

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: A2282/2013

Date Heard: 22 August 2013

Date Delivered: 28 August 2013

In the matter between:

THE OWNERS OF THE mv "SILVER STAR"

Applicant

and

HILANE LIMITED

Respondent

JUDGMENT

EKSTEEN J:

[1] A writ of summons *in rem* against the mv "Silver Star" (herein referred to as "the vessel") was issued by the respondent herein on 12 August 2013. At the same time Plasket J ordered that a warrant of arrest be issued in respect of the vessel. The vessel was duly arrested in the port of Port Elizabeth on the same evening.

[2] In the present application the applicant seeks an order that the arrest of the vessel be set aside, that the respondent provide security for the applicant's claim for damages against the respondent for the wrongful arrest of the vessel without reasonable and probable cause and for leave to sue the respondent by edictal citation.

[3] The application was launched on 14 August 2013 as a matter of urgency to be heard on 16 August 2013. In the answering affidavit filed on 16 August on behalf of the respondent the urgency of the matter is not disputed. The deponent to the answering affidavit on behalf of the respondent, Mr Cunningham of Attorneys Bowman Gilfillan Incorporated, the respondent's attorneys of record, declared that due to the time constraints chosen by the applicant herein the answering affidavit had been prepared in great haste which was compounded by logistical problems arising from the fact that Attorneys Bowman Gilfillan were instructed by solicitors in London who in turn represented clients in Hong Kong, each location in a different time zone. He accordingly reserved the right, if necessary, to seek leave to supplement the opposing papers in due course, in the event that the application should not be finalised on 16 August 2013.

[4] On 16 August, by agreement between the parties, the matter was postponed to 22 August 2013 and the respondent agreed to provide security in respect of the delay during which the vessel would be detained and would be off-hire. The respondent did not, however, avail itself of the opportunity to file supplementary papers.

[5] The matter was argued before me on 22 August 2013. Although I would have preferred more time to consider the matter I am alive to the urgency of the case and the considerable expense incurred as a result of the vessel being held in port. In the circumstances I have considered it necessary to give preference to this judgment.

[6] The writ of summons *in rem* issued as aforesaid records the respondent's claim against the applicant. The respondent is a company incorporated in Hong Kong which carries on business, *inter alia*, as the owner of the vessel mv "Sheng Mu" (to which I shall refer as the "Sheng Mu").

[7] The vessel is, a bulk carrier with a Panamanian Flag IMO no. 9512214 and a gross tonnage of 43 830. The registered owner of the vessel is Action Partner Limited (herein referred as "Action Partner"). Action Partner, so it is alleged in the summons, was owned and/or controlled by Trade Line LLC (herein referred as "Trade Line"), incorporated in the United Arab Emirates. The claims of the respondent are alleged to have arisen in respect of the voyage charterparty entered into between it and Trade Line, through its (Trade Line's) subsidiary and chartering arm Phiniqia International Shipping LLC (herein referred to as "Phiniqia"), on a GENCON 1994 form with additional clauses, of the Sheng Mu in order to carry a cargo of 15,271,531 MT coking coal ("the cargo") from Bandar Abbas, Iran to Vizag, India.

[8] Prior thereto on 20 June 2011 Golden Waves FZC, UAE (herein referred to as "Golden Waves") concluded an agreement of sale in terms of which it agreed to sell the cargo to Trade Line. The respondent's claim, it is alleged, arises in respect of the charter of the vessel by Phiniqia and the breach by Phiniqia of its obligations, *inter alia*, in terms of certain letters of indemnity issued by Phiniqia to the respondent in respect of Bills of Lading relating to the cargo and its delivery. As a result of the alleged breach a dispute arose between Trade Line and Golden Waves. This in turn gave rise to further disputes between the respondent and Golden Waves and

between the respondent and Phiniqua. Golden Waves instituted arbitration proceedings in London against the respondent in respect of the latter's alleged misdelivery of the cargo in terms of Bills of Lading issued and signed by the Master of the vessel. Golden Waves caused the Sheng Mu to be arrested in the Port of Napier, New Zealand, as security for the arbitration which in turn caused the respondent to suffer further damages. In order to enforce the indemnities furnished by Phiniqua to the respondent in terms of the charterparty the respondent has successfully prosecuted arbitration proceedings in London against Phiniqua pursuant to which it was directed that the respondent was entitled to the enforcement of its indemnities and to the payment of its damages in the total amount of US\$3 843 927,10.

[9] The respondent now contends that the vessel is owned and/or controlled by Trade Line, which at the time that the plaintiff's claim arose, also owned and/or controlled Phiniqua, who, as the charterer of the Sheng Mu is deemed in terms of section 3(7)(c) of the Admiralty Jurisdiction Regulation Act, 105 of 1983, (herein referred to as "the Act") to be its owner. In the circumstances it was alleged that the vessel is liable in terms of section 3(6) and (7) of the Act to be arrested in an action *in rem* as an associated ship to the Sheng Mu. In obtaining the warrant for the arrest of the vessel a certificate was filed in accordance with section 4(3) of the Act in which this contention was advanced, although very little can be gleaned from it as to the factual basis underlying the conclusion.

