THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 104/2025

NAME OF SHIP: MV 'HARALAMBOS'

In the matter between:

HENGDELI DEYESION INTERNATIONAL SHIPPING LIMITED **APPELLANT**

and

MV 'HARALAMBOS' **FIRST RESPONDENT**

NERO OIL INCORPORATED **SECOND RESPONDENT**

IRON PASHA INCORPORATED **THIRD RESPONDENT**

Neutral citation: *Name of Ship: MV 'Haralambos': Hengdeli Deyesion International Shipping Limited v MV 'Haralambos' and Others* (104/2025) [2026] ZASCA 107 (13 August 2026)

Coram: MBATHA, GOOSEN, SMITH and NORMAN JJA and PHATSHOANE AJA

Heard: 19 May 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 13 August 2026 at 11h00.

Summary: Maritime Law – vessel association – Admiralty Jurisdiction Regulation Act 105 of 1983 (AJRA) – standard and burden of proof on reconsideration under Uniform Rule 6(12)*(c)* – meaning of 'control' under s 3(7)*(a)*(iii) of AJRA – purposive construction of the s 3(7) deeming provisions – evidential weight of third-party vessel-tracing reports – deemed arrest and submission to jurisdiction under s 3(10)*(a)*(i) of the AJRA.

ORDER

On appeal from: KwaZulu Natal Division of the High Court, Durban (Wallis AJ sitting as a court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the high court is set aside and is replaced with the following order:

'The reconsideration application is dismissed with costs, including the costs of two counsel where so employed.'

JUDGMENT

Mbatha and Norman JJA (Goosen and Smith JJA and Phatshoane AJA concurring):

Introduction

[1] This is an appeal against the decision of the KwaZulu-Natal Division of the High Court, Durban, per Wallis AJ, (the high court) (exercising its Admiralty Jurisdiction), delivered on 2 September 2024. The high court reconsidered an *ex parte* security arrest order of *MV Haralambos* following an order issued by Harrison AJ on 6 June 2024. Upon reconsideration of the order, Wallis AJ set aside the security arrest of the vessel and directed the appellant to pay costs. The appellant is before us with the leave of this Court.

[2] The appellant, Hengdeli Deyesion International Shipping Ltd (Hengdeli), brought an application seeking an *ex parte* security arrest of *MV Haralambos* in terms of s 5(3)*(a)* of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the AJRA).[1] A letter of undertaking (LOU) was delivered to secure the release of *MV Haralambos*. She remained under a deemed arrest as contemplated in s 3(10)*(a)*(i) of the AJRA.[2]

Background facts

[3] The appellant, formerly known as Deyesion International Shipping Limited, changed its name on 11 October 2021 to Hengdeli, a company duly incorporated in accordance with the laws of Hong Kong. It has its registered offices in Hong Kong.

[4] The first respondent is *MV Haralambos*, a bulk carrier built in 2009 and flagged in Liberia. The second respondent is Nero Oil Incorporated (Nero Oil), a company duly incorporated in the Marshall Islands. Nero Oil is the registered owner of *MV Haralambos.* The third respondent is Iron Pasha Incorporated (Iron Pasha), a company duly incorporated in Marshall Islands. Iron Pasha is cited because it is the registered owner of *MV Argentina*, a ship against whom the appellant's claim lies (the ship concerned). *MV Argentina* has since been sold by Iron Pasha and renamed *MV Transworld Navigator*. For reasons which shall

[1] Section 5(3)*(a)* of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the AJRA) provides:
'A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property or which would be so enforceable but for any such arbitration or proceedings.'
[2] Section 3(10)*(a)*(i) of the AJRA provides:
'Property shall be deemed to have been arrested or attached and to be under arrest or attachment at the instance of a person if at any time, whether before or after the arrest or attachment, security or an undertaking has been given to him to prevent the arrest or attachment of the property or to obtain the release thereof from arrest or attachment.'

become apparent later this sale has no bearing on the disputed issue of association. We also refer to *MV Haralambos* and Nero Oil as the respondents, where the context requires.

[5] Iron Pasha chartered *MV Argentina* to Hengdeli. The terms of the fixture recap and charterparty are not in issue. Pursuant to the charterparty, *MV Argentina* was delivered to Hengdeli on 16 April 2021. On 14 August 2021, the cargo being the 'iron ore fines' was shipped on board the *MV Argentina* at the loading port of Pepel, Sierra Leone. On or about 16 September 2021, Kingho Railway and Port Company Limited declared two ports for the discharge of the cargo, namely Rizhao or Jingtang, both in China.

[6] On 22 September 2021, Iron Pasha addressed an email to Hengdeli through its brokers, Diamond Shipbroking Ltd, wherein it alleged that while en route to the discharge port, the hatch covers were opened to check the condition of the cargo whereupon it was noticed there was a significant amount of water collected in the cargo holds. Its preliminary investigations indicated that the composition of the cargo was misdescribed at the load port and that its moisture content was much higher than the representations made in the shipper's declaration. The email further stated that urgent arrangements were being made to call a port of refuge to discharge the cargo and that Hengdeli would be held liable for any losses, damages, costs and expenses as a result of the cargo's liquefaction[3] during sea passage.

[7] On 23 September 2021, Iron Pasha sent a further email to Hengdeli informing it that *MV Argentina* would be ordered to deviate to Keelung, China,

[3] Merriam-Webster Dictionary defines Liquefaction as: 'The process of making or becoming liquid; or the state of being liquid.'

as a port of refuge in order to discharge the cargo. Hengdeli disagreed with Iron Pasha's decision to deviate *MV Argentina* to Keelung in China for a number of reasons including: (a) That the port was incapable of handling a fully laden capesize vessel; (b) that there were no endorsements on the Bills of Lading or Mate's receipt to highlight or express any objection to the quality or grade of the cargo after it had loaded; (c) that Iron Pasha and the Master knew, in advance that *MV Argentina* was fixed to load a consignment of iron ore fines at Pepel and there was sufficient time to prepare for its loading; (d) that Iron Pasha and the Master were, according to the International Ship Management (ISM) Code,[4] required to carry out voyage planning and risk assessments, which included confirmation of the grade and quality of the cargo and special requirements for loading thereof via its agent; (e) Iron Pasha had not engaged an expert to assess the state of the cargo; (f) no steps had been taken to ensure that *MV Argentina* maintains her stability in the event that water had been collected mid-voyage; (g) Iron Pasha had not established the practical stability of *MV Argentina* regarding its calculated metacentric height (the height) at the time of sailing, the loss of height at the time of sailing and the loss of height due to collection of free water; and (h) that Iron Pasha remained fully responsible for its actions. Further correspondence was exchanged between the parties regarding the condition of the cargo at the discharge port.

[8] On 26 September 2021 at 15h12, the *MV Argentina* tendered its Notice of Readiness and arrived at the port of Rizhao in China. The berth was congested and *MV Argentina* had to wait at the anchorage. On 2 October 2021 at 09h48, *MV Argentina* arrived at the designated berth in Rizhao and discharged 112,188

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[4] International Ship Management (ISM) Code is a set of international regulations and standards for the safe management and operation of ships and for pollution prevention. The ISM Code became a mandatory law in 1998. It was added to the United Nations SOLAS (Safety of Life at Sea) Convention. SOLAS is the most important set of rules for making sure ships are safe.

metric tons of the cargo. On 4 October 2021 at 04h39, Iron Pasha sent an email to Hengdeli alleging that the condition of the cargo in hold H1 and H2 was bad and that the receivers were not discharging any more cargo from those holds. The discharge operations were completed at 16h00. On 6 October 2021, Iron Pasha refused to sail *MV Argentina* because the condition of the cargo on board and its post-discharge configuration posed a risk that the reserve stability of *MV Argentina* may degrade and potentially be lost. In addition, it alleged that there was non-compliance with the shipped cargo with the International Maritime Solid Bulk Cargoes Code (IMSBC Code) as there was failure to accurately declare the moisture content and total moisture limit; it intended to discuss the impact of the cargo on the safety of sailing *MV Argentina* with the vessel's classification society and the Flag State. As a result, Hengdeli had to make arrangements for the discharge of the balance of the cargo in Rizhao, China.

