes this conclusion, as the children are said to exercise such control with Adam Polemis, and not to his exclusion.

[34] I have noted the multiple references referred to by the respondent in argument, to the dictates of logic militating against a finding that the control can vest in alternative persons or entities. However, in my view the introduction of an alternative cannot *per se* result in the absence of a single *locus* of control, and the factual context is relevant. For example, if the argument was that the control was exercised either by Adam Polemis or by the Polemis children (thus excluding Adam); this would result in two different sources of control.

[35] The applicant distinguishes 'management' from 'control', relying distinction made by Wallis who explains the necessary control as consisting of oversight of the

²⁰ Para 17 of the applicant's heads, page 430 of the indexed papers.

²¹ Para 18 to 27 of the applicant's heads, pages 430 to 434

activities including the power to continue or alter or discontinue its activities, to lay up the vessel or to sell it. It is the ability to control and direct that is significant here not the actual day to day activities of the person in whom the power rests.²² This defines the role played by Adam Polemis.

[36] There is no scenario or argument advanced in which Adam Polemis does not feature as the central figure in the control of NSL. While no adverse inference is being imputed on the respondents, their failure to file answering papers and 'set the record straight' is not without consequence. The respondents cannot, in argument, rely on papers that are not before the court or were not before the court that granted the arrest order, to bolster their case. In this regard I am referring to the attempt to show that the applicant advanced a different basis of association in *MV New Elly*, which also relied on the Gray Page report for the establishment of its association with the *MT New Diamond*. It is only the allegations in the founding papers that matter, and that are regarded as true.

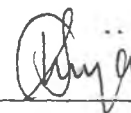
[37] The applicable standard of proof is the civil standard of the preponderance of probabilities, and not proof beyond a reasonable doubt. The annexures relied on by the applicant demonstrate, on a balance of probabilities, that the first respondent and the vessel are associated ships as contemplated in section 3(6) read with section 3(7) of the Admiralty Act. Having concluded that a *prima facie* case of association was correctly found to be established, this is sufficient for the refusal of the reconsideration application, without more.

[38] No argument was advanced on the issue of costs, and in this regard I have to rely on what is set out in the heads of argument. The applicant asked for costs of senior and junior counsel, and the need for the employment of senior and junior counsel was not challenged by the respondents. I can conceive of no reason not to follow the general principle that costs follow the result.

[39] In the result I grant the following order:

²² *The Associated Ship and South African Admiralty Jurisdiction* p188

1. The application for reconsideration of the order of 30 May 2022 for the arrest of the MV *New Endeavor*, in terms of Uniform Rule 6(12)(c) is dismissed.
2. The respondents are directed to pay the costs of the application.



SIBIYA J

APPEARANCES

Counsel for the Applicant	: Mr G D Harpur SC Adv L M Mills
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Date of Hearing	: 13 October 2022
Date of Judgment	: 15 December 2022