

copy.

IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

(Exercising its Admiralty Jurisdiction)

CASE NO: A41/2008

NAME OF SHIP: mv "PIONEER TRADER"

In the matter between

**EXTRA COVER MARITIME CO INCORPORATED** First Applicant

**ORIENT SHIPPING ROTTERDAM BV** Second Applicant

and

**mv "PIONEER TRADER"** First Respondent

**SEA TRANSPORT CONTRACTORS LIMITED** Second Respondent

**AMBIENT SHIPHOLDING CO** Third Respondent

**AND IN THE MATTER** of an application for counter security for wrongful arrest, the setting aside of the arrest of the First Respondent, alternatively a reduction in security

---

**JUDGMENT**

delivered on 21 May 2008

---

**HUGO J**

On 1 April this year PILLAY J authorised the arrest of the mv "Pioneer Trader" for security to the applicants for their claims against the second respondent in arbitration proceedings in London. That order was made in an *ex parte* application without notice to the respondents. I shall refer to the parties as they were cited in the original application for arrest.

The arrest was authorised because of the allegations in the original application that the "Pioneer Trader" and the mv "Further Confidence" were associated ships as intended in sections 3(6) and (7) of the Admiralty Jurisdiction Regulation Act 105 of 1983 as amended.

The present application before me was brought as a matter of urgency by the respondents for the setting aside of the arrest of the "Pioneer Trader" and for certain ancillary relief.

The ship is still under arrest at Richards Bay, no security having, thus far, been lodged.

It is common cause that, when the arrest was applied for, the applicants had to show *prima facie* that the two ships were associated but that at this stage and in this application the *onus* is on the applicants to show the association on a balance of probabilities.

Mr *Stewart* SC for the applicants has fairly conceded that he cannot argue on the papers as they now stand that this *onus* has been discharged. He argues that there is sufficient evidence to justify the aspect of association to be sent for the hearing of oral evidence.

There is authority for the proposition that such a matter might well be decided by the hearing of oral evidence.

This procedure was followed in two cases in this Division, namely, in the case of "*Leros Strength*", *Rosa v mv "Progress"*; *mv "Progress" v Stone Engineering Ltd*, a judgment by LEVINSOHN J reported in SCOSA at C20 and by a Full Bench of this Division in the "*Kadirga 5 (No 1) J A Chapman & Co Ltd v Kardiga Denizcilik Ve Ticaret A.S.* reported in SCOSA C12, a decision by BOOYSEN J (with McLAREN and JAPPIE JJ concurring) delivered on 9 April 1999. In neither of these two cases was the propriety or otherwise of a referral to evidence discussed and these orders were simply made after a lengthy discussion of the factual issues that had arisen.

In particular no reference was made to the case of *Zygos Corporation v Salen Rederierna AB*, 1985 (2) SA 486 (C) and in particular at page 497. In that case, as in this, the issue was the question of association between various ships. The Court found that on the papers the applicant had not discharged the *onus* on a balance of probabilities and was asked to refer the matter to oral evidence. FRIEDMAN J, as he then was, said the following:

Such an order is competent in terms of s 4 of the Act, but in my view this is not an appropriate case in which to direct that oral evidence be heard. The issue in these proceedings is whether this Court has jurisdiction to enforce the arbitration award given in favour of Salen against Antaios. The Court will have jurisdiction only if MV *Zygos* is an associated ship of the MV *Antaios* within the meaning of s 3 (6) and (7) of the Act. If the MV *Zygos* is an associated ship, the attachment would be valid and the Court would entertain jurisdiction in the action *in rem* in which Salen seeks to enforce the arbitration award, not against MV *Zygos*, but against the MV *Antaios*. If, on the other hand, the MV *Zygos* is not an associated ship, the attachment

would not have been justified and the Court will not have jurisdiction. These proceedings are accordingly analogous to an attachment *ad fundandum jurisdictionem* in which an applicant seeks to attach property belonging to a peregrine respondent as a means of acquiring jurisdiction in an action which the applicant contemplates bringing against the respondent. A Court would normally be reluctant to order a *peregrinus* to contest an action before it in order to determine whether the Court has jurisdiction against that *peregrinus*. See *Anderson and Coltman Ltd v Universal Trading Co* (*supra* at 1284) and *Lipschitz v Dechamps Textiles GmbH and Another* 1978 (4) SA 427 