[9] On the other hand, Hengdeli contended that Iron Pasha's allegations were unfounded as it had failed to provide evidence to support the allegations that *MV Argentina* was unsafe to perform her final voyage or that the *MV Argentina's* static or dynamic stability measures showed otherwise. In an email dispatched on 6 October 2021, Hengdeli insisted that *MV Argentina* continue its voyage to Jingtang to discharge the balance of the cargo. On the same day Hengdeli sent another email to Iron Pasha requesting it to instruct the Master to sail to Jingtang as soon as possible; place the vessel 'off hire' due to the Master's unreasonable refusal to follow the voyage instructions to sail the vessel to the discharge port; and reserved its rights to claim any loss from Iron Pasha.

[10] On 7 October 2021, Iron Pasha's Protection and Indemnity Freight Demurrage and Defence Insurers, North of England P&I Association, wrote to Hengdeli informing it that Iron Pasha was not obliged to follow the Hengdeli

orders that *MV Argentina* should sail to Jingtang, that *MV Argentina* remained on hire, and that Hengdeli would be responsible for all consequences of the shipment of the Cargo. On 22 November 2021 at 22h30, the *MV Argentina* arrived at Lanshan, China as per the directions of Iron Pasha, China, and tendered its notice of readiness. On 23 November 2021, at 15h48, the *MV Argentina* berthed and discharged the remaining cargo.

[11] On 28 November 2021, Brave Maritime Corporation Incorporated (Brave Maritime), acting on behalf of Iron Pasha, informed Hengdeli that hire was due on 28 November 2021 and had not been received. Brave Maritime further stated that if hire was not received within three banking days, Iron Pasha would withdraw the *MV Argentina*. Hengdeli rejected the notice on the basis that the *MV Argentina* had been placed off-hire from 6 October 2021 at 21h30, until she resumed sailing on 22 November 2021 at 19h40 (ie 47.2986 days' worth of off-hire). On 1 December 2021, Hengdeli wrote to Iron Pasha and reiterated that it was entitled to deduct the overpaid hire pursuant to clause 36 of the charterparty or equitable set-off, in the sum of USD 1,216,590.39 (erroneously recorded as USD 1,126,590.39). As a result, Hengdeli denied that any hire was payable to Iron Pasha and further threatened that if *MV Argentina* was wrongfully withdrawn, Hengdeli would recover all loss and damage, including but not limited to the repayment of the upfront 50-day hire.

[12] On 2 December 2021, Brave Maritime notified Iron Pasha that it was withdrawing the *MV Argentina*, thereby cancelling the charterparty. On the same day Hengdeli wrote to Iron Pasha confirming that the withdrawal of *MV Argentina* was wrongful and a repudiatory breach or renunciation of the charterparty, which breach or renunciation was accepted by the appellant. Hengdeli further requested Iron Pasha to return the 50-day hire payment paid

upfront by it within three days, failing which it would take all necessary steps to recover it. It reserved its right to claim from Iron Pasha the overpaid hire and all losses and damages resulting from the breaches of the charterparty.

[13] Hengdeli claimed damages arising from Iron Pasha's alleged breaches of the charterparty, including wrongful termination or renunciation. It alleged that Iron Pasha refused to promptly discharge the remaining cargo at Lanshan, China. As a result, it claimed loss-of-profit damages of USD 2,232,760.00. It further claimed that Iron Pasha's breaches caused the loss of a fixture for the sub-charter of the vessel with Five Ocean Corporation, resulting in a claimed loss of USD 816,128.73. Hengdeli also claimed damages for the alleged wrongful withdrawal of the vessel and the outstanding balance of hire, in the amount of USD 1,960,060.88. The total amount claimed was thus USD 5,008,949.61.

[14] Subsequently, an arbitration tribunal was constituted. In the arbitration tribunal, Hengdeli contended that its claim is a maritime claim as envisaged in s 1(1)*(j)*[5] and/or s 1(1)*(ee)*[6] of the AJRA. It further submitted that its claim is sound, and *prima facie* sustainable under English law, by way of arbitration proceedings in London commenced by Hengdeli. It emphasised that its claim is against a shell company registered in the Marshall Islands with no attachable or disposable assets.

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[5] Section 1(1)*(j)* of AJRA provides:
'"**Maritime claim**" means any claim for, arising out of or relating to –
(a)...
.....
(j) any charter party or the use, hire, employment or operation of a ship, whether such claim arises out of any agreement or otherwise;
...
[6] Section 1(1)*(ee)* of AJRA provides:
'any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs… .'

[15] Pursuant to that, Hengdeli sought the arrest of *MV Haralambos* on the grounds that it is an associated ship of *MV Argentina* as contemplated in ss 3(6) and 3(7)[7] of the AJRA. It instructed attorneys in South Africa, Bowman Gilfillan Inc, with the senior associate, Wesley Jude Rajbansi, deposing to a founding affidavit, dated 5 June 2024, in support of an *ex parte* application under s 5(3) of the AJRA. The security arrest order was granted on 6 June 2024 at Richards Bay, while the MV 'Haralambos' was scheduled to load a cargo of magnetite.

Findings of the High Court

[16] The high court, in reconsidering and setting aside the *ex parte* order of arrest of *MV Argentina,* made the following findings. On the issue of association, it held that it is insufficient to simply allege that there is a family connection between different entities without establishing, as a matter of fact, that the family connection is such as to constitute control within the meaning of s 3(7) of the AJRA. While it accepted that Mr Harry Vafias plays a significant part in the direction of the two entities (StealthGas and C3IS Incorporated (C3IS)), the

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[7] Sections 3(6) and 3(7) of AJRA provide:
'An action *in rem,* other than such an action in respect of a maritime claim referred to in paragraph *(d)* of the definition of "maritime claim", may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.
(7)*(a)* For the purposes of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose-
(i) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or
(ii) owned, at the time when the action ion is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or
(iii) owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.
(b) For the purposes of paragraph *(a)*-
(i) ships shall be deemed to be owned by the same persons if the majority in number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons;
(ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company;
(iii) a company includes any other juristic person and any body of persons, irrespective of whether or not any interest therein consists of shares.
(c) If at any time a ship was the subject of a charter-party the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the subcharterer, and not the owner, is alleged to be liable.'

evidence does not show that he has unilateral power to direct the two entities. Documents upon which Hengdeli relied in alleging control evince that the majority share-holding in the two entities have been sold to third party investors. The high court further found that the evidence substantially undermines the case that the Vafias Group can be treated as an indivisible conglomerate where control, within the meaning of that term is in s 3(7) of the AJRA, vests with a 'family group'. It found that the evidence confirms that Brave Maritime is the manager (and possibly commercial operator) of the vessel. The high court concluded by finding that true 'sister vessels' possibly means no more than that the two vessels are managed as 'sister vessels' or may even mean that the two vessels are constructed to the same specification.

[17] For the purposes of association, the high court held that it is not sufficient to prove common managerial control and, in this regard, relied on *Saga Welco AS v MV 'Guo Shu'* (*Saga Welco*).[8] It further held that the evidence relied upon by Hengdeli was not sufficient to establish control on the balance of probabilities as envisaged by s 3(7) of the AJRA, and that it was prudent not to address the question of the letter of undertaking in the order. Finally, the high court concluded that the absence of any description of how a beneficial owner's shareholding is identified in the Seasearcher report or what it means by control carries little to no weight at all.