[10] In the present application two issues arise. Firstly the applicant denies that the vessel is an associated ship in respect of the respondent's claim and secondly, in

any event, it is argued that the respondent was not entitled to proceed with an associated ship arrest in the circumstances of the respondent's claim. No notice was given in the papers filed of the foundation for this contention of law.

[11] I shall deal first with the legal issue. The legal argument raised by Mr **Gordon**, on behalf of the applicant, raises the question whether the associated ship provisions contained in section 3(6) and (7) of the Act can or do apply to a case where an arbitration award is sought to be enforced.

[12] The respondent's alleged cause of action is summarised above. It is the true owner of the Sheng Mu. The respondent had a claim against Phiniqia by virtue thereof that Phiniqia was the charterer of the Sheng Mu at the time that the respondent's alleged claim arose and is therefore deemed to have been the owner of the Sheng Mu. The dispute between the respondent and Phiniqia has been subjected to arbitration and an award has been made.

[13] Section 3(6) of the Act provides that 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 which the maritime claim arose".

[14] Once an award in arbitration has been made, so the argument goes, the award itself creates a new cause of action for the enforcement thereof which replaces the original cause of action. On this basis it is contended that there can be no claim *in rem* against the vessel as the claim which the respondent's seeks to

enforce does not arise in respect of the Sheng Mu or indeed of any ship, but rather it arises from an award made in arbitration as against Phiniqia.

[15] The argument is reliant heavily upon an English decision of the Queen's Bench Division (Admiralty Court) in "***The 'Bumbesti'***", Lloyd's Law Report [1999] Vol. 2 p. 481.

[16] In ***The Bumbesti*** the issue addressed was whether the English Admiralty Court had jurisdiction *in rem* to hear and determine a claim to enforce an arbitration award made by the Constantza Court. The only basis for the court's *in rem* jurisdiction relied upon in this particular case by the claimants is section 20(2) para (h) of the Supreme Court Act, 1981. In terms of this provision of the Supreme Court Act the Admiralty Court has jurisdiction to hear and determine "any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship". The provision is similar to the provisions of section 1(1)(j) of the Act.

[17] The Queen's Bench held that in English law it is clear that if a claim for damages is referred to arbitration and the arbitration award is made for the payment of damages this creates a new right of action for the enforcement of the award that replaces the original cause of action. Hence it is argued that the claim which the respondent may have had against Phiniqia in respect of the Sheng Mu has fallen away and is replaced by a claim against Phiniqia arising from the arbitration award.

[18] I am not persuaded that the position is necessarily the same in South African law. In ***Swadif v Dyke NO*** 1978 (1) SA 928 (A) at 944G it was held that where the

only purpose of the judgment is to enable the creditor to enforce his right of payment “it was realistic, and in accordance with the view of the Roman-Dutch writers, to regard the judgment not as novating the obligation, but rather as strengthening or re-enforcing it”. The effect thereof is that “the enforceable right remains the same.”

[19] This view was subsequently reconsidered in *mv Ivory Tirupati and Another v Badan Urusan Logistik (aka BULOG)* 2003 (3) SA 104 (A) where Farlam JA found himself unable to agree that the enforceable right remains the same. He referred with approval to the writings of Van der Keessel, as follows:

“Having stated that it was clear that a *novatio necessaria* takes place on *litis contestatio*, Van der Keessel said that it was equally clear that it does not terminate the antecedent obligation or those things that were accessory to it, such as pledges, sureties or interest.”

(See *mv Ivory supra* p. 115J-116A.)

[20] Farlam JA then concluded that there is nothing unusual about an obligation being confirmed or re-enforced by the incurrence of another obligation which is in effect an alternative to an antecedent one, such as where a cheque is given in payment of an existing debt without any intention to novate the existing debt. (See *mv Ivory supra* p.116C.) The position in the South African law, he held, is that although the original cause of action may survive in a re-enforced and strengthened form, a judgment (or an arbitration award) may also give rise to a new independent cause of action enforceable between the parties in another court. The award therefore creates an alternative obligation which exists alongside the original one. On this basis alone I think that the judgment in *The Bumbesti* cannot assist.

[21] In *The Bumbesti* Aikens J, having discussed the issue and various previous decisions concluded as follows:

‘I have come to the conclusion that the answer that I must give to this question is “no”. I think that it is not within the paragraph as a matter of construction.’

It turned, accordingly, on the construction of the particular section of the English statute.

[22] In considering whether an award in arbitration could be said to be a claim “arising out of an agreement relating to the use or hire of a ship” he went on to hold that an agreement to refer disputes to arbitration is not, itself, an “agreement” in relation to the use and hire of a ship. This, he said, is because the arbitration agreement, whether it is the individual reference or the general agreement to refer, is a contract that is distinct from the principle contract, i.e. the bare boat charterparty in that case. Whilst recognising that the agreement to refer disputes which have arisen out of a charterparty to arbitration are disputes which are indirectly “in relation to the use or hire of a ship”, he concluded that they were not sufficiently direct so as to fall within the ambit of the section under discussion.

