

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No: A10/2020

In the matter between:

DHL PROJECT & CHARTERING LTD

PLAINTIFF

and

MV “SHANDONG HAI CHANG”

DEFENDANT

Admiralty action in rem

JUDGMENT

D Pillay J

Introduction

[1] The transnational nature of maritime trade has generated distinct principles of governance for the industry.¹ Those engaged in maritime trade are exposed to the high risk of debtors defaulting on debt repayment; insolvency is a constant concern. Pinning down debtors to a particular jurisdiction is challenging. The owner could be a company registered in an obscure country with unidentifiable shareholders, untraceable bank accounts and unpaid debt for bunkers in a jurisdiction unrelated to any of the preceding factors. Given the “floating character of maritime debtors and their ability to disappear over the horizon”,² creditors would struggle with enforcement but for the facility of a

¹ Malcolm Wallis ‘Recovery of Maritime Debts and the Role of the Associated Ship’ (November 2012) 28.1 *Banking & Finance Law Review (B.F.L.R.)* 103 at 104; James Allsop ‘Maritime Law: The Nature and Importance of Its International Character’ (2010) 34 *Tulane Maritime Law Journal* 555.

² Wallis at 105.

court order to arrest a ship as security for maritime claims. The Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act') fortified the position of creditors by enabling most shipping actions to be actions *in rem* (actions against the thing). Providing for arrests of associated ships is the Act's response to address problems created by both offshore registration of vessels and 'one ship' companies. Companies owning several vessels each in a fleet controlled through a pyramid of companies do by design obscure the real controlling interests. The purpose of the Act is 'to make the loss fall where it belongs by reason of ownership, and in the case of a company, ownership or control of the shares.'³

[2] Associated ships are ships owned separately or jointly and controlled by the same person, with the emphasis now being on attaching liability to those who control the vessels.⁴ As for control of a company, s 3(7)(b)(ii) of the Act provides that 'a person shall be deemed to control a company if he has power, directly or indirectly, to control the company.' Control is understood in the maritime industry to mean that:

'... the person must control the overall destiny of the company and not merely control the running of the company's day to day affairs ... Such a person [must] be in effective control directly or indirectly of the affairs of the company ... and really be the directing mind and will of the company.'⁵

It is 'not the power to control a company in the sense of managing its operations' but 'the power to determine its "direction and fate"'.⁶ Managing the day-to-day operations of a company for which the board of directors and senior management are answerable to shareholders, is distinguishable from controlling the fate and destiny of the company, which is a power vesting in shareholders who hold the majority voting rights.⁷

³ *MV Silver Star: Owners of the MV Silver Star v Hilane Limited* [2014] ZASCA 194; [2015] 1 All SA 410 (SCA); 2015 (2) SA 331 (SCA).

⁴ Wallis at 103-111.

⁵ Wallis at 115 fn 34 citing *The Kadirga Five (no I) JA Chapman & Co v Kardiga Denizcilik ve Ticaret AS*, Shipping Cases of South Africa C12 at C14E-G.

⁶ *International Marine Transport v MV "Le Cong" and Another* [2005] ZASCA 106 ('Le Cong') para 7 citing *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* [1999] ZASCA 44; [1999] 3 All SA 337 (A); 1999 (3) SA 1083 (SCA) ('*MV Heavy Metal*') para 12.

⁷ *MV Heavy Metal* at 1105-1106.

[3] Fortifying the position of creditors further, where a claim lies against the charterer and not the owner of the ship, the charterer is deemed to be the owner of the ship for the purposes of the associated ship provisions in the Act.⁸ The purpose of the deeming provision is to avail the associated ship provisions to facilitate the arrest of an associated ship owned by a company, which is controlled by the same person as controlled by the charterer of the ship concerned.

[4] In this way the concept of associated ships in the Act enables creditors of one of the vessels in a fleet to enforce their claims against all the vessels in the fleet, irrespective of where in the world those debts are incurred, if the vessels call at a South African port. In this case, the issue in dispute is not about ownership but about control of the vessels. Control is a legal question to be determined according to the laws of the Peoples' Republic of China.

