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

CASE NO: A49/2023

NAME OF SHIP: MV "EAST AYUTTHAYA"

In the matter between:

CELOSIA SHIPPING LTD — **APPLICANT**

and

MV "EAST AYUTTHAYA" — **FIRST RESPONDENT**
EAST AYUTTHAYA CO. LTD — **SECOND RESPONDENT**
EAST SHIPPING PTE LTD — **THIRD RESPONDENT**

ORDER

The following order shall issue:

1. The application for reconsideration of the court order dated 4 October 2023 is dismissed.
2. The respondents are directed to pay the costs of the application for reconsideration, jointly and severally, the one paying the other to be absolved, on scale C.

JUDGMENT

BEKET AJ

Introduction

[1] The applicant obtained an ex parte arrest order for the first respondent pursuant to s 5(3) of the Admiralty Jurisdiction Regulation Act[1] ("the Act") on 4 October 2023. A letter of undertaking was delivered to secure the release of the first respondent. The first respondent remains under a deemed arrest as contemplated in s 3(10)*(a)*(i) of the Act.

[2] The respondents seek an order setting aside the arrest of the first respondent. In so doing the second and third respondents accept that the applicant has on the papers, established a prima facie case. The respondents contend, however, that the applicant has failed to establish, on a balance of probabilities, both the association contended for and that it has a genuine and reasonable need for security.

Association

[3] Central to these proceedings is the allegation, by the applicant, that the MV Dawn and the first respondent are associated vessels within the meaning of ss 3(6) and 3(7) of the Act.

[4] The applicant's claims against the third respondent arise out of the third respondent's charter of the MV Dawn. The MV Dawn is therefore the "ship concerned" (or "guilty ship") and the first respondent is alleged to be an "associated ship".

[5] The definition of an associated ship is set out in 3(7) of the Act:

'*(a)* ...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.'

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[1] Admiralty Jurisdiction Regulation Act 105 of 1983.

[6] Although the respondents seek the setting aside of the arrest of the vessel, the applicant bears the onus of proving on a balance of probabilities that, at the time of the first respondent's arrest on 4 October 2023 her owner, the second respondent:

(a) was controlled by the third respondent; or

(b) was controlled by the same person or group of persons (natural or juristic) that controlled the third respondent at the time when the maritime claim arose (May to July 2018).

[7] Section 3(7)*(b)* of the Act provides:

'*(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.'

[8] In discussing the judgment of *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD*[2] the Supreme Court of Appeal ("the SCA") in *MV New Endeavour and Others v Indian Oil Corporation Ltd*[3] held as follows:

'In *Heavy Metal*, this court, in considering the aforementioned provisions of the Act, had regard to the language used, the purpose of the provision, its context and the objects of the Act as a whole. It held that the object of the associated-ship provisions was to enable the associated ship to be arrested in respect of the maritime claims, and the purpose was to afford the claimant with an alternative defendant to enforce its claim. It went on to say that the subsection distinguishes between "direct" and "indirect" control. Direct control can be exercised by a person wielding power behind the scenes "de facto" or by a person who was in "de jure" control of the company. This court recognised this as

> "[the] extension of *de jure* power to *de facto* power [which] is in line with the objective of the section: to prevent the "true 'owner", by presenting a false picture to the outside world, from concealing assets from attachment and execution by creditors."

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

[3] *MV New Endeavour and Others v Indian Oil Corporation Ltd* [2024] ZASCA 67; 2024 (6) SA 64 (SCA) para 14.

The Court concluded that the same approach should be adopted in the deeming provisions of the Act, i.e. s 3(7)*(c)*, 3(10)*(a)*(i) and (ii) and *(b)*, and 3(11)*(b)* of the Act.' (Footnote omitted.)

[9] The level of control required is that the person must control the overall destiny of the company and not its day-to-day business.[4] In instances where the power to manage the operations of the company and the power to determine its direction and fate lie in different hands, it is the latter that is required for the purposes of association.[5]

Applicant's case

[10] It is the applicant's case that:

(a) the first and third respondents were at relevant times under common control. Such control vests ultimately in Narongsak Puttipornmongkol ("Narongsak"), who is the head and founder of a group of companies to which they both belong;

(b) although the group's employees, Kishen Dev Singh ("Singh") and Chanodom Chotikapanitch ("Chanodom"), hold shares in the second and third respondents, as does Narongsak's son, Sutthipong ("Sutthipong"), they only attend to the day-to-day business of these companies, and it is Narongsak who directs the fate and destiny of those companies. Sutthipong is not involved in the activities of those companies;

(c) the third respondent, together with a Thai company named Eastman Shipping Co Ltd, controls the activities of the first respondent vessel and holds itself out as the beneficial owner. The person in ultimate control of both Eastmen companies is Narongsak; and

(d) if Narongsak, Singh, Chanodom and Sutthipong act together they have direct / de jure power to control the second and third respondents.