[23] As stated earlier it was only one section of the English Act which was in issue at the time. Unlike the English Act a “maritime claim” as defined in the Act includes the provisions of section 1(1)(aa) which provides for a claim arising out of or in relation to “any judgment or arbitration award relating to a maritime claim, whether given or made in the Republic or elsewhere. Had the English Act contained a similar

provision the result in ***The Bumbesti*** would clearly have been different. In any event, whereas the arbitration award does not in South African law extinguish the underlying cause of action as set out earlier herein, I am of the view that the arbitration award does arise “in respect of” the Sheng Mu as envisaged in section 3(6) of the Act. That being so an action *in rem* against the vessel may be brought in terms of section 3(6) of the Act. In all the circumstances I am of the view that the argument must fail.

[24] I turn to consider whether the vessel is an associated ship to the Sheng Mu in respect of the respondent’s claim. Mr Norton, an attorney of Edward Nathan Sonnenbergs (herein referred to as “ENS”) deposed to the founding affidavit on the strength of information provided to him, predominantly one Captain Rathee, who is described in the papers as the CEO of Stellar Ocean Transport LLC (herein referred to as “Stellar Ocean”), which concern according to Rathee is the technical and commercial managers of the vessel.

[25] Norton confirms that Action Partner is the registered owner of the vessel. The applicant takes the position that Action Partner is a special purpose vehicle in which one Ahamed Mubarak Habeeb (herein referred to as “Habeeb”) is the sole shareholder. Norton records that Rathee has advised that Habeeb has confirmed to him that he is not a nominee shareholder and that he holds the shares for his own account. Habeeb, so it is contended, is accordingly the beneficial owner of the vessel and it is strenuously denied that Trade Line owns or controls the applicant in any manner. In support of these averments Action Partner annexed the official certificate of incorporation and its annual return to the papers.

[26] Initially no confirmatory affidavit was filed either by Habeeb or by Rathee, however, on 16 August, albeit belatedly, both filed confirmatory affidavits together with the applicant's replying affidavit. I shall revert to these below.

[27] The respondent set out the basis for its claim relating to the association of the vessel fully, for the first time, in its answering affidavit. It accepts, as is apparent from the summons *in rem*, that the registered owner of the vessel is Action Partner and that Action Partner is a one ship owning company. It contends, however, that the vessel is group owned by Trade Line. Habeeb is the vice chairman of Trade Line. The respondent records that according to Lloyd's List Intelligence on Action Partner and the vessel and according to the reports by Sea-Web, both of which were annexed to the papers, Stellar Ocean is the ship manager and beneficial owner of the vessel and Stellar Shipping is the operator of the vessel. Both Stellar Ocean and Stellar Shipping are, according to these sources, subsidiaries of Trade Line.

[28] Against this background the respondent contends that on 7 June 2011 Stellar Shipping, then the owner of the vessel purported to sell the vessel to Action Partner for US\$49 800,00. A Bill of Sale is annexed in support hereof. Four months later, however, on 18 October 2011, Action Partner entered into a mortgage agreement with Emirates NDB Bank in terms of which it mortgaged the vessel in favour of the bank as security for a loan in the amount of US\$40 600 000,00 to Stellar Shipping. The amount was advanced to Stellar Shipping, in accordance with the facility (loan) agreement, which the respondent contends is usually used to pay for the purchase

price of the vessel either in part or in full. The actual borrower, as is evident from the mortgage agreement, so the respondent contends, was Stellar Shipping.

[29] In respect of Habeeb's position the respondent acknowledges that he is the sole shareholder in Action Partner. Respondent contends, however, that Habeeb acquired the shares in Action Partner on 8 June 2011, the day after the signature of the Bill of Sale and the delivery of the vessel to Action Partner. It is contended therefore that in order for Habeeb to have acquired the shareholding he must have made payment to the value of the vessel given that Stellar Shipping had borrowed the funds to pay the majority of the purchase price, approximately US\$50 000 000,00. Habeeb, it is contended on the strength of a LinkedIn profile obtained, completed his schooling in 2004, graduated with a BCom degree at Madras University in 2007 and commenced work as a project co-ordinator in 2008 after completion of a MBA at Anna University. He has subsequently been employed, so it is alleged, as a relationship officer, business development manager, marketing director and coal trader since 2009 and has worked for Trade Line facilitating "coal shipment successfully over the past five years for Trade Line LLC ...".

[30] Reliant on the information obtained from the Lloyd's List Intelligence and the Sea-Web Report, the circumstances of the Emirates NDB Bank loan to Stellar and the alleged youthfulness of Habeeb the respondent contends that, in the absence of evidence as to how Habeeb paid for the acquisition of shares in an entity owning a vessel worth US\$50 000 000,00 the probabilities are that he holds the shares on behalf of Stellar Shipping and/or Trade Line and that the purported sale of the vessel

to Action Partner is nothing more than a simulated transaction to give the impression that the vessel is no longer owned by Stellar Shipping.