Before this Court

Hengdeli's submissions

[18] Hengdeli submitted that the high court erred in its approach when applying the principles in relation to reconsideration as stated in the *MV New Endeavor*

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[8] *Saga Welco AS v MV Guo Shun* [2017] ZAKZDHC 43 (*Saga Welco*).

and Others v Indian Oil Corporation Ltd (*MV Endeavor*).[9] It contended that the reliance by the high court on *Saga Welco*[10] was erroneous as in that case the high court had misconstrued the dicta in *Hasselbacher Papier Import and Export(Body Corporate) and Another v MV Stavroula* (*Hasselbacher*).[11] The high court erred in its distinction between the concept of proof on a balance of probabilities and a *prima facie* case; it erred as regards the weight to be attached to the Lloyd's List Intelligence Sea Searcher Report, and wrongly assessed the evidence. Hengdeli further submitted that the totality of the evidence contained in the founding affidavit establishes the association contended for on a balance of probabilities, and by failing to find accordingly, the high court erred. This Court should explain what it meant in paragraphs 37 and 51 of its judgment in *MV 'New Endeavor'*[12] and whether the approach adopted by the high court to the evidence adduced by Hengdeli is sustainable. Hengdeli sought an order upholding the appeal with costs.

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

[10] *Saga Welco* fn 8 above para 12.

[11] *Hasselbacher Papier Import and Export (Body Corporate) and Another v MV Stavroula* 1987 (1) SA 75 (C) (*Hasselbacher*).

[12] [37] In concluding that an association had been established by Indian Oil, the high court relied on the evidence contained in the founding affidavit. That evidence, so it held, proved, on a balance of probabilities, that Adam was the central figure of control of NSL and that, at the time the claim arose, the New Endeavor and the New Diamond were associated ships, both owned by NSL. It mattered not whether Adam exercised such control either by himself as head of the family or together with his children. The high court further held that, whilst no adverse inference could be imputed to the appellants, their failure to file an answering affidavit was not without consequences. As we attempt to show hereunder the findings by the high court are unassailable.

[51] For all the reasons mentioned above, we are satisfied that Indian Oil had discharged the *onus* resting on it on a balance of probabilities. The high court's findings on the issue of association were correct. In pleading the issue of control in the alternative as it did, Indian Oil was perhaps being cautious. This is understandable. It was up to the appellants to controvert the evidence by placing credible evidence before the court. They failed to do so. This flows from the well – established principle that less evidence will be required to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party.

Respondents submissions

[19] The *MV Halarambos* and Nero Oil oppose the appeal. They submitted that Hengdeli's contention that the vessels are associated because they have the same ship manager, Brave Maritime, is untenable. Ship management does not constitute the requisite control, nor does operating a number of vessels as a fleet. It argued that Hengdeli did not adduce any evidence relating to, inter alia, the shareholding of either of the ship-owning companies (namely Iron Pasha and Nero Oil), the identity of the directors or officers of the shipping companies; whether any shareholders, or other agreements existed which gave persons other than the shareholders the power to control those companies. They contended that Hengdeli failed to show any cross-mortgages or corporate guarantees between the companies or any other indication that they were related. It submitted that common management of ships is not a necessary condition for common ownership.

[20] In addressing the allegation that Mr Harry Vafias is the CEO or Managing Director (MD) of the Vafias Group of which Brave Maritime is alleged to be part, would not give him the type of control required to found association because he would be subject to instructions from the general body of shareholders in matters of strategic importance. Shareholders also have the power to replace him. In this regard it was submitted that Hengdeli is relying on unsubstantiated facts that are vague and unverified. As a result, Hengdeli failed to prove that *MV Haralambos* is an associated ship of the *MV Argentina* and thus susceptible to arrest. The respondents submitted that the high court correctly found that on the facts alleged, association was not established on a balance of probabilities and correctly set aside the arrest order. They sought an order dismissing the appeal with costs.

Issues for determination

[21] The sole issue for determination is whether Hengdeli, discharged the onus of establishing on a balance of probabilities the alleged association between the respective ship-owning companies of *MV Haralambos* and *MV Argentina* as contemplated in subsections 3(6) and 3(7) of the AJRA. The question central to the determination of that issue is: who controls those ships?

The arrest application and the basis for association

[22] Hengdeli relied for its contentions regarding the chain of alleged control on the following factors:

a) That Nero Oil (owner of *MV Haralambos*) and Iron Pasha (owner of *MV Argentina)* were both controlled by Brave Maritime. The latter was controlled by the Vafias Group, which was itself controlled by Mr Harry Vafias.

b) Both vessels are dry bulk carriers. Hengdeli set out the Vafias Group background as a family-owned shipping enterprise founded in 1972. Brave Maritime was incorporated in 1987. A Securities and Exchange Commission of the United States share prospectus filed by the Vafias Group in connection with C3IS Incorporated (C3IS) describes Brave Maritime as 'a company controlled by members of the Vafias family'. Hengdeli regarded this as a formal regulatory admission that was made by the Vafias Group itself to the United States Securities and Exchange Commission.

c) Harry Vafias's accession to control is confirmed by the following media sources. An article in The Pictet Report (Winter 2013) states: 'In 2009, his father decided to end his involvement in shipping, so Harry Vafias took over Brave Maritime which he now runs along with Stealth Maritime and Stealth Gas'. A 'Manager of the Year 2023' article describes Harry Vafias as 'Managing Director of the Vafias Group of Companies' and states that

‘In 2008 Vafias became CEO of the Vafias Group, which today is one of Greece's largest shipping groups with 91 vessels’. A June 2022 Seatrade Maritime podcast introduced Harry Vafias, without correction from him, as someone who ‘controls four companies’ including ‘dry bulk under Brave Maritime’.

d) The Seasearcher (Lloyd's List Intelligence) vessel reports attached to the founding affidavit showed that for both the *MV Haralambos* and *MV Argentina* the Vafias Group is reflected as the ‘Beneficial Owner’ at the material times. Both reports list Brave Maritime as the commercial operator and technical manager.

e) Extracts from the world shipping register show that both Nero Oil and Iron Pasha share the address ‘c/o Brave Maritime Corp Inc, Building 2, Apollon Business Centre, 331 Kifisias Avenue, Kifisia, 145 61, Athens’.

f) Both vessels were previously named with the ‘Brave’ prefix: the *MV Haralambos* was formerly the ‘Brave Haralambos’ and *MV Argentina* was formerly the ‘Brave Argentina’. The founding affidavit states that the underlying ownership structure never changed during this period.

g) Common operational documents used by both vessels support an inference of association. Those are: The *MV Argentina’*s charterparty was expressly based on the pro forma time charterparty of the *MV Haralambos*. Hire invoices for both vessels at the relevant time bore the identical signature of Mr Apostolos Kargas, described as ‘Operations Manager’ for both Iron Pasha and Nero Oil. A letter of authorisation for *MV Haralambos* dated 15 August 2021, bears the Brave Maritime Corporation Inc logo, as does the Master's Notice of Readiness under *MV Argentina’s* charterparty.

h) The *‘sister vessel’* email dated 21 September 2021 from the owners of the *MV Haralambos* to Hengdeli reads: ‘*Would like to draw Chris attention to* *the latest info provided by P&Is regarding the i/o fines ex Pepel (below link for reference) and the findings on the cargo to the sister vessel Argentina where she loaded her cargo at Pepel in August.* This email was sent by Nero Oil through its brokers. (Emphasis added.)

i) Broker circulars and trade press being: A Fearnleys Hong Kong Limited circular dated 13 December 2021 listed both vessels as part of Brave Maritime's fleet in 2021. Baltic Exchange broker circulars in January and April 2024 confirmed the *MV Haralambos* remained in Brave Maritime's fleet. A Tradewinds article dated 3 December 2015 described Iron Pasha as 'a ship owning affiliate of the Vafias group's Brave Maritime'. A 2016 Tradewinds article reported both vessels as being 'in the fleet of Brave Maritime'.