[5] The plaintiff, DHL Projects and Chartering Ltd, seeks to enforce the arbitration award dated 30 July 2019 handed down by a Hong Kong arbitration tribunal. To this end, the plaintiff arrested the defendant, mv *Shandong Hai Chang*, in Richards Bay on 19 February 2020 to enforce a claim *in personam* against Tonkolili Iron Ore Co Ltd ('Tonkolili') for the payment of demurrage and costs arising out of the charter by the plaintiff to Tonkolili as voyage charterer of the mv *Zhong Teng Hai*. The principle claim in the sum of USD 1 325 460.97 arose during November 2017 to February 2018.

[6] This *in rem* action is brought against the defendant under s 3(6) and (7) of the Act. The plaintiff alleges that the defendant was an associated ship of mv *Zhong Teng Hai*. To succeed in its enforcement action *in rem*, the plaintiff must prove that the owner of the defendant, being Shandong Haiyang Shipping Company Limited ('Shandong Haiyang'), and Tonkolili were, when the plaintiff's claim arose, controlled by Shandong Provincial State-Owned Asset Supervision and Administration Commission ('SASAC'), an agency or arm of the government of the Peoples' Republic of China.

⁸ In terms of s 3(7)(c) of the Admiralty Jurisdiction Regulation Act 105 of 1983.

[7] SASAC was the majority shareholder of Shandong Shipping Corporation ('Shandong Shipping'), which owned 100 per cent of Shandong Shipping (Hong Kong) Holdings Limited, which in turn owned 100 per cent of Shandong Haiyang, the registered owner of the defendant. SASAC controlled the defendant through Shandong Haiyang.

[8] SASAC was also the controlling shareholder of Shandong Iron and Steel Group Company Limited ('SIS'). SIS owned 100 per cent of Tonkolili. Therefore, SASAC was the parent of the owners of both the defendant and Tonkolili as the deemed owner of the *mv Zhong Teng Hai*. Notwithstanding such common parentage, determining who controls the fate and destiny of the defendant involves interpreting and applying of laws of the Peoples' Republic of China.

[9] The plaintiff bears the onus of proving that at the time its claim arose, the defendant was an associated ship of *mv Zhong Teng Hai*, in respect of which Tonkolili is the deemed owner. This involves proving that SASAC had the power, directly or indirectly, to control Tonkolili in the sense of controlling its fate and destiny.

[10] The content of foreign law is a question of fact, which must be proved.⁹ A party who wishes to make out a case that the law of another country differs significantly from the law of South Africa must adduce evidence to that effect. Surmising what the foreign law is and whether it differs materially from that of South Africa is impermissible.¹⁰

[11] The expert witnesses, Dr Li Zhaoliang for the plaintiff and Mr Peng Jun for the defendant, assisted the court by identifying the relevant laws, confirming the accuracy of the translations into English, preparing reports of their expert opinion, and submitting a joint minute of their points of agreement and disagreement. Whilst their expert opinions are relevant for contextualising the laws of the Peoples' Republic of China,

⁹ *The Asphalt Venture: Windrush Intercontinental SA and Another v UACC Bergshav Tankers AS* [2016] ZASCA 199; 2017 (3) SA 1 (SCA) ('*The Asphalt Venture*') para 31; *Le Cong* para 12 citing *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* [1983] 1 All SA 145 (A); 1983 (1) SA 276 (A) ('*Standard Bank*') at 294G.

¹⁰ *MV Heavy Metal* para 8.

interpretation and application of the laws is the responsibility of the court. The court is not bound to accept the view of the experts and may accept the testimony of one expert against another if they are at odds.¹¹

[12] For context, the recent political economic history of the Peoples' Republic of China is helpful. The transition from communism, a system of political and economic control in which ownership of the major means of production vested in the State, to a socialist market economy is foreshadowed in the Preamble to the Constitution of the Peoples' Republic of China adopted on 4 December 1982 ('the PRC Constitution'). It records a commitment by the Chinese people:

' . . . to uphold the peoples' democratic dictatorship, stay on the socialist road, carry out reform and opening up, steadily improve the socialist institutions, develop the socialist market economy and socialist democracy, improve socialist rule of law, apply the new development philosophy, and work hard in a spirit of self-reliance to modernise step by step the country's industry, . . . to build China into a modern socialist country. . . ' ¹²