[11] The applicant relies on the following in support of its contentions:

(a) there is a group of companies that operates from the same address in Bangkok, Thailand. The group includes inter alia, the second and third respondents;

(b) each of the companies in the group have the same registered address (save

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[4] *The Kadirga 5 (No 1) JA Chapman & Co Ltd v Kadirga Denizcilik ve Ticaret AS* SCOSA C12 (N) at C14E.

[5] *MV Heavy Metal* above fn 2 para 8.

for the third respondent which has an obligatory "brass plate" registered address in Singapore but carries on its business at the group's address);

(c) that it is common cause that the second respondent is the registered owner of the first respondent vessel and that Narogsak held shares in the second respondent (until 31 October 2018, Narongsak held a controlling shareholding in the second respondent when he divested himself of a percentage of his shareholding in the second respondent, with Narongsak holding 36.99985% of the shares in the second respondent and his son, Sutthipong, holding 0.00015%, while Chanodom holds 5% and Singh 10% (their combined shareholding is therefore 52%));

(d) that the directors of the second respondent are Narongsak, Sutthipong, Chanodom and Singh as well as two other family members of Narongsak;

(e) Narongsak holds 43.99% of the shares in Kaizen Ship Management Co. Ltd. The directors of the second respondent are also directors of Kaizen Ship Management Co. Ltd;

(f) at the time when the applicant's claims arose, the shareholders of the third respondent were Singh and Sutthiphong (each holding 50%). They were also its directors. Subsequently, in 2023, Chanodom also became a shareholder and director;

(g) Singh and Chanodom are employees of the group and directors of not only the second and third respondents but also of Suenfong Shipping (registered owner of the MV East Bangkok), Eastmen Thailand, KC Salt, Kaizen Ship Management, Kaizen Marine Services, and other group companies; and

(h) it is likely that the third respondent was registered in Singapore for tax purposes solely in order to receive the income generated by the vessel and to pay its expenses.

[12] The applicant relies on reports from Infospectrum and LSR Services Ltd, investigative companies, containing what it refers to as compelling evidence of common control. LSR reports that the second and third respondents are ultimately controlled by Narongsak, while their day-to-day business is run by Singh and Chanodom. In concluding that the second and third respondents are ultimately controlled by Narongsak, while their day-to-day business is run by Singh and Chanodom, LSR rely on two sources of information, namely:

(a) a representative of one of the group companies, who informed LSR that the second and third respondents are ultimately controlled by Narongsak, who is referred to as an "investor" and that their day-to-day business is conducted by Singh and Chanodom;

(b) a former staff member of the third respondent, who informed LSR that Eastmen Singapore is a "paper company" used for tax purposes and that Narongsak is its owner, but its day-to-day business is run by Singh and Chanodom.

[13] Other than the investigative reports the applicant relies upon:

(a) a brochure supplied to the applicant by the respondents' own representatives (which predates the acquisition of the first respondent by the group);

(b) the fact that the P&I insurance cover for the first respondent vessel is held in the name of the third respondent as member (it is alleged that the third respondent would not bind itself to pay the substantial "calls" for the vessel's P&I cover if it did not have a proprietary interest in the ship); and

(c) that the third respondent holds itself out to third parties as the owner of the first respondent vessel and is listed on numerous websites as her owner. The third respondent charters the vessel to third parties in its own name and the hire is paid into the third respondent's bank account.

Respondents case

[14] The respondents argue that the affidavits of the applicant are based largely on speculation and misguided inference. The respondents conclude that in such circumstances the applicant has failed to discharge the onus on it.

[15] The respondents rely on the following in this regard:

(a) that it cannot be disputed that the respective shareholders of the second and third respondents are dissimilar (in this regard the respondents refer to paragraphs 83, 88, 94 and 95.3 of the affidavit of Mr Fitzmaurice);

(b) that whilst not disputing that KC Salt International Co Limited has nine shareholders, Narongsak holds only 35.998% of its shares and that he no longer controls KC Salt in the sense contemplated by the Act;

(c) that it is common cause that Narongsak is not a director or shareholder of the third respondent;

(d) that little probative value can be attached to the investigative reports relied upon by the applicant;

(e) that the LSR report makes no express reference to the third respondent;

(f) that the subscribers to the memorandum of association of the third respondent as at 26 February 2009 were Sutthipong and Singh; and

(g) that payment for the purchase of such shares in the second respondent by Singh and Chanodom occurred prior to the submission of the claim of the applicant in the London Arbitration proceedings (reliance was placed on Agreements of Share Transfer marked as annexures "KSD.4A" and "KSD.5B" to the replying affidavit in this regard).