Discussion

[23] The requisites for a security arrest were formulated by the Appellate Division in *Cargo Laden on Board the MV Thalassini Avgi v MV Dimitris* (*Thalassini*),[13] as follows. A claimant applying for an arrest order of a ship in terms of s 5(3)*(a)* of AJRA, for the purpose of obtaining security in respect of a claim, which is the subject of contemplated proceedings, to be instituted in a foreign forum is required to satisfy the Court: (a) that he has a claim enforceable by an action in rem against the ship in question or against a ship of which the ship in question is an associated ship; (b) that he has a *prima facie* case in respect of such claim which is *prima facie* enforceable in the nominated forum or forums of his choice, in the sense explained above; and (c) that he has a genuine and reasonable need for security in respect of the claim.[14]

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[13] *Cargo Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) (*Thalassini)* at 832 I-J.

[14] The same requisites were confirmed in *Bocimar NV v Kotor Overseas Shipping Limited* 1994 (2) SA 563 (A) at 579A-E

The reconsideration principle

[24] Subsections 3(6) and 3(7) read with s 5(3) of AJRA afford an entitlement to a claimant to arrest an associated ship instead of the ship that is responsible for the maritime claim for the purposes of providing security for its claim. The enquiry into the association of the two vessels is directly linked to 'the control' aspect. The findings on those aspects are largely based on facts.

[25] The procedural framework for reconsideration applications under rule 6(12)*(c)* of the Uniform Rules of Court was addressed by this Court in *Afgri Grain Marketing (Pty) Ltd v Trustees for the time being of Copenship Bulkers A/S (in Liquidation) and Others* (*Afgri*).[15] The Court identified, relevantly, the second available approach:

> 'Rule 6(12)*(c)* does not prescribe how an application for reconsideration is to be pursued. The absence of prescription was intentional, and the procedure will vary, depending upon the basis on which the party applying for reconsideration seeks relief against the order granted *ex parte* and in its absence. A party wishing to have the order set aside on the ground that the papers did not make out a case for that relief, may deliver a notice to this effect and set the matter down, for argument and reconsideration, on those papers. It may do the same if it merely wishes certain provisions in the order to be amended, or qualified, or supplemented. The matter is then argued on the original papers. It is not open to the original applicant, save possibly in the most exceptional circumstances, or where the need to do this has been foreshadowed in the original founding affidavit, to bolster its original application by filing a supplementary founding affidavit.'[16]

[26] The most recent and directly relevant authority is *New Endeavour*. This Court held that no adverse inference can be drawn from a respondent's election not to file an answering affidavit in a reconsideration application.[17] This Court

[15] *Afgri Grain Marketing (Pty) Ltd v Trustees for the time being of, Copenship Bulkers A/S (In Liquidation) and Others* [2019] ZASCA 67; [2019] 3 All SA 321 (SCA); 2024 (1) SA 373 (SCA) (*Afgri*).
[16] *Afgri* above para 12.
[17] *New Endeavour* fn 9 above para 37.

adopted the following passage from MJD Wallis, *The Associated Ship and South African Admiralty Jurisdiction*, as correctly stating the law:

'There is always some evidence available to a claimant and as long as it can produce enough to constitute at least a prima facie case of association that will suffice to force the owners of the two vessels to produce in response some direct evidence that they are not in truth associated....In the absence of countervailing evidence from the owners of the shares in the ship-owning companies that will usually suffice to discharge the onus of proof on the claimant even in the face of a bare denial of the fact of association. This flows from the well-established principle that less evidence will be required to establish a prima facie case where the matter is peculiarly within the knowledge of the opposite party.'[18]

[27] The evidential principle underlying the above quote in *New Endeavour* derives from a long line of appellate authority. In *Union Government (Minister of Railways) v Sykes*, the Court recognised that where the facts are peculiarly within the knowledge of one party, less evidence is required of the other to discharge its burden.[19] This principle was applied in *Marine & Trade Insurance Co Ltd v Van der Schyff*.[20] It was applied to the associated ship context in *Hasselbacher*,[21] which was affirmed by this Court in *Strydom v Engen Petroleum Ltd*, where Wallis JA held that where matters are within the exclusive knowledge of one party, 'less evidence is required to be adduced by the other party to discharge the onus of proof on a point'.[22]

[28] In *Belfry Marine Ltd v Palm Base Maritime SDN BHD Name of Ship: MV 'Heavy Metal'* (*Heavy Metal*), Smalberger JA (for the majority) applied this principle even in a case where full affidavits were filed, holding that the *prima*

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[18] *New Endeavour* fn 9 above para 51, quoting M J D Wallis, *The Associated Ship and South African Admiralty Jurisdiction* (Siber Ink, 2010) (the Wallis text) at 186-187.
[19] *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173-174.
[20] *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 39G-H.
[21] *Hasselbacher* fn 11 above at 791J.
[22] *Strydom v Engen Petroleum Ltd* [2012] ZASCA 187; 2013 (2) SA 187 (SCA); [2013] 1 All SA 563 (SCA) para 19.

facie case made out by the respondent was 'enough to overcome Lemonaris' express denial that there was a relevant connection in the ownership of the *Sea Sonnet* and the Heavy Metal.[23]

[29] This Court in *New Endeavour*,[24] following the established principles laid down in *Thalassini*,[25] cemented the issues of onus: that the arresting party bears the *onus* of establishing on a balance of probabilities the alleged association between the respective ship-owning companies, in this case between the *MV Haralambos* and *MV Argentina*.

The associated ships

[30] Section 3(7)*(a)*(iii) of AJRA provides that:

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

…

(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.'

[31] Subsections 3(7)*(b)*(ii) and (iii) provide that:

'*(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;

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[23] *Belfry Marine Ltd v Palm Base Maritime SDN BHD Name of Ship: MV 'Heavy Metal'* [1999] 3 All SA 337 (A); 1999 (3) SA 1083 (SCA) (*Heavy Metal*) para 20.
[24] *New Endeavour* fn 9 above para 7.
[25] *Thalassini* fn 13 above.

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

[32] A formative analysis of these provisions was conducted by this Court in *Heavy Metal* where the concept of control was examined. Smalberger JA (for the majority) held:

'The subsection [3(7)*(b)*(ii)] elaborates upon and refines the concept of control by that person. Control is expressed in terms of power. If the person concerned has power, directly or indirectly, to control the company he/she shall be deemed to control the company. 'Power' is not circumscribed in the Act. It can be the power to manage the operations of the company or it can be the power to determine its direction and fate. Where these two functions happen to vest in different hands, it is the latter which, in my view, the Legislature had in mind when referring to "power" and hence to "control".'[26]

[33] In the *Heavy Metal* judgment, the court in considering the aforementioned provisions of AJRA, had regard to the language used, the purpose of the provision, its context and the object of AJRA as a whole. It held that the objects of the associated ship provisions are to enable the associated ship to be arrested in respect of the maritime claim and 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 power can be exercised by a person who was wielding power behind the scenes "*de facto*" or by a person who was in *de jure* control of the company. The court recognised this as '[the] extension of "*de jure*" power to *de facto* [which] is in line with the objectives 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.' The

[26] *Heavy Metal* fn 23 above para 8.

court concluded that the same approach should be adopted in the deeming provisions of AJRA, namely, s 3(7)(*c*), 3(10)(*a*)(i) and (ii) and (b), and 3(11)(*b*).

[34] Because maritime claims are often transient, the AJRA provides a mechanism to ensure that arrests are grounded on control. The respondents contend that, before a court may find common control by a group of juristic persons, two requirements must be met: first, the group of companies controlling each ship-owning company at the relevant time must be identical; and second, the component parts of that group must be named and identified in relation to each ship-owning company. On that formulation, unless those entities are identified, the court cannot conduct the enquiry contemplated by AJRA. That formulation reflects the respondents' characterisation of the law, drawn from *Saga Welco*. It does not, however, reflect the approach adopted by this Court in *Heavy Metal* or *Silver Star*. Those decisions require the identification of a single repository of control, but they do not demand formal documentary proof of shareholding or directorship. Where, as here, the ship-owning companies are incorporated in a jurisdiction that does not require public disclosure of share registers, the controlling person may be identified through an accumulation of credible circumstantial evidence, without the production of the corporate records themselves.