[13] Our courts have already had an opportunity to interpret and apply the PRC Constitution and some statutes of the Peoples' Republic of China in *International Marine Transport v MV "Le Cong" and Another* ('Le Cong').¹³ In *Le Cong* both entities, Guangzhou and Shantou Sez, were State-owned enterprises. Guangzhou was the owner of the mv *Le Cong*, while Shantou Sez was deemed to be the owner of the *Gaz Progress*. In the absence of a commonality in ownership, establishing that the vessels were associated ships involved an enquiry to determine whether both State-owned enterprises were controlled by the same person. Guangzhou and Shantou Sez were considered to be owned 'by the whole people'. However, Guangzhou was established and funded at the level of the central government; Shantou Sez was established and funded at municipal level. Consequently, the power to control vested at central and

¹¹ The *Asphalt Venture* para 31; *Le Cong* at 12 citing *Standard Bank* at 294G.

¹² Constitution of the People's Republic of China; <http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml>, last accessed on 27 May 2022.

¹³ *International Marine Transport v MV "Le Cong" and Another* [2005] ZASCA 106.

municipal levels of government for each entity respectively, and the central government was precluded from controlling the municipality and its assets.¹⁴

[14] In *Le Cong*, the court recognised that the Peoples' Republic of China 'not only has a legal system different from ours but its constitutional and social structures are vastly different, as is its political philosophy and culture, and it is in this context that its laws must be interpreted.'¹⁵ Of particular significance is the 'division of functions and powers between the Central Government and the organs of State administration of provinces, autonomous regions, and municipalities directly under the Central government.'¹⁶ This division of power was replicated in different ways in the Chinese Budget Law. Fortified by the provisions of the Budget Law, the court found that Guangzhou's version of the law of the Peoples' Republic of China had to be accepted as correct¹⁷ on the application of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.¹⁸

[15] Although *Le Cong* is distinguishable on the facts and the applicable law, it is a curtain raiser to an enquiry into Maritime Law in the Peoples' Republic of China. However, each claim of association must be determined on its own merits.

[16] It will become apparent in this case, as it was in *Le Cong*, that a superficial reading of the provisions of the foreign law does not give a decisive answer to the question about where the power vests to control the fate and destiny of a vessel. For instance, enabling or empowering provisions hedged by the duty to act within the law requires recognition of both forces at play. It is not enough to establish what the law permits but also what it prohibits and enforces. A deeper probe is necessary to determine whether the reform foreshadowed in the PRC Constitution has not only reached the entity concerned but also confers on it the controlling power required for the

¹⁴ *Le Cong* para 9.

¹⁵ *Le Cong* para 13.

¹⁶ *Le Cong* para 15 citing article 89 of the Constitution of the Peoples' the Republic of China.

¹⁷ *Le Cong* para 17.

¹⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A).

vessel it owns to be regarded as an associated ship. To snatch a phrase here and a sentence there from the legal materials in an attempt to prove one's point would be opportunistic. More importantly, it would not yield the depth of understanding required to determine where power lies to control enterprises in a socialist market economic system in transition. The legal materials must be considered holistically and with appreciation that the Peoples' Republic of China was constitutionally committed to the process of reform from a communist to a market economy.

Experts' opinions

[17] Dr Li is the chief director and partner in a law firm specialising in Maritime Law. He has a bachelor and a masters' degree in Maritime Law and a PhD in International Law. Mr Peng is the external legal counsel for the Chinese government in negotiating international rules. He works with the World Trade Organisation and the European Union; his task is to explain the Chinese legal system pertaining to State-owned enterprises (SOEs) to his counterparts.

[18] Factually, the experts disagree on whether SASAC is the actual controller of both Tonkolili and Shandong Haiyang. They also disagree on the objectives and the results of the government-SOE relationship reform. In Dr Li's opinion, SASAC is the actual controller of both Shandong Haiyang and Tonkolili and therefore Tonkolili is under common control of SASAC. SASAC is the actual controller because it owns 70 per cent of the equities in SIS which directly owns 100 per cent of the equities in Tonkolili, he says.