[31] The respondent states, and it is not in dispute, that Habeeb holds a 25% share in Trade Line and is described in the company profiles from the Dubai Chamber of Commerce as a “partner”. One Al Ghurair holds a 51% share in Trade Line and is described in the said profiles as “managing partner”. Habeeb holds a 19% share in Stellar Shipping and is described as “managing partner” in the said profiles. Al Ghurair holds a 51%share in Stellar Shipping and is also described as a “managing partner” in the said profiles.

[32] In its replying papers the applicant paints a very different picture. The replying affidavit was deposed to Ms Pitman on the strength of information passed to her by Habeeb and Rathee.

[33] In respect of Habeeb the applicant admits his shareholding in Stellar Shipping and Trade Line as well as the position which he holds as “vice chairman” in Trade Line. Habeeb, a Belgium citizen, however, is stated to be 60 years of age and a successful businessman of many years standing with interests in diamond trading, real estate, construction, restaurant business and shipping. It is accordingly denied that he fits the profile attributed to him by the respondent. In support hereof he has annexed a copy of his Belgium passport which bears out his citizenship and age. These averments the respondent cannot dispute and they must be accepted.

[34] His shipping interests are said to be varied. Some investments are entirely his own and others are through shareholding purchased in the shipping vehicles of others. His investments in the Al Ghurair Group fall into the latter category.

[35] In respect of Stellar Ocean it is alleged that Habeeb entered into the shipping industry for his own account in 2008. He decided to start his own ship management company, being Stellar Ocean. The use of the name "Stellar", it is contended, is quite popular in the shipping industry around the world and so it is suggested that the similarity in name to Stellar Shipping is purely coincidental.

[36] Stellar Ocean was incorporated in the United Arab Emirates. In accordance with the law of this country it is necessary for any local company to be sponsored by a citizen of the UAE who must own at least 51% of the shares. In the circumstances it is stated that although Stellar Ocean was started and managed by Habeeb it was necessary for a local sponsor to hold 51% of the shares in the company. Such shareholding was not nominal and the local citizen must hold the shares for his own account which, it was alleged, was indeed what occurred in the case of Stellar Ocean. In the case of Stellar Ocean one Ahmad Salam Ahamd Darwish was the sponsor. Habeeb held a 23% shareholding in the company which he managed, until he sold his interests in the company. The answering papers are silent as to when Habeeb is alleged to have sold his shares or to whom he had sold them. In a supplementary replying affidavit, to which I shall revert later it is contended that Habeeb sold his shares in Stellar Ocean in 2012. In the supplementary affidavit, however, the confidentiality as to the identity of the purchaser remains intact.

[37] The interests of Habeeb in the Al Ghurair Group are admitted. It is stated that Habeeb is a shareholder in the group and is aware of the fact that Trade Line, Stellar Shipping and Phiniqia are and always have been controlled as to 51% shareholding by Al Ghurair. He denies, however, that Stellar Shipping and Phiniqia are subsidiaries of Trade Line and avers that Al Ghurair independently controls all three companies through his shareholding.

[38] In respect of the company structures the applicant contends that Action Partner was a special purpose vehicle which had previously owned another vessel, the beneficial owner thereof was Abu Dhabi National Leasing LCC. The vessel had been sold and during 2011 the company was dormant. In these circumstances the dormant company was offered to Habeeb and the shares were duly transferred to him on 8 June 2011 for no consideration. The applicant records that it was later established that the transfer of two of the three shares in Action Partner had mistakenly not been transferred to him on 8 June 2011 due to an administrative error which was subsequently corrected on 25 November 2011. The company owned nothing of value other than the vessel which had been paid for, so it is contended, by Habeeb.

[39] Stellar Ocean, the applicant contends, is the commercial and technical manager of the vessel and is not a subsidiary of Trade Line. Pitman states that since Habeeb had sold his shares in Stellar Ocean there is no common shareholding between Trade Line and Stellar Ocean.

[40] Stellar Shipping too, it is alleged, is not a subsidiary of Trade Line although Mr Al Ghurair is a 51% shareholder in both companies and Stellar Shipping has nothing whatsoever to do with the vessel which is operated by Stellar Ocean. In the circumstances it is denied that the vessel is group owned by Trade Line.

[41] Turning to the sale of the vessel. The applicant contends that there were two Bills of Sale in respect of the vessel, one from the shipyard to Stellar Shipping and one dated 7 June 2011, which was annexed to the respondent's affidavit, from Stellar Shipping to Action Partner. The applicant explains that during or about 2008 Trade Line, Phiniquia and Stellar Shipping were badly affected by the economic downturn. Stellar Shipping had a number of new-buildings on order from various shipyards. The vessel was one such and her price being approximately US\$50 000 000,00. Stellar Shipping had arranged a loan of US\$40 600 000,00 from Emirates NDB Bank and the remaining amount of approximately US\$9 500 000,00 was payable by Stellar Shipping to the shipyard. Stellar Shipping was no longer in a position to honour its obligations and to pay the US\$9 500 000,00.