[35] The share prospectus relied upon by Hengdeli, refers to Brave Maritime as the management company of all vessels and any additional dry bulk carriers owned by the Vafias family. Brave Maritime Corporation SA or Brave Maritime was formed by the Vafias Group in 1987. It is controlled by the members of the Vafias family. Brave Maritime also earns a fee equal to 1.0% of the contract price for any vessel bought or sold by them on behalf of the Vafias family.

[36] The high court found that the concept of a 'beneficial owner' was not explained. We do not agree. In the joined cases C-37/20 and C-601/20 which originated in Luxembourg, the issue of beneficial ownership was central because it had been introduced by the European Union by way of 'beneficial ownership registers' as part of its efforts to combat money laundering, terrorist financing, tax evasion and the misuse of legal entities.[27] The legality of those provisions was challenged as they alleged unrestricted public access to beneficial ownership information maintained in the Luxembourg register of beneficial owners. These matters were referred to the Court of Justice of the European Union (CJEU) for determination. The CJEU accepted that combating money laundering and terrorist financing constitutes an objective of general public interest of the highest importance. However, the CJEU emphasised that even legitimate public interests must be pursued in a manner consistent with fundamental rights. Those were, inter alia, Article 7 (respect for private and family life) and Article 8 (protection of personal data).

[37] The CJEU found that once information becomes publicly available, beneficial owners effectively lose control over how that information is used and may expose them to risks including, fraud, kidnapping, identity theft, and other forms of criminal targeting. It concluded that unrestricted public access constitutes serious interference with fundamental rights. The CJEU, ultimately declared invalid the provisions of the Fifth Anti-Money Laundering Directive that granted members of the public unrestricted access to beneficial ownership information.

[27] Court of Justice of the European Union - Judgment of 22 November 2022 in the Joined Cases C-37/20 and C-601/20 WM (C-37/20) and Sovim SA (C-601/20) v Luxembourg Business Registers C-37/20 (ECLI:EU:C:2022:912).

[38] We mention these cases to demonstrate how difficult it is for anyone who is not a beneficiary in an entity to obtain information relating to beneficial owners. In the share prospectus there is an endorsement which reads:

'**Other information**

Because we are incorporated under the laws of the Republic of the Marshall Islands, you may encounter difficulty protecting your interests as shareholders, and your ability to protect your rights through the U.S. federal.'

[39] In *Smyth and Others v Investec Bank Ltd and Another*,[28] this Court stated that:

'In *Sammel & others v President Brand Gold Mining Co Ltd* at 666C-D, this court said that a "nominee" is a person who is nominated or appointed to hold the shares in his name on behalf of another and that the nominee is in effect simply an agent of the transferee. And that the reason why 'nominee' and not 'agent' is used is because the word comes from the English law. This court went on to state at 666D-E that: "*The policy of the law is that a company shall concern itself only with the registered holder and not the owner or beneficial owner of the shares".* The nominee does not hold the shares as an agent for another but must himself appear on the register as the holder of the shares. *Henochsberg on the Companies Act* Butterworths Lexis Nexis Service Issue 33 of June 2011 states that the fact that the nominee holds the shares on behalf of another, generally known as the 'owner' or 'beneficial owner', does not appear on the company's register. This is explained with reference to the decision in *Standard Bank of South Africa Ltd v Ocean Commodities Inc* at 289. There, this court said that it is the policy of the law that a company should concern itself only with the registered owners of the shares.' (Own emphasis.)

[40] Having regard to the *Smyth* decision and those of the Court of Justice of the European Union , it appears therefrom that a beneficial owner is a natural person who either directly or indirectly owns or exercises effective control over the company.It follows that to expect an arresting applicant to furnish details of

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[28] *Smyth and Others v Investec Bank Ltd and Another* [2017] ZASCA 147; [2018]1 All SA 1 (SCA); 2018 (1) SA 494 (SCA) para 21.

beneficial owners at the arresting stage would be quite onerous given the applicable laws on privacy rights in certain jurisdictions. Our courts are alive to the difficulties facing arresting parties hence they permit reliance on hearsay evidence. That is consistent with the provisions of s 6(3) of AJRA, which expressly permits the admission of hearsay evidence in admiralty proceedings. The appellants herein relied on similar pieces of information or documentation to prove association.

[41] Our courts accept records from Lloyd's list Intelligence and investigative reports to prove control as was the case in *Silver Star*. The evidence from Lloyd's investigators proved that *Silver Star* was not owned by the sole shareholder of Action Partner Limited, Mr Habeeb. It revealed that Stellar Shipping was not only the operator of the vessel, but a subsidiary of Tradeline. Stellar Ocean was the beneficial owner of the vessel owned by a group controlled by Tradeline, in which the so-called 'sole shareholder' was the Vice-Chairman. Mr Habeeb held only a 23% share-holding and not a 100% share-holding. The same principle applies to Hengdeli's relies on the Seasearcher vessel report from the Lloyd's List Intelligence which contained information that was updated on 08 May 2024 reflecting details of *MV Haralambos*, its movements and ownership. The beneficial owner is listed as Vafias Group, the registered owner is Nero Oil Incorporated and Brave Maritime Corporation Incorporated as commercial operator, technical manager and ISM Manager.

[42] The high court relied heavily on *Salga Welco* for its finding that the allegation of beneficial ownership is a matter of opinion and the remainder of the Seasearcher report is in the nature of hearsay evidence. This case is distinguishable from *Salga Welco* in that although the applicant in *Salga Welco* relied on the 'Panama papers', it failed to attach them. The court therefore had to

speculate about their contents since they were not put up. In this case there was documentation put up including the Seasearcher report. The relevant Seasearcher report is published by Lloyd's List Intelligence, and is described in the founding affidavit as 'a leading publisher of ship and ship ownership information' forming part of the Lloyd's List Group, and available by subscription. These are not obscure or unverified sources; they are the most widely used and accepted commercial vessel-tracing tools in the maritime industry, routinely consulted and relied upon by shipowners, charterers, P&I clubs and flag state administrations worldwide.

[43] The Seasearcher report carries full evidential weight on matters that are factual and directly verifiable from registry and commercial sources. The information contained therein is reliable. In 2012, according to an Article published by Manager of the Year, Mr Harry Vafias was awarded by Lloyd's List newspaper as the newsmaker of the year. In 2013 he, together with StealthGas were named by Lloyd's List as the best tanker company of the year. This supports the contention that these documents are relied upon in the maritime industry. Absent a document or evidence contradicting the contents of the Seasearcher report, the high court by according it 'little or no weight', erred.

[44] It was submitted by the respondents that the reason that both Nero Oil and Iron Pasha share the same addresses is because they are both managed by Brave Maritime, a management agent. They therefore contended, that does not prove association. We do not agree. The following extract from the share prospectus demonstrates that Brave Maritime is clearly controlled by the Board of Directors of the Vafias family:

'The Vafias family, of which our Non-Executive Chairman, Harry Vafias, is a member, has been active in shipping for over 50 years. The Vafias family formed Brave Maritime Corporation SA, or Brave Maritime, in 1987, which is our fleet manager, is responsible for all aspects of our administration and operations under the direction of our Board of Directors. As of the end of April 2023, Imperial Petroleum and affiliates of our Manager *Brave Maritime owned or partially owned* in total 76 vessels (including 19 dry bulk carriers).'

[45] Brave Maritime also owns or partially owns 76 vessels including 19 dry bulk carriers. It is common cause that both *MV Haralambos* and *MV Argentina* are dry bulk carriers. Both vessels were previously named with the 'Brave' prefix. The founding affidavit states that the underlying ownership structure never changed during this naming period.