[19] In Mr Peng's opinion, while SASAC is the actual controller of Shandong Haiyang, SIS rather than SASAC is the actual controller of Tonkolili. Mere indirect shareholding by SASAC of Tonkolili is not sufficient for the analysis. The reform must be considered. SIS has been reformed and converted into a SOE holding company because of the reform. SASAC remains the controlling shareholder of SIS, but the control over the fate and destiny of Tonkolili, as a subsidiary of SIS, has been vested in the hands of SIS. On the facts, Mr Peng opines that it is SIS rather than SASAC, that is the actual controller

of Tonkolili. Therefore, in his view Shandong Haiyang and Tonkolili are not under the common control of SASAC.

[20] The legal basis for the factual disputes above arises from the experts' disagreement about the relationship between the Peoples' Republic of China Law on State-Owned Assets of Enterprises ('PRC Law on SOEs') and the government-SOE relationship reform measures. For the latter, Mr Peng relies on several government documents, the authenticity of which are uncontested.

Dr Li

[21] In Dr Li's opinion, the government would 'never' delegate all rights to SOEs. The reform does not change ownership through shareholding of Tonkolili, which is strictly controlled by SASAC. As capital contributor and controller, it is 'impossible' that SASAC would lose its control of power over Tonkolili. The investment relationship between the government and the State-owned enterprises should be clearly set out. If SASAC authorises other enterprises or institutions to exercise some of its rights as a capital contributor, the status of the party performing the contributor functions and its power to control State investment enterprises remains unaffected.

[22] Dr Li emphasises that the PRC Law on SOEs is the national law; any reform must be in accordance with it. It is 'effective and of higher authority than the policies, plans and opinions' on which Mr Peng relies for the government-SOE relationship reform measures. The State Council documents are expressions of opinion, suggestion and guidance at the national level. State Council instructions are not peremptory; they are administrative instructions that must abide the law. During implementation, flaws may be found or adjustments must be made to the State Council instructions. They 'do not reform the enterprises' status of "actually controlled" by the state.' The reform is only about the operations and management of enterprises. While it is up to SASAC and the central government to delegate rights to enterprises and recall such delegation, this does not change the position of the actual controller. Reforms cannot go beyond the law.

[23] In Dr Li's opinion, irrespective of the government-SOE relationship reform measures, it will not prevent the government agencies (such as SASAC) from being the actual controlling shareholder and exercising the power of control in relation to SOEs under them. Even if SASAC has authorised some of its contributor functions to SOE holding companies, it always has the power to recoup such functions and retain the powers and responsibilities to control these SOE holding companies. 'The enterprises' status of actually controlled by the State i.e., Shandong SASAC, cannot be and has never been reformed and changed.'¹⁹

[24] Therefore, in Dr Li's opinion, SASAC controls the fate and destiny of Tonkolili. This is so because, even if SASAC delegated any of its powers to its subsidiary, SIS, which he claims SASAC cannot and did not do, SASAC can revoke them.

Mr Peng

[25] In Mr Peng's opinion, there is no conflict between the PRC Law on SOEs, which came into effect on 1 May 2009, and the reform measures that were initiated in 2013. The PRC Law on SOEs had already foreshadowed the principle of the reform in separating the public management function of the government from its function as the capital contributor of State-owned assets to ensure the independent operation of SOEs. This principle involved 'the decoupling of the hat of the shareholder and the hat of the regulator'. The objective of the reform is that the government retains the functions of public administration (the 'hat' of the regulator) and divests the functions of State-owned capital contributors (the 'hat' of the shareholder) to SOE holding companies.

[26] Mr Peng says that SASAC has established a three-tier system of State-owned assets supervision and administration authority with SASAC at the top, the SOE holding company in the middle and the subsidiaries at the bottom. After the reform, SASAC remains the controlling shareholder of the SOE holding company, but the control stops at that level. The duties of capital contributors (shareholders) have been divested from

¹⁹ Joint Minute of Experts para 13.

SASAC and authorised to Shandong SOE holding companies. As a result of the reform, SASAC is barred from exercising the power to control the fate and destiny of the subsidiaries under Shandong SOE holding companies which have completed the reform.