[42] In these circumstances Habeeb resolved to purchase the vessel personally. He arranged for Stellar Ocean to pay the US\$9 500 000,00 margin to Stellar Shipping. The sale was then concluded on 7 June 2011, the shares in Action Partner, save to the extent set out above, were transferred to Habeeb on 8 June 2011 and the vessel registered in the name of Action Partner on 9 June 2011. The loan which had been arranged by Stellar Shipping, so it is contended, was duly granted and paid to Action Partner and the mortgage registered in the name of Action Partner, initially on 29 June 2011 and, after the mortgage documents became

available, then on 19 September 2011. The applicant categorically denies that Stellar Shipping was the borrower. The applicant contends that, although the facility letters were concluded between Stellar Shipping and the bank, before the loan was granted Stellar Shipping encountered financial difficulties and could not continue with the loan. Habeeb agreed to step in and to buy the vessel and the loan of US\$40 600 000,00, was advanced not to Stellar Shipping but to Action Partner.

[43] In order to bolster this claim it is alleged that it is very well known that mortgagee banks go to some lengths to ensure that if a group company is taking a loan the main companies of the group stand as guarantors for that loan. In the present case it is alleged that the loan documentation does not mention Trade Line, Stellar Shipping or Phiniqia. This in itself, it is argued, is a telling fact that such companies were not related to Action Partner.

[44] I alluded earlier to the confirmatory affidavits filed by Habeeb and Rathee. Habeeb in his confirmatory affidavit confirms his personal circumstances, his Belgium citizenship and his business interests. He confirms that he is the sole shareholder of Action Partner and that he holds those shares for his own account and not as nominee. He states that Trade Line does not own or control Action Partner and he confirms that Stellar Ocean is the technical and commercial manager of the vessel. Habeeb specifically limits his confirmation to these issues and does not confirm any facts relating to the sale of the vessel or the circumstances surrounding either the sale or the loan.

[45] Rathee, for his part, confirms that the facts and allegations in the affidavit filed by Ms Pitman are correct and that he had conveyed these to Norton. In particular he confirms that he is personally aware of the facts relating to the purchase of the vessel by Habeeb as Stellar Ocean, he says, handled the transaction for him. He continues to record that he is aware of the fact that Habeeb was offered and accepted Action Partner as a vessel to own the vessel and that he personally paid the margin for the vessel out of his own funds. Stellar Ocean then arranged for him to transfer the vessel to Action Partner, the balance of the purchase price being funded by the mortgagee bank.

[46] Rathee continues to confirm that he had personal knowledge of the fact that Habeeb is certainly no nominee and that Stellar Ocean trades the vessel. His confirmation of personal knowledge in respect of the capacity in which Habeeb holds the shares is, of course, at variance with the averments made by Norton in the founding affidavit to which I have referred above. In that instance Norton recorded that Rathee had advised him that Habeeb had informed him that he holds the shares in his personal capacity.

[47] Following on in the replying papers the respondent called for delivery of the facility letters dated 26 July 2010 and 7 September 2010 respectively, which are referred to in the mortgage document dated 18 October 2011. These documents show conclusively that the true borrower of the US\$40 600 000,00 from Emirates NDB Bank was indeed Stellar Shipping. Moreover the documentation reveals that Trade Line and the shareholders of Trade Line and Stellar Shipping were indeed required to stand as guarantors for the loan. The documents were clearly

destructive of the case advanced in the replying papers in respect of the loan and the payment of the US\$49 800 000 to Stellar Shipping as reflected in the Bill of Sale dated 7 June 2011.

[48] These circumstances prompted the applicant to file a further affidavit by Rathee. Rathee confirms that he had provided the information to ENS which was set out in the affidavit of Ms Pitman. He states that some of the information contained in the affidavit of Ms Pitman fell within his own personal knowledge whilst others, predominately the information personal to Habeeb were provided to him by Habeeb and relayed to ENS Attorneys.

[49] After Ms Pitman's affidavit had been drafted by ENS the replying affidavit was forwarded to him and he confirms that he went through the affidavit and advised that the facts contained therein were correct and could be deposed. I pause to mention that Rathee does contend that it occurred in some haste.

[50] Rathee then proceeds to state that, on re-reading the replying affidavit he noted a number of "inaccuracies" which he seeks to correct in his further affidavit. Significantly, Rathee now seeks to deny that he had intimated that Trade Line and Stellar Shipping had not been required to stand as group guarantors for the loan from Emirates NDB Bank and he confirms that Stellar Shipping was indeed the real borrower. I pause to mention that Ms Pitman is a respected officer of the court and I have no doubt that her affidavit was prepared with meticulous care. In seeking to explain the error in his earlier instructions Rathee records as follows:

“I understood this paragraph to be making the point that neither Trade Line nor Stellar Shipping were guarantors of Action Partner Limited’s commitment under the ship’s mortgage agreement. Clearly a cursory read of paragraph (b) of the preamble to the mortgage at page 117 of the papers makes it clear that Stellar Shipping is the borrower from the bank. I believed that EMS had grasped this point and I believe that I was reading these papers as if this point had been understood and was being confirmed, not the opposite, as I subsequently understood to be the case.