[46] The following circumstantial evidence demonstrates substantial connections between Nero Oil and Iron Pasha, supporting the inference that they were subject to a common repository of control:

a) The world shipping register records Nero Oil Inc., under "Activity", as "Owner, Manager", care of Brave Maritime Corp Inc, Building 2, Apollon Business Centre, 331 Kifisias Avenue, Kifisia, 145 61 Athens. The same information appears in respect of Iron Pasha Inc.
b) Nero Oil and Iron Pasha issued two debit notes, on two different dates, addressed to the same entity, Deysion International Shipping Limited. One debit note was issued in relation to the *MV Haralambos* and the other one related to *MV Argentina*. Nero Oil and Iron Pasha also share the same address: Trust Company Complex, Ajeltake Road, Ajeltake Island, 96960, Marshall Islands.
c) The hire invoices for both vessels bore the identical signature of Apostolos Kargas, described as "Operations Manager", who signed in the same manner for both Iron Pasha and Nero Oil. The *MV Argentina* charterparty was also based on a pro forma document similar to the one of *MV Haralambos* charterparty, indicating a common operational origin.

[47] A conclusion that Brave Maritime is only a management agent is inconsistent with the facts that were put up by the Vafias family in the share prospectus. It is also contrary to what Brave Maritime put out in the shipping register where it is identified as 'owner, manager' of both Nero Oil and Iron Pasha. Hengdeli also relied on an article published by Trade Winds dated 3 December 2015, where the following was published:

'*Judge orders HNA – related assets seized in Louisiana <u>Vafias group's</u> Brave Maritime affiliate seeks to recover allegedly unpaid charter hire for the Capesize bulker GCL Argentina.'* (Own emphasis.)

[48] In the Brave Maritime Handy Bulk it is recorded 'Brave Maritime Corporation Inc. is the dry bulk shipping arm of the Vafias Group'. Hengdeli attached to its papers an advertisement campaign for Brave Maritime Corporation Inc and Brave Bulk Transport Ltd published on the Vafias Group News. In an interview transcribed in the Seatrade Maritime; The Maritime Podcast, in conversation with Harry Vafias on 22 June 2022 it is stated: '*Harry controls four companies US listed gas shipping companies, stealth gas tankers under Stealth Maritime, dry bulk under Brave Maritime*, US listed tanker company, Imperial Petroleum'. (Own emphasis.)

[49] In an email from Nero Oil's shipbroker, Diamond Shipbroking to SH Lee: Subject Re: *MV Haralambos*/Deyesion, stated the following:

'1...

2...

3. Would like to draw Chrts attention to the latest info provided by P&Is regarding the i/o fines ex Pepel (below link reference) and the findings *on the cargo to the sister vessel Argentina* where she loaded her cargo at Pepel in August. We strongly recommend Chrts prior concluding any fixture, to consult their P&I and their resources for potential risks and keep Owners informed.' (Own emphasis.)

[50] The high court found that it was possible that 'sister vessels' as contended by Hengdeli in the email was an admission that the two vessels are ultimately owned by the same party. In the same breath, the high court ruled out that possibility and found that 'sister vessels' may mean no more than that the two vessels are managed as 'sister vessels'. It found that the potential range of meanings may mean that the two vessels are constructed to the same specification. In this regard the high court relied on the provisions of s 226(2) of the Merchant Shipping Act 57 of 1951, treating the statutory concept of 'sister ships' as support for a broader, non-ownership-based understanding of the phrase.

[51] This finding is not supported by any facts. The respondent elected not to file an answering affidavit. Where a court reconsiders an *ex parte* order it must have regard to the papers filed and is not at liberty to assume facts that are not before it. Courts should avoid advancing possibilities unsupported by the evidence, as that approach is impermissible.

[52] Our courts have consistently held that control may be inferred from a group of factors, including common management, shared corporate officers, fleet branding, financing arrangements, and the use of common ship managers. Where such evidence points to a unified commercial operation, the absence of direct rebuttal evidence from the shipowner may tip the balance in favour of association.

[53] In *Heavy Metal*,[29] this Court held:

'The subsection elaborates upon and refines the concept of control by that person. Control is expressed in terms of power. If the person concerned has power, directly or indirectly, to control the company he/she shall be deemed ("geag ... word") to control the company. "Power" is not circumscribed in the Act. It can be the power to manage the operations of the company

[29] *Heavy Metal* fn 23 above para 8.

or it can be the power to determine its direction and fate. Where these two functions happen to vest in different hands, it is the latter which, in my view, the legislature had in mind when referring to "power" and hence to "control". In South African legal terminology that means (essentially for the reasons given by the court *a quo* at …at 492 C - F ("the reported judgment"); see also sec 195(1) of the Companies Act 61 of 1973) the person who controls the shareholding in the company. Foreign law is a question of fact. If the appellant wished to make out a case that the law of the Republic of Cyprus differed significantly from the law of South Africa, it should have adduced evidence to that effect. It did not do so. Consequently, there is no reason to surmise that the applicable law in Cyprus differs materially from that of South Africa (*cf Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998(3) SA 938 (A) 954 B- E).'

[54] We also refer to the decision of this Court. In *Dole Fresh Fruit International Ltd v MV Kapetan Leonidas and Another* that a person may control a company without controlling all the shares in the company and control over a company can be exercised even without a majority shareholding.[30]

[55] All these factors, taken together, establish clearly that Brave Maritime is either the owner or in control of Iron Pasha and Nero Oil. Iron Pasha and Nero Oil own the *MV Haralambos* and *MV Argentina*, respectively. Brave Maritime is controlled by the Vafias family and in particular by Harry Vafias, as stated in the podcast. The control chain required by s 3(7)*(a)*(iii) is accordingly established. Harry Vafias controls the Vafias family group; the Vafias family controls Brave Maritime, which the World Shipping Register identifies as owner/manager, not merely agent, of both Iron Pasha and Nero Oil; and Iron Pasha and Nero Oil are the registered owners of the *MV Argentina* and the *MV Haralambos* respectively. The person who controls Brave Maritime therefore controls, directly or indirectly within the meaning of s 3(7)*(b)*(iii), both ship owning companies.

[30] *Dole Fresh Fruit International Ltd v MV Kapetan Leonidas and Another* 1995 (3) SA 112 (A) at 119F-G.

[56] On 2 December 2021, when Hengdeli accepted the withdrawal of the *MV Argentina* and the maritime claim arose, Iron Pasha was controlled by Harry Vafias through the Vafias family's control of Brave Maritime. This finding is grounded on the following evidence. First, Brave Maritime wrote to Hengdeli on behalf of Iron Pasha as late as 28 November 2021, four days before the claim arose, demonstrating that Brave Maritime was exercising operational authority over Iron Pasha at the material time. Second, the Fearnleys Hong Kong broker circular of 13 December 2021, eleven days after the claim arose, lists both vessels as part of Brave Maritime's fleet, consistent with the control structure being unchanged at and around 2 December 2021. Third, the Pictet Report (2013) and the Seatrade podcast (June 2022) bracket the claim date and establish a continuous period of Vafias control over Brave Maritime from at least 2009 to mid-2022. No evidence before the Court suggests any change in the control structure of Iron Pasha between April 2021 and 2 December 2021.

[57] On 6 June 2024, when the arrest was affected and these proceedings commenced, Nero Oil was controlled by Harry Vafias through the same Vafias family control of Brave Maritime. The C3IS prospectus of 30 June 2023, approximately eleven months before the arrest, confirms that Brave Maritime is controlled by members of the Vafias family and is responsible for all aspects of the fleet's administration and operations. The Baltic Exchange broker circulars of January 2024 and April 2024 confirm that the *MV Haralambos* remained in Brave Maritime's fleet within months of the arrest. The Seasearcher report at the date of arrest reflects the Vafias Group as beneficial owner of the *MV Haralambos* and Brave Maritime as the commercial operator and technical manager. There is no evidence to suggest any change in Nero Oil's control structure between the prospectus of June 2023 and the arrest of June 2024. The

true ownership structure of Nero Oil is a matter exclusively within the respondents' own knowledge; their election not to adduce any evidence addressing it carries the evidential consequence described above.