[27] Mr Peng bases his opinion about the reform on several State Council and SASAC documents. The State Council is the central government. It has the power over the ministries at central, provincial and local levels. The Several Opinions of the State Council on Reforming and Improving the State-Owned Asset Management System of 2015 urges that 'the decisions and arrangements of the CPC [Communist Party of China] Central Committee and the State Council shall be followed'. The Notice of Shandong SASAC on Printing and Distributing the Authorization and Decentralisation List by Shandong SASAC (the 'List Notice')²⁰ dated 16 December 2019 issued by SASAC is not a recommendation; the local governments must implement it in:

'... the spirit of the Notice by the State Council of Issuing the Plan for Reforming the State Owned Capital Authorised Operation System ([19 April 2019] of the State Council) (the 'Plan for System') and Ten Opinions of Shandong Provincial Party Committee and Shandong Provincial Peoples Government on Accelerating the Reform of State Owned Enterprises (No. 17 of [2017] of the Shandong Provincial Government).'

The Plan for System – also issued for 'diligent implementation' – confirms that the State-owned capital investments and operation companies, that is the SOE holding companies, are entrusted with the duties of capital contributors for their subsidiaries.

[28] Mr Peng agrees with counsel for the plaintiff that direct authorisation by the government is required to enable SIS to act as a capital contributor. The List Notice is such authority for conferring that power and confirming that SASAC implemented the reform. SOE holding companies control the fate of their subsidiaries. SASAC, a government agency, cannot intervene into the market decision-making of the

²⁰ This document (Annexure 'PJ 12' of record) is also indexed as 'List of Authorizations and Divestiture issued by Shandong SASAC on 17 December 2019.'

subsidiaries under SIS. This is market-oriented reform. It lets those who are sensitive to the market make decisions for their own fate rather than the government agencies.

[29] From November 2016, the number of investment and operation companies among provincial enterprises grew to 13. Particulars of these 13 SOE holding companies which are published on SASAC website include SIS.

[30] Consequently, SIS has been reformed into an SOE holding company. The control of the subsidiaries (Tonkolili) is delegated to the SOE holding company (SIS). The provincial enterprises named in the List Notice are the provincial SOEs directly under SASAC. That is the basics of the reform so that the intervention of the government is prevented or minimised through the breaking of the control.

[31] Mr Peng continues to explain that because SIS has already been reformed and established as the SOE holding company, SASAC can only control the SOE holding companies; it has no power to exercise control over the fate and destiny of the subsidiaries of SIS. The List Notice authorises the delegation of significant powers of control over the subsidiaries, including the restructuring and transfer of State-owned property rights, merger, dissolution, liquidation and application for bankruptcy.

[32] Mr Peng emphasises that SASAC has no power in respect of the decisions of the subsidiaries. If it is unhappy with a report from SIS or with SIS's decision to liquidate Tonkolili, SASAC can regulate as a government agency and regulator, but SASAC cannot intervene as shareholder in SIS. So, if SIS decides in the name of Tonkolili to do something illegal SASAC would not be powerless. SIS has exclusive control over its subsidiary but SASAC retains oversight over the lawfulness of SIS.

[33] SASAC has the power to appoint and remove directors of subsidiaries. But in Mr Peng's view it would be an abuse of power if SASAC removed directors because of their decisions about Tonkolili. Removal and appointment of directors must be within the

scope of the law. It is counter-intuitive, but that is the basis for the SOE market-oriented reform; SASAC cannot intervene in market decision-making.

[34] That does not mean that SIS can do what it wants. There are systems in place to prevent abuse of powers. Article 12 of the PRC Law on SOEs equates the capital contributor's right to that of a majority shareholder. If Tonkolili does anything illegal the government power of regulation is there to regulate and rectify illegal activities.

[35] Mr Peng agrees that the establishment of the 'dynamic adjustment mechanism for authorised matters' in the List Notice and the authority to regularly evaluate the implementation and its effect suggest that SASAC as a regulator has the power to withdraw authority in respect of those items on the Notice List. But Mr Peng suggests that these powers are not unfettered.

[36] The reform is different from association. Otherwise, Mr Peng points out, all companies in China would be deemed to be associated because they are all subject to government power of regulation. SASAC being a direct controlling shareholder of SIS has the power of capital contributor over SIS but SASAC has no power of control over the subsidiaries under SIS. That is logical because that is the very purpose of SOE reform. But it is counter intuitive.

[37] The reform started as early as 2013 and is more than eight years in progress. In Mr Peng's view the reform cannot be wished away by simple assertions. As for reversing the reform so that the powers revert to SASAC, SASAC would have to persuade central government to publish new decrees or instructions to revoke or supersede what has been done over the last eight or nine years. Otherwise, it is not legal.