In fact, as is clear from the facility letter that has been provided to the respondent as a consequence of its request for it, Stellar Shipping remains the borrower and there are indeed corporate and personal guarantees in place from Trade Line and the Stellar Shipping shareholders. The guarantees are for the performance of Stellar Shipping, not Action Partner Limited for its commitment in terms of the mortgage agreement.”

[51] The inescapable conclusion to be drawn from this is, of course, that Stellar Shipping borrowed an amount of US\$40 600 000,00 from the bank in order to pay the purchase price of the vessel to Cosco. Guarantees were required in respect of the loan from Trade Line and Stellar Shipping and their shareholders and Stellar Shipping remains liable to the bank in respect of the loan.

[52] Realising this difficulty Rathee set out a very different case in the supplementary affidavit. He confirms, as emerges from the original facility letter from the bank that the vessel was to be owned by Stellar Shipping and was to be registered in the name of Stellar Shipping. The guarantees were required from Trade Line and the shareholders of Trade Line and Stellar Shipping, including Habeeb, and the original facility letter was signed for Stellar Shipping by Al Ghurair, the majority shareholder in Stellar Shipping.

[53] Rathee re-iterates the negative effects which Stellar Shipping had encountered as a result of the economic downturn and states that Stellar Shipping had failed to make payments due under its contract with the shipyard in respect of the purchase of the vessel. The shipyard accordingly cancelled the agreement on 21 October 2010. A copy of the letter of cancellation is annexed. Astoundingly, the letter is addressed to Stellar Shipping Company: Attention Captain AK Rathee. Rathee's association with Stellar Shipping remains unexplained. In any event, he proceeds to record that Cosco later agreed to continue in the contract.

[54] He states that Emirates NDB Bank called upon Stellar Shipping to pay the margin monies which Stellar Shipping was unable to do. Stellar Shipping accordingly approached the shareholders to ascertain whether any of them would be prepared to take over the transaction against payment of the margin monies. The reason for doing so was, that Stellar Shipping calculated that if the transaction was not pursued it was at risk of losing in the region of US\$15 000 000,00 in damages to the yard. It was for that reason, it is alleged, that Stellar Shipping was prepared to continue to act as borrower to facilitate the continuation of the existing facility agreement for the benefit of a third party and the guarantors were prepared to continue to act in that capacity for the same purpose. Habeeb then took over the transaction. The terms upon which Habeeb did so are alleged to be those set out in a letter which is annexed to his supplementary affidavit. Rathee's states that Habeeb agreed to these terms. The letter referred to purports to be a letter from Trade Line to Habeeb. It confirms that in principle Emirates NDB Bank, Trade Line and Stellar Shipping were agreeable to extend the loan facility to Habeeb. It was necessary however for Habeeb to confirm a number of pre-conditions set out in the

letter, including that he would indemnify Trade Line, Stellar Shipping and the shareholders of any liability associated with the finance of the vessel. Habeeb has filed no confirmatory affidavit in respect of these terms and it is not alleged that such an indemnity was forthcoming.

[55] In any event, Rathee continues to state that Habeeb then made arrangements to pay the margin of US\$9 500 000,00 to the shipyard. He did so by arrangement with Habeeb's brother, Mujeerbur Rahman Habeeb by using the proceeds of the sale of the mv "Majestic Star" a vessel owned by a company known as Stellar Mini Bunkers Hong Kong Limited. The sole shareholder of this company was Habeeb's brother. The payment was arranged by Stellar Ocean who as manager of the mv "Majestic Star" then controlled those funds on behalf of Stellar Mini Bunkers Hong Kong Limited to Stellar Shipping. The balance of the margin, Rathee states, was paid by Stellar Ocean to Stellar Shipping from funds that were owed by Stellar Ocean to Habeeb as a shareholder. In support of this contention he annexes a copy of a document which had not been provided previously and which he contends proves this payment. The document is on a letterhead of Stellar Ocean dated 6 November 2010. It is addressed to National Bank of Abu Dhabi and requests the transfer of the amount of US\$5 000 000,00 to Stellar Shipping. It is signed on behalf of Stellar Ocean by Habeeb. In respect of payment details the document records:

"Transfer to sister concern"

[56] Rathee now denies that this inscription conveys that Stellar Ocean and Stellar Shipping were commonly controlled. He states that the terminology was chosen

merely because Habeeb was a common shareholder in the two companies at the time. Habeeb, however, is silent in this regard.

[57] No explanation is tendered for why Habeeb has not made a confirmatory affidavit in respect of these events and, as earlier alluded to, the applicant has not taken the court into its confidence in respect of who Habeeb had alienated his shares in Stellar Ocean to.