[58] Applying the test stated in *Silver Star*: the person who controlled Iron Pasha on 2 December 2021 is Harry Vafias, through the Vafias family's control of Brave Maritime as owner or manager of Iron Pasha. The person who controls Nero Oil on 6 June 2024 is Harry Vafias, through the same Vafias family control of Brave Maritime as owner or manager of Nero Oil. Those controllers correspond. The same person controls both companies. Association is accordingly established within the meaning of s 3(7)*(a)*(iii) read with s 3(7)*(b)*(iii) of AJRA.

[59] The high court addressed the burden of proof question at paragraphs 15 to 30 of its judgment. The high court acknowledged that *New Endeavour* confirmed that a failure to file an answering affidavit was 'not without consequences'. The high court recorded that it understood Hengdeli to be arguing that the reference to 'tipping the balance' suggested 'some modification to the historic requirement that association be established on a balance of probabilities'. The high court rejected that reading, giving two reasons. First, that s 6(3) of AJRA's permissive approach to hearsay already affords a considerable advantage to the arresting party. Second, that a reconsideration application confers a wide discretion on the court. Section 6(3) of AJRA provides that:

'[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.'

[60] Before this Court, Hengdeli submitted that the high court misconstrued Hengdeli's argument, since it never argued for a standard lower than the balance

of probabilities. There is therefore agreement that the standard of proof is on a balance of probabilities and it is consequently not necessary to revisit that issue. It follows that the high court correctly restated the standard of proof as set out in *New Endeavour*, and that is on a balance of probabilities.

[61] Hengdeli's contention, which is entirely consistent with *New Endeavour*, is that where a *prima facie* case of association is established on the founding papers and the respondents elect not to place countervailing evidence before the court, the *prima facie* case, if accepted, will ordinarily constitute proof of association. This is because, in those circumstances, the inference of association becomes the most natural and plausible conclusion on the evidence as it stands, without lowering the standard. The mechanism that explains this result is the principle established in *Sykes,* referred to above*,* regarding the peculiar knowledge of the respondent, and applied to the associated ship context in *Hasselbacher*, *Heavy Metal*, and *New Endeavour*. Where the facts bearing on association are exclusively within the knowledge of the respondents, less evidence is required of the applicant to discharge its onus. Where the respondents elect not to place any countervailing evidence before the court, the applicant's prima facie case is assessed at its full weight, undiminished by any competing version. In those circumstances, a prima facie case that is accepted by the court as credible and reliable will ordinarily constitute proof on a balance of probabilities. This is not a departure from *Thalassini*: it is the application of *Thalassini's* standard to the specific evidence landscape addressed in *New Endeavour.*

[62] The two reasons given by the high court do not withstand scrutiny. The permissive approach to hearsay under s 6(3) applies to all admiralty proceedings, not only to reconsideration applications. It does not explain why an unanswered

prima facie case, *if accepted, cannot justify a conclusion that there was an association*. Similarly, the width of the court's discretion on reconsideration is a procedural consideration that does not alter the applicable standard of proof. (Own emphasis.)

[63] The respondents' counter argument is that where there is only one version before the court, there is 'no balance to be tipped' and the question is simply whether the evidence meets the balance of probabilities standard on its own. This undervalues the specific guidance in *New Endeavour*, which was directed precisely at the situation where there is only one version. The passage quoted from the Wallis text holds that a *prima facie* case 'will usually suffice' in the absence of countervailing evidence, where the relevant facts are peculiarly within the opposing party's knowledge. To accept the respondents' argument would render that guidance meaningless in the scenario it was designed to address.

[64] The correct synthesis of the authorities is this. The balance of probabilities standard applies throughout all stages of an associated ship arrest, including at the reconsideration stage. That standard does not change. What the *New Endeavour* established is consistent with the dictum in *Thalassini*.

[65] In *Twende Africa Group (Pty) Ltd t/a TAG Marine v MFV Qavak*,[31] this Court set out the following standard of proof:

'In terms of s 3(4)(*b*) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the AJRA) an action *in rem* in pursuit of a maritime claim may be instituted by the arrest of a vessel, where the owner of the vessel to be arrested would be liable *in personam* in respect of the claim giving rise to the arrest. In order to sustain its arrest of the *Qavak*, TAG bore the onus to prove that it had a personal claim against Fisherman Fresh and that the claim was a maritime claim. The

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[31] *Twende Africa Group (Pty) Ltd t/a TAG Marine v MFV Qavak* [2019] ZASCA 9 para 6.

standard of proof required to discharge that onus was no more than a prima facie case, a test that is satisfied if there is evidence, which, if accepted, will establish a cause of action.'

This standard is the same as that which is explained in *Thalassini*.[32]

[66] The perceived confusion referred to in the submissions before the high court relates to the following. In *Thalassini* reference to a prima facie case is a standard to be met where an arresting party is to prove that it has a personal claim and that the claim is a maritime claim. That prima facie case does not on its own, without more, morph into a standard on a balance of probabilities. It is only where the prima facie case consists of evidence, and if such evidence is accepted, it will establish a cause of action.

[67] We do not understand *Thalassini* to advocate for a standard of proof that if there is a *prima facie* case and that *prima facie* in reconsideration is not controverted, then an arrestor would have discharged the standard on a balance of probabilities. That is correct as a general statement. It does not, however, preclude the result described above. The distinction is this: *Thalassini* does not lower the standard where a prima facie case is left unanswered. What it does is to permit the court, in applying the balance of probabilities standard, to assess the *prima facie* evidence. If the evidence which was put up to satisfy a court at the initial stage of the inquiry, that is, when the standard to permit an order of arrest to be made was a *prima facie* case, is not countered by any countervailing evidence (as happens when no affidavits are filed), then the court must consider whether the uncontroverted evidence is sufficient to establish the balance of probabilities. In doing so it takes cognisance of the fact that the evidence is entirely uncontroverted and it accepts the *facts as stated*. It must still ask itself

[32] *Thalassini* fn 13 above at 834F-G; *MV Wisdom C: United Enterprises Corporation v STX Pan Ocean Co Ltd* [2008] ZASCA 21; 2008 (3) SA 585 (SCA); [2008] 3 All SA 111 para 16; *Thalassini* at 831G-832C.

whether those *facts* are sufficient to sustain the conclusion, on a balance of probabilities. (Emphasis added.)

[68] There are several reasons that militate against Hengdeli's understanding of the rationale of *Thalassini*. First, a *prima facie* case must still be tested against the evidence adduced to support it or to contrast it. Second, a court would be abdicating its responsibility of putting the arresting party to the proof of its allegations of association and should not lightly infer an association not least because of the undoubted prejudice an arrest of a ship can cause to those who seek to make a living from her plying the seas, unfettered by the chains of the debt of others with whom they may have no legal or commercial truck.[33] Third, to embrace that approach would relieve the arresting party from putting up a case supported by credible and reliable evidence when seeking an arrest order; instead, a party affected by the arrest would be compelled to put up evidence to challenge the arrest in circumstances where the arrestor did no more than put up a prima facie case.

[69] *New Endeavour* does not create the ambiguity suggested by the respondents. Ambiguity arises only if the burden of proof is conflated with the prima facie threshold. A prima facie case is an initial evidentiary threshold: it requires evidence sufficient to support a claim or fact, and, if accepted and not rebutted, may be enough to establish a cause of action. The reconsideration of the arrest order concerned association only. It did not require a determination of whether a maritime claim exists.

[33] Hare J. (2016). Shipping Law and Admiralty Jurisdiction in South Africa. 2nd edition, Juta & Co. Ltd, pages 113- 114.