[16] The respondents rely on:

(a) KDS3, being an extract from the Thai Registry detailing the shareholding of the second respondent at the time of the arrest which indicates that the subscribers to the memorandum of association of the third respondent as at 26 February 2009 were Sutthipong and Singh;

(b) KDS2, being certificates of registration in respect of Eastmen Thailand;

(c) a certificate issued to the third respondent by the Inland Revenue Authority of Singapore; and

(d) confirmatory affidavits deposed to by Chanodom and Suttipong.

Challenge to investigative reports and sale of shares

[17] It is necessary that two preliminary issues are dealt with.

[18] Insofar as the investigative reports are concerned the respondents contend that little probative value can be attached thereto, in that:

(a) the report of LSR simply refers to a "discreet call" to one of the related Thai companies, but fails to make mention which entity the Thai company is related to;

(b) that the representative providing such information did not use the term "*ultimately* controlled" when referring to Narongsak and that the applicant misconstrued that portion of the LSR report for its own benefit; and

(c) that the LSR report refers to the averments at paragraph 17.3 as being the "agent's opinion".

[19] Ms *Mills*, appearing for the applicant, argued that the reports were admissible by reason of the hearsay provisions encapsulated in s 6(3) of the Act. Section 6(3) of the Act provides as follows:

'A court may in the exercise of its admiralty jurisdiction receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such directions and conditions as the court thinks fit.'

[20] The court was referred to the SCA judgment of *MV New Endeavor and Others v Indian Oil Corporation Limited*[6] which at paragraph 16, noted that control is not easy to prove by means of direct evidence but that this can be ameliorated by reliance on hearsay evidence in the form of, inter alia, investigative reports.

[21] It is incumbent upon this court to have regard to the totality of the evidence. Cognisant of difficulties an applicant in seeking arrest will have in obtaining first-hand evidence, this court exercises its discretion in having regard thereto.

[22] In seeking to address the evidence relied upon by the applicant, regarding the sale of shares in the second respondent, it was argued that the payment for the purchase of shares in the second respondent by Singh and Chanodom occurred prior to the submission of the claim of the applicant in the London Arbitration proceedings.

[23] Mr *Fitzgerald SC* sought to rely on the judgment of Kruger J in this court of *Asian Hope Shipping Ltd v Ocean Trade SA.*[7] Kruger J in dealing with the divesting of associated vessels, found that there was nothing sinister or suspicious in the sequence of events resulting in divesting. It was argued that the respondents were entitled to regulate their affairs.

[24] Ms *Mills* argued that *Asian Hope Shipping* was distinguishable in that it involved the sale of shares to a company not related to the ship concerned therein.

[25] I am satisfied that the judgment is distinguishable.

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[6] *MV New Endeavor* above fn 3.
[7] *Asian Hope Shipping Ltd v Ocean Trade SA* [2008] JOL 21087 (D).

[26] Reliance on the sale of shares in addition only forms a small part of the evidence put before court by the applicant. If I am satisfied that the evidence unrelated to the sale of shares suffices to demonstrate the association contended for it is unnecessary for me to draw any adverse inference regarding the sale of shares.

Analysis

[27] It is accepted that a dispute of fact arising in application proceedings ought to be dealt with in line with the dictum of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[8]

[28] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[9] the SCA restated the approach to disputes of fact arising:

'[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151A - 153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him...'

[29] Ms *Mills*, argued that the respondents' response to the evidence pointing to common control is evasive. In making such argument the applicant relies on the failure of the respondents to put forward explanations as to:

(a) the sale of shares and the divesting of shareholding;

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[8] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.
[9] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA).

(b) why Narongsak is not a shareholder or director of the third respondent, when he is a majority shareholder in direct control of Eastmen Thailand and the two companies are operated together, as one business;

(c) why the third respondent charters out the first respondent vessel to third parties itself (it would not make sense when it is not the owner or commercial manager);

(d) why the third respondent has been registered in Singapore when it conducts no business there and it is part of a Thai group of companies, operated in Thailand;

(e) why the first respondent's P&I cover is in the name of the third respondent instead of the second respondent as registered owner (it being argued that there would be no commercial rationale for the third respondent to be at risk for any liability to third parties arising from the operation of the vessel);

(f) why the group's own brochure claims that the group has ventured into ship owning and that it owns the MV East Bangkok through a subsidiary, Suenfong Shipping;

(g) why the third respondent holds itself out as the first respondent's owner to third parties; and

(h) why the third respondent and Eastmen Thailand are registered as separate companies, when they carry on business as a single enterprise.

[30] It was argued that it is highly improbable that the second and third respondents' relationship is anything other than one between companies under common control.