[58] In this regard there is a further aspect which arises from Rathee's supplementary statement. Rathee states that he erred in his original instructions to Ms Pitman and that he was incorrect in suggesting that it was not possible to have a citizen of the United Arab Emirates sponsor a company by holding 51% shareholding for a fee, without any participation, financial or otherwise in respect of the company. In the case of Stellar Ocean, he now states that Darwish was indeed such a sponsor and confirms that the company was, until 24 September 2012 controlled by Habeeb. The 51% shareholding which Darwish held in the company, on my understanding of this allegation, was accordingly held as a nominee. Habeeb controlled the majority shareholding in Stellar Ocean up until 2012. This being so the purchaser of Habeeb's shareholding would have obtained control of Stellar Shipping.

[59] It is trite that a dispute of fact on issues which arise in motion proceedings are to be approached in line with what was stated in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A) at 634H-635C. There Corbett JA, as he then was, stated:

“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact ... If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court ... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks ... Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ...”

[60] In ***Bradbury Gretorex Co. (Colonial) Ltd v Standard Trading Company (Pty) Ltd*** 1953 (3) SA 529 (W) at 531A-D Steyn J pointed out that an applicant cannot by obtaining *ex parte* an order in his favour secure a more advantageous position than he would have been in if the other party had had an opportunity of putting counter allegations before the court; consequently, if the other party applies for setting aside the order, the original applicant retains the onus of satisfying the court that he was entitled to it. This approach, in a matter such as the present, was approved in the Appellate Division of the Supreme Court (as it then was) in the matter of ***Cargo Laden on Board the mv Thalassini Avgi v mv Dimitris*** 1989 (3) SA 820 (A). In argument before me counsel were correctly in agreement that for purposes of the application of the approach set out in ***Plascon-Evans Paints*** *supra*,

the respondent, who retains the onus to establish his entitlement to the arrest of the vessel, should be regarded as the applicant.

[61] Adopting this approach the following which emerges from the affidavit on behalf of the applicant must be accepted. Firstly, Al Ghurair owns 51% of the shareholding in Trade Line, Stellar Shipping and Phiniqia. Al Ghurair accordingly controls these companies. Habeeb is the vice chairman of Trade Line and is a shareholder in the group of companies owned by Al Ghurair. Stellar Ocean is the technical and commercial manager of the vessel.

[62] On the version of the applicant Habeeb owned the majority shareholding in Stellar Ocean (23% in his own name and 51% via Darwish) until he sold his shareholding on 24 September 2012. Habeeb accordingly controlled Stellar Ocean until September 2012.

[63] The reports of Sea-Web and Lloyd's List Intelligence upon which the respondent relies reflects Stellar Ocean currently to be a subsidiary of Trade Line. This the applicant denies and states that since Habeeb sold his shareholding in Stellar Ocean there has been no common shareholding between Stellar Ocean and Trade Line. I think that the two features of this denial are of particular significance. Firstly Habeeb, although he made a confirmatory affidavit which was filed together with the replying affidavit limits his confirmation to particular issues and astutely avoids confirmation of any of the averments made in respect of his shareholding Stellar Ocean. The second significant feature hereof is that the applicant refrains from taking the court into its confidence in respect of the identity of the purchaser of

Habeeb's shareholding. This is clearly a matter which falls within the knowledge of Habeeb. In the absence of this information I do not think that the denial can raise a genuine dispute of fact. The application accordingly falls to be decided on an acceptance that Stellar Ocean is a subsidiary of Trade Line.

[64] The association between Stellar Shipping and Stellar Ocean emerges further from certain of the annexures annexed to the supplementary affidavit provided by Rathee. I have alluded above to the letter from Cosco Shipyard Co. Ltd which purports to cancel the agreement for the construction of the vessel. It was addressed to Stellar Shipping Company for attention Captain Rathee. This association between Rathee, the CEO of Stellar Ocean, and Stellar Shipping is not explained by Rathee at all. In addition the explanation for the description of Stellar Shipping as a "sister concern" of Stellar Ocean in a document signed by Habeeb, which I have referred to above is, in the absence of a confirmatory affidavit by Habeeb not convincing. I think it is clearly untenable.

[65] On a consideration of all these matters I think that the dispute arising in respect of the control of Stellar Ocean, to the extent that it might be material, is not a real, genuine or *bona fide* dispute of fact as was envisaged in ***Plascon-Evans Paints supra***.

[66] In the answering affidavit the respondent took the position that Habeeb holds the shares in Action Partner as a nominee on behalf of Stellar Shipping and/or Trade Line and in addition that the purported sale of the vessel by Stellar Shipping to Action Partner is nothing more than a simulated transaction in order to give the

impression that the vessel is no longer owned by Stellar Shipping. In the event that the sale was a simulated transaction, then it follows as a matter of logic that the vessel remains the property of Stellar Shipping which is part of the group of companies owned and/or controlled ultimately by Al Ghurair. By virtue of the conclusion to which I have come in respect of the sale I do not think that it is necessary to address the question of the capacity in which Habeeb may hold the shares.