[70] The high court was correct to hold that no adverse inference arises from the failure to file an answering affidavit. But it erred in concluding that this procedural choice is 'not without consequences' only in a trivial sense. The consequences identified in *New Endeavour* 'constitute a substantive evidential consequence'. That consequence is the operation of the fact that the respondents have peculiar knowledge of the relevant identity of who controls the ships. No adverse inference is drawn against the respondents from their silence. The scales do not tip by reason of an inference against the respondents; they tip because the appellant's side carries full weight and the respondents' side is empty. This is precisely the mechanism described in the passage from the Wallis text adopted in *New Endeavour*[34] and applied in *Heavy Metal*.[35]

[71] The question for this Court is not whether the standard is met in the abstract, but whether Hengdeli has discharged the onus resting on it on a balance of probabilities. If so, whether the information or evidence relied upon by *Hengdeli* is evidence that would be within the peculiar knowledge of the respondents? If so, whether this Court should draw any adverse inference against the respondents for their failure to deal with allegations on matters that fell squarely within their knowledge.

[72] The practical significance is acute. Ship owning companies incorporated in the Marshall Islands are not required to disclose their share registers publicly. The true ownership structures of Nero Oil and Iron Pasha are matters exclusively within their own knowledge. Hengdeli, as an external creditor, relied on circumstantial evidence, public information, and commercial database sources. Had Nero Oil and Iron Pasha wished to rebut the *prima facie* case, they possessed

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[34] *New Endeavour* fn 9 above paras 17 and 18.
[35] *Heavy Metal* fn 23 above para 10.

far greater access to the dispositive corporate information than Hengdeli. Their election not to file that information carries, under *New Endeavour*, the evidential weight the high court declined to give it.

[73] In *Heavy Metal*, the majority distinguished between direct and indirect control:

‘The subsection clearly distinguishes between “direct” and “indirect” power. That distinction must be given a meaning. Indirect power can only refer to the person who de facto wields power through, and hence over, someone else. The latter can only be someone who wields direct power vis-à-vis the company and the outside world and who therefore, in the eyes of the law (ie de jure), controls the shareholding and thus determines the direction and the fate of the company. On the facts of the present case Lemonaris is the person in that situation. Of course, the same person may in given circumstances exercise both de facto and de jure control.

In my view, therefore, direct power refers to de jure authority over the company by the person who, according to the register of the company is entitled to control its destiny; and indirect power to the de facto position of the person who commands or exerts authority over the person who is recognised to possess de jure power (ie the beneficial “owner” as opposed to the legal “owner”). This extension of de jure power to de facto power 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 his assets from attachment and execution by his creditors.’[36]

[74] The level of control required was defined in *The Kadirga 5 (No 1): JA Chapman & Co Ltd v Kadirga Denizcilik ve Ticaret AS* SCOSA, C12(N) at C14E-G: the person must control the ‘overall destiny’ of the company, not merely its ‘day to day affairs’. This formulation was adopted in *EE Sharp and Sons Ltd v MV Nefeli*[37] and endorsed in *Heavy Metal*. Both authorities were relied on by the respondents themselves in their heads of argument. Having regard to an article published by Manager of the year 2023, Mr Harry Vafias is described as the

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[36] *Heavy Metal* fn 23 above paras 9-10.
[37] *EE Sharp and Sons Ltd v MV Nefeli* 1984 (3) SA 325 (C); [1984] 2 All SA 294 (C) at 326IC-E.

person who founded Stealth Maritime Corp in 1999, which has invested in new generation newbuilds for the renewal of its tanker fleet.

[75] This Court in *Silver Star* affirmed the purpose of the associated ship provisions, and quoted the MJD Wallis text on the intended simplicity of the inquiry:

‘The maritime claimant identifies the party who controls the company that owned the ship concerned and identifies the party who controls the company that owns the associated ship that it seeks to arrest. The result of those exercises is then compared. If they correspond, in the sense that the same person or persons control both companies, then the requisite association is established. If they are not the same then the association is not established.’[38]

[76] This Court in *New Endeavour* additionally confirmed that ‘family control is sufficient to establish association, and this kind of control is prevalent in Greek shipping’.[39] The Court endorsed the proposition that common control within a family group, if established on the facts, constitutes a cognisable form of control under s 3(7).

[77] The most recent authority of this Court bearing on the construction of the s 3(7) deeming provisions is *MV ‘Tai Harmony’ and Another v Sure Success Steamship S.A and Another* (*Tai Harmony*).[40] Although *Tai Harmony* arose under s 3(7)*(c)* (the time-charterer deeming provision) rather than under s 3(7)*(a)*(iii) (common control), it confirms a principle of general application: the s 3(7) deeming provisions serve a procedural enforcement purpose and do not alter private law rights between owners and charterers. This Court stated that the

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[38] *MV Silver Star: Owners of the MV Silver Star v Hilane Ltd* [2014] ZASCA 194; [2015] 1 All SA 410 (SCA); 2015 (2) SA 331 (SCA) (*Silver Star*) para 40 quoting the MJD Wallis text at 187.
[39] *New Endeavour* fn 9 above para 40.
[40] *MV ‘Tai harmony’ and Another v Sure Success Steamship S.A and Another* [2026] ZASCA 60; [2026] 2 All SA 460 (SCA) (*Tai Harmony*).

deeming provisions 'enable procedural enforcement' and that the associated ship arrest mechanism 'prevents the frustration of a maritime claim'. It further confirmed that s 3(7)*(c)* encompasses all types of charterparties, holding that the scope of the provision is to be construed consistently with its legislative purpose. That purposive approach applies with equal force to s 3(7)*(a)*(iii): the court's task is to identify whether the person who controls the companies owning both vessels is the same person, reading 'control' and 'company' in light of the object the section was enacted to achieve, namely preventing concealment of assets from a claimant through the interposition of corporate forms.[41]

[78] Although *Tai Harmony* arose under s 3(7)*(c)*, the purposive construction it endorses applies to s 3(7)*(a)(*iii) because both provisions serve the same legislative object: preventing a person who controls two ship owning entities from insulating the associated ship from arrest by interposing separate corporate forms. Section 3(7)*(b)*(iii), which extends the deeming of control to indirect as well as direct power, confirms that the Legislature intended all sub-provisions of s 3(7) to be read in light of this anti-evasion purpose.

[79] The high court's approach is subject to two observations. First, the court treated the absence of formal corporate documentation as a hurdle that circumstantial evidence could not overcome. This is difficult to reconcile with the decisions in *Heavy Metal* and *Silver Star*. Second, the court applied *Saga Welco* to find that the evidence amounted to speculation, while declining to give meaningful effect to the guidance in *New Endeavour* (a judgment of this Court)

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[41] *Tai Harmony* above paras 25 and 36. See also *MV Nyk Isabel Northern Endeavour Shipping Pte Ltd v Owners of MV Nyk Isabel and Another* [2016] ZASCA 89; 2017 (1) SA 25 (SCA) paras 29-34, confirming that the deeming provisions enable procedural enforcement without altering private law rights.

that an unanswered *prima facie* case based *on accepted evidence* will ordinarily tip the balance in favour of the association.

[80] Taking all those factors into account, including the established standard of proof on a balance of probabilities, Hengdeli succeeded in discharging the *onus* resting on it. We heed the caution from this Court in *Weissglass N O v Savonnerie Establishment*[42] where it was stated that '[a court] must be careful not to enter into the merits of the case or at this stage to attempt to adjudicate on credibility, probabilities or the prospects of success'.

[81] The high court erred in its reconsideration of the arrest order and in discharging it in circumstances where there was sufficient evidence to support a conclusion of association between the two vessels, *MV Haralambos* and *MV Argentina.* We are also satisfied that all the requirements of ss (3), including the genuine and reasonable need for security, were proved by Hengdeli, as it is accepted that in security arrest, not only association must be proved.

[82] It follows that the appeal should succeed. There is no reason to depart from the general rule that costs should follow the result.

[83] In the circumstances, we make the following order:

1 The appeal is upheld with costs, including the costs of two counsel where so employed.
2 The order of the high court is set aside and is replaced with the following order:

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[42] *Weissglass N O v Savonnerie Establishment* 1992 (3) SA 928 (A) at 938H.

'The reconsideration application is dismissed with costs, including the costs of two counsel where so employed.'

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JUDGE OF APPEAL

T V NORMAN

JUDGE OF APPEAL

Appearances:

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