[38] Regarding the defendant, Mr Peng clarifies that he agrees with Dr Li that SASAC is the actual controlling party of Shandong Haiyang because he (Dr Peng) finds no evidence to prove that the SOE holding company of Shandong Haiyang completed the

reform. In contrast, he concludes that the evidence proves that the reform is completed for SIS.

Submissions

[39] The plaintiff submits that SASAC exercises both direct and indirect control over Tonkolili, sufficient to satisfy the requirements for establishing the association contemplated in the Act. The reform has not resulted in control of the destiny of Tonkolili being delegated to SIS.

[40] To resist the claim, the defendant contends that, following the reforms which began around 2013, SIS was a newly constructed SOE holding company that took over the role of capital contributor from SASAC in respect of Tonkolili. Therefore SIS controlled Tonkolili under s 3(6) and (7) of the Act.

Analysis

[41] The reason for the constitutionally induced reform from a communist to a socialist market economy was for enterprises to be modernised, autonomous and responsive to market conditions, to ensure that the quality of State-owned assets improved. The experts agree that the reform is gradual in the Peoples' Republic of China. Mr Peng is explicit about what reforms are implemented. He advanced his 'regulator hat' and 'investor-contributor hat' theory of reform. For Dr Li, the reform is not about control but of operational and management powers.

[42] In this case, the plaintiff must demonstrate that the power to control the fate of the companies vested in the same entity, that is SASAC:

- (a) in relation to Tonkolili, when the claims arose, that is during November 2017 and February 2018; and
- (b) in relation to Shandong Haiyang, when the action commenced, that is when the arrest was effected on 19 February 2020.

[43] Having regard to Mr Peng's concession above that SASAC is the actual controlling party of the defendant as that reform appears to be incomplete, the focus is on whether SASAC controls the destiny of Tonkolili.

[44] Prior to the reform, SASAC controlled Tonkolili. To determine whether SASAC or SIS controlled the fate and destiny of Tonkolili during November 2017 and February 2018, the court must determine what the reform was; whether it resulted in a devolution of authority; if so, what authority devolved and when; whether the devolution conferred the power to control the destiny of Tonkolili; and whether the devolution was revocable. Chronologically traversing the legislation and State Council documents would clarify the evolution of the reform.

[45] The Decision of the First Session of the Tenth National People's Congress on the Plan for Restructuring the State Council (effective date 10 March 2003) ('the Decision') records that:

'[T]he current tasks of the State Council for restructuring are chiefly ... [t]o deepen the structural reform of State-owned assets administration, by establishing a State-owned Assets Supervision and Administration Commission under the State Council.'²¹

At the national level of reform, this Decision lays the ground for establishing SASAC.

[46] In 2009, the Central Committee of the Chinese Communist Party and the State Council approved the Plan for Restructuring the Shandong Provincial People's Government (the 'Plan for Province'). It records that SASAC was established under the Provincial Peoples' Government. Furthermore, the Party Committee of SASAC performs the duties prescribed by the Provincial Party Committee.²²

[47] Article 6 of the PRC Law on SOEs effective from 1 January 2009:

'... requires government to perform the duties of a contributor in accordance with the principles of "the separation of the functions of the government from those of

²¹ Annexure 'GL4' at 43.

²² Annexure 'GL6' at 63.

enterprises, and the separation of public administrative functions from the functions of state-owned asset investors.”

Effectively, Article 6 lays the statutory ground for decoupling administrative functions from investor functions.

[48] Article 11 of the PRC Law on SOEs advances the decoupling by anticipating a delegation of contributor’s functions as follows:

‘The state-owned assets supervision and administration body under the State Council and the state-owned assets supervision and administration bodies established by the local people’s governments according to the provisions of the State Council shall perform the contributor’s functions for state-invested enterprises on behalf of and upon the authorization of the corresponding people’s government. The State Council and the local people’s governments may, when necessary, *authorise other departments or bodies to perform the contributor’s functions* for state-invested enterprises on behalf of the corresponding people’s government.’²³ (Emphasis added)

[49] Essentially, Article 11 empowers SASAC to perform the contributors’ functions in relation to its SOEs, such as SIS. However, the State Council and the local people’s governments may also authorise other departments or bodies to perform the contributors’ functions.