[67] It is not in dispute that the construction of the vessel was commissioned by Stellar Shipping from Cosco Shipyard in China. A Bill of Sale was concluded between Stellar Shipping and Cosco. Thereafter, a second Bill of Sale was concluded between Stellar Shipping and Action Partner, dated 7 June 2011. The actual terms upon which the vessel was sold by Stellar Shipping to Action Partner have not been disclosed. The Bill of Sale records only that Stellar Shipping acknowledges that it transfers 100% of the shares in the vessel to Action Partner for an amount of US\$49 800 000,00 which it records has been paid by Action Partner and received by Stellar Shipping. Pitman, in the replying affidavit records that the only asset which Action Partner had in June 2008 was the vessel which had been paid for by Habeeb. The applicant's case was clearly that the full purchase price was paid to Stellar Shipping and that Action Partner had obtained US\$40 600 000,00 on loan from Emirates NDB Bank.

[68] On the evidence which emerges from the affidavits it cannot be gainsaid that Habeeb caused the margin amount of US\$9 500 000,00 to be paid to Cosco. In the replying affidavits it is contended that the loan which had been arranged by Stellar

with Emirates NDB Bank was then advanced to Action Partner and Action Partner was the actual borrower of the amount. This accounts for the remaining US\$40 600 000,00 which was allegedly paid to Stellar Shipping. It was categorically and firmly denied that Stellar Shipping remained the actual borrower.

[69] The mortgage documentation, which was signed on 18 October 2012, some months after the Bill of Sale, read together with the facility letters referred to in the mortgage bond and which were not forthcoming before respondent called for them, show unequivocally that this is not true.

[70] In terms of the mortgage bond Action Partner agreed to secure the liability of Stellar Shipping to the mortgagee. The mortgage provided that in the event of a breach of the loan agreement by Stellar Shipping the vessel could be sold in order to liquidate the outstanding indebtedness of Stellar Shipping. It further provided that the secured indebtedness shall at the election of the mortgagee become immediately due and payable if one of the events of defaults mentioned in the loan agreement occurs.

[71] On this basis it is argued, and I think correctly, that it is clear that Action Partner put up its alleged vessel as security for the loan indebtedness of Stellar Shipping. Clearly the US\$40 600 000,00 borrowed under the loan agreement was utilised by Stellar Shipping to pay Cosco Shipyard for the purchase of the vessel.

[72] As recorded earlier Habeeb caused the margin amount to be paid. In order to do so it required the sale of a vessel owned by his brother. On the replying papers,

however, no explanation can be given as to how the remaining amount of approximately US\$40 000 000,00 which was allegedly paid to Stellar Shipping, as recorded in the Bill of Sale, was paid.

[73] After the facility letters came to light it became clear that the version relating to the loan agreement which had been firmly advanced by the applicant in the replying papers was simply not true. The endeavour of Rathee to explain the reason for his incorrect instructions is, in my view, untenable and Habeeb has refrained from providing any confirmation in respect of the events relating to the loan agreement, the facility letters or the mortgage bond, notwithstanding that he personally signed the mortgage bond and provided a personal guarantee in respect thereof. Once it is accepted, as I think that it must be, that the loan from the Emirates NBD Bank was utilised to pay Cosco Shipping then the conclusion is inescapable that the Bill of Sale dated 7 June 2011, which records and confirms that the purchase price of US\$49 800 000,00 has been paid by Action Partners to Stellar Shipping, must be a simulation.

[74] In all the circumstances I do not think that there is a genuine, or *bona fide* dispute of fact about the validity of the purported sale and in the premises I conclude that the vessel remains the property of Stellar Shipping, which, it common cause, falls within the companies owned by and/or controlled by Trade Line or Al Ghurair. The vessel is accordingly an associated ship in respect of the respondent's claim.

[75] I turn to consider the relief sought in respect of security for the alleged wrongful arrest of the vessel. The onus in this regard rests upon the applicant and,

applying the test set out in ***Plascon-Evans Paints***, to which I have referred earlier, the averments made by the applicant and which have been admitted by the respondent together with the facts alleged by the respondent should be considered.

[76] I think that it follows from the conclusions to which I have come above that the applicant has not made out a case upon which it can be held that the arrest of the vessel at the instance of the respondent was without reasonable and probable cause.

[77] No argument was presented to me in respect of the relief sought relating to edictal citation and I shall accordingly make no finding in that regard.

[78] In the result I make the following order:

1. The application to set aside the arrest of the mv “Silver Star” is dismissed.
2. The application for security in respect of a claim for damages against the respondent for the arrest of the mv “Silver Star” without reasonable and probable cause is dismissed.
3. The security provided by the respondent in respect of the postponement on 16 August 2013 is to be released to the respondent.
4. The applicant is to pay the respondent’s costs occasioned by the application.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv D A Gordon SC instructed by Edward Nathan Sonnenbergs
c/o Pagdens Attorneys, Port Elizabeth

For Respondent: Adv M J Fitzgerald SC instructed by Bowman Gilfillan Inc c/o
Chris Baker Attorneys, Port Elizabeth