[31] Mr *Fitzgerald SC* argued that the arrest can only be maintained if the version proffered by the respondents together with those facts in the applicant's affidavits which the respondents cannot dispute, justify the arrest.

[32] Acknowledging that circumstances may warrant the rejection of the version of a respondent merely on the papers, it is argued that there is no basis in fact or in law for the rejection of the version of the respondents on the papers and that the facts deposed to by Singh on behalf of the respondents, indeed create a genuine and *bona fide* dispute of fact.

[33] If in opposed motion proceedings to set aside an arrest, the arresting creditor produces enough evidence to constitute at least a prima facie case of association, and

the owners fail to produce sufficient countervailing evidence to displace this, this will usually suffice to discharge the onus of proof, even in the face of a bare denial of association.

[34] The applicant has placed as much evidence and detail as could be expected of it before Court, considering the limitations on an applicant in accessing necessary information.

[35] The respondents have not been forthcoming, and a more detailed answer would have been expected, especially since there are no limitations on the respondents' access to information regarding the association in question. I agree with Ms *Mills* that the respondents' response to the evidence pointing to common control is evasive.

[36] Considering the extensive detail (despite the limitations), including the investigative reports, details regarding P&I insurance and the overall involvement of Narongsak, the applicant has demonstrated that the second and third respondents are ultimately controlled by Narongsak and that the fate of the second and third respondents lie in the same hands.

[37] Accordingly the applicant has discharged the onus on it in so far as the association contended for is concerned.

Genuine and reasonable need for security

[38] The test for the need for security was set out in *MV Orient Stride Asiatic Shipping Services Inc v Elgina Marine Co Ltd*[10] as being a genuine and reasonable apprehension that a party whose property is arrested will not satisfy the judgment or award if its claim is successful.

[39] In the arrest application the applicant alleged that to cover its claim, interest, and costs in the arbitration security in the sum of approximately US$823 000 was required.

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[10] *MV Orient Stride Asiatic Shipping Services Inc v Elgina Marine Co Ltd* 2009 (1) SA 246 (SCA).

[40] In summary the applicant contends that it will not be in a position to enforce any award made in its favour against the third respondent because the third respondent's business is volatile and unpredictable, and that the third respondent has no fixed assets against which execution could be levied.

[41] In support of such contention the applicant relies on:

(a) the nature of the third respondent's business (namely that it is a brass plate company that it is used solely to charter vessels and that it does not have any physical existence, staff or operations separate from those of Eastmen Thailand);

(b) the third respondent's financial statements which show losses suffered (in 2019 the third respondent suffered a loss for the year of US$438,177, in 2018 it suffered a loss of US$2,019,41658 and the third respondent went from cumulative earnings of US$ 600,537 in the year ended 31 January 2020 to a loss of US$412,427 as at 1 February 2020);

(c) the third respondent's auditors' statement that the third respondent's total liabilities exceeded its total assets by US$180,890 (2021 - US$2,635,254) which indicates the existence of material uncertainty that may cast significant doubt on the third respondent's ability to continue as a going concern;

(d) continued financial support of the shareholders is necessary; and

(e) that the third respondent transfers significant sums of monies to "related parties" every year.

[42] The respondents have refuted the applicant's allegations and in so doing rely on copies of the third respondent's audited financial statements for the years ending 31 January 2022 and 31 January 2023 and an allegation that the applicant has failed to consider the third respondent's business model and activities.

[43] The respondents conclude that the financial statements of the third respondent demonstrate that its business operations are ever improving and that the third respondent has a real prospect of satisfying any adverse award.

[44] The respondents' conclusion that the third respondent's business operations are "ever improving" offers little comfort that any award to be granted will be satisfied.

[45] Upon a consideration of the issue of security I am satisfied that the applicant has demonstrated a genuine and reasonable apprehension that, should it be successful in the London arbitration proceedings, it is likely that it will not be able to enforce its award against the third respondent.

Conclusion

[46] The applicant has demonstrated both the association contended for and that it has a genuine and reasonable need for security. The application accordingly falls to be dismissed.

[47] There is no reason why the costs of the application ought not to follow the result. Insofar as the scale of costs is concerned the matter required specialist knowledge and the need to instruct counsel of sufficient seniority and expertise. The appropriate scale of costs in the circumstances is scale C.

Order

[48] Accordingly, I make the following order:

1. The application for reconsideration of the court order dated 4 October 2023 is dismissed.

2. The respondents are directed to pay the costs of the application for reconsideration, jointly and severally, the one paying the other to be absolved, on scale C.

BEKET AJ

CASE INFORMATION:

Date of hearing: 29 October 2024

Date of judgment: 28 January 2025

For the applicant: L Mills
Instructed by: Webber Wentzel

For the respondents: M Fitzgerald SC
Instructed by: Bowman Gilfillan