[50] Article 12 of the PRC Law on SOEs gives contributors the right to participate in major decisions and the duty to report to the government for approval:

‘A body performing the contributor’s functions on behalf of the corresponding people’s government shall enjoy the return on assets, participation in major decision-making, selection of managers and other contributor’s rights to the state-invested enterprises *according to law*. A body performing the contributor’s functions shall formulate or participate in the formulation of the bylaws of state-invested enterprises *according to the provisions of laws and administrative regulations*. For the major matters on the performance of the contributor’s functions that are subject to the approval of the

²³ Annexure ‘GL5’ at 48.

corresponding people's government as prescribed by laws, administrative regulations and the corresponding people's government, a body performing the contributor's functions shall report such matters to the corresponding people's government for approval.' (Emphasis added)

[51] Significantly, 'a body performing the contributor's functions' implies that the function is not restricted to SASAC. Furthermore, the duty to report is limited to matters subject to the approval of the corresponding people's government. And the report is made to the appropriate level of government. Major decisions are not defined in the PRC Law on SOEs. Importantly, all that is done must be 'according to law', which anticipates that law would prohibit abuse of these enabling provisions.

[52] Additionally, the Progress of Reconstruction and New Construction of State-Owned Capital Investment and Operation Companies in our Province issued on 30 November 2016 (the 'Progress Report') records that with 'the consent of the provincial government, the provincial SASAC approved the reconstruction plans of 9 enterprises including... [SIS]'. As the Progress Report is drawn from the website of SASAC, and its authenticity is unchallenged, the court must accept that it is official information of a government agency issued with the approval of the provincial government. Consequently, the plaintiff's contention that the Progress Report and relatedly the List Notice are not direct authority from the government must be rejected.

[53] The reform must be subject to the PRC Law on SOEs and other government directives. The PRC Law on SOEs authorises a separation of functions between government and enterprises. It attributes public administration and regulatory functions to government and investor functions to enterprises. The State Council instructions are peremptory. They are not recommendations but binding instructions that must be implemented diligently.

[54] Extracted from the website of SIS, its Notes for Consolidated Financial Statement for Year 2017, is also an official public document. It records that SASAC funded and established SIS.²⁴ Therefore, in 2017, SASAC was the capital contributor of SIS.

[55] The Plan for System dated 19 April 2019 issued by the State Council states: 'State-owned capital investment and operation companies directly authorized by the government shall perform the duties of capital contributors with respect to state-owned capital within the scope of authorization in accordance with relevant provisions, and conduct the operation of state-owned capital *in accordance with the relevant laws* and provisions on the supervision of the securities market.' (Emphasis added)

[56] Consistent with Article 6 of the PRC Law on SOEs, the Plan for System vests SASAC with the power to delegate its capital contributor rights to the SOE holding company (SIS) in relation to its subsidiaries (Tonkolili) while SASAC remains the shareholder in the holding company (SIS).

[57] The List Notice was effective from 16 December 2019. However, it is a historical record of the relevant dates for specific devolution for different types of entities. Those dates appear alongside the devolution. For SIS, the devolution could only have occurred after its establishment by 30 November 2016 and before January 2018. This deduction is fortified by the fact that by 2017, SASAC was already the capital contributor of SIS. Therefore, the List Notice does not support the plaintiff's submission that the claim against Tonkolili preceded the reform. Manifestly, the reform preceded the claim.

[58] The List Notice authorises SASAC to delegate its capital contributor functions to its provincial enterprises, Shandong SOEs, State-owned capital investment and operating companies and 'double hundred enterprises'. Whatever the differences are amongst these entities, they are immaterial. Contrary to the plaintiff's contentions, the court is not concerned about every provincial enterprise and SOE, or whether they were pre-existing State-owned companies or SOE holding companies. This case is about the

²⁴ Annexure 'GL8' at 108.

status of SASAC, SIS and Tonkolili during November 2017 and February 2018. The plaintiff's contention that there is no evidence of any delegation to SIS of the functions of SASAC as a capital contributor by the authorising body which is People's Government, is unsupported by the evidence.

[59] The plaintiff submits that SASAC can withdraw its power to perform its function of a capital contributor given to SIS and it has the power to appoint executive and external directors of SIS, which implies the power to remove directors. This, the plaintiff suggests, means that SASAC controls Tonkolili. It points to Article 22 of the PRC Law on SOEs as a driver for SASAC controlling Tonkolili in this way. Article 22 provides: 'A body performing the contributor's functions shall, *according to laws, administrative regulations and enterprise bylaws*, appoint or remove, or suggest the appointment or removal of the following personnel of a state-invested enterprise:' (Emphasis added)

The personnel include the president and vice presidents, persons in charge of finance and other senior managers of a wholly state-owned enterprise, the chairman and vice chairman of the board of directors, directors, chairman of the board of supervisors and supervisors.

[60] Having found above that SASAC's contributor functions devolved to SIS, and with the emphasis being on acting 'according to the laws', SIS and not SASAC appoints and removes the personnel of Tonkolili. SASAC cannot abuse its control over SIS to manipulate SIS's decisions regarding Tonkolili. The plaintiff's submission in this regard must be rejected.

[61] The Plan for Systems entrusted the SOE holding companies with the duties of capital contributors for the subsidiaries. Duly authorised, SASAC approved the reform of SIS into a SOE holding company exercising capital contributor functions over its subsidiary Tonkolili. SASAC's control is limited to regulating SIS. This limitation is in furtherance of the aims of the reform to prevent or minimise government interference in subsidiaries. Considering that the nature of the powers include deciding on 'the

restructuring, transfer of State-owned property rights, merger, division, dissolution, liquidation and application for bankruptcy of provincial level II and below enterprises', they extend beyond the day to day management of the subsidiaries. Indeed, the powers are sufficient to determine the fate and destiny of the subsidiary Tonkolili.

[62] The Western world might find the alienation of control by shareholders illogical or counter-intuitive. That is, until one recognises that the direction of the reform is from communism, a system in which the State owned major enterprises, towards a market economy. To accomplish this dramatic journey, the State must relinquish its control of the reins to its enterprises. With the opening of the economy to the Western world, for as long as the State controlled the destiny of all its enterprises, the Peoples' Republic of China would be rich pickings for claims of association. The reform would bring the State ownership of enterprises by the Peoples' Republic of China in line with Western market economies, whilst maintaining a socialist agenda.

[63] SASAC exercises its regulatory powers to hold SIS to the course of conducting itself lawfully. Conversely, SASAC cannot overstep its boundaries and interfere in the investor-shareholder decisions of SIS. Predictably, relinquishing control entrenched in the political economy over decades and having 'the courage to cut into their own "cheese"' as the Progress Report describes, is no easy transition. The State Council and SASAC documents are littered with the lament that:

'there remain the *problems of non-separation* of government administration and enterprise management and *non-separation* of government socioeconomic management function from its function as the owner of state-owned assets in the state-owned asset management system'.²⁵ (Emphasis added)

Unsurprisingly, the problems are not about separation but the opposite.

[64] The views expounded by the plaintiff supported by Dr Li compound the problem of non-separation. Essentially, the submission is that irrespective of the stated intention of

²⁵ Several Opinions of the State Council on Reforming and Improving the State Owned Asset Management System (No.63 [2015] of the State Council).

the Peoples' Republic of China to reform economically, the will to reform is lacking because those entities that hold shareholder or capital contributor power will not relinquish their hold. This view is disrespectful and misanthropic of the reform that the Peoples' Republic of China is constitutionally committed to undergo. It is tarnished by the unwholesome tendency of violations of the rule of law being treated as inconsequential. Constitutionally, the Peoples' Republic of China remains a 'democratic dictatorship'. Imputing cynicism about compliance with the rule of law to another sovereign State would be a distortion.

[65] Although the defendant bears no onus, it has not only led sufficient evidence to rebut the plaintiff's proposition that the relevant reforms did not extend to SIS; it has also proven that there is strong probability that they did.

Order

[66] Plaintiff's claim is dismissed with costs, such costs to include the costs of the qualifying fees of the expert witness, Mr Peng.

Judge D Pillay

CASE INFORMATION

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Date of Hearing : 8 March 2022

Date of Judgment : 30 May 2022

The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII. The date for hand down is deemed to be 30 May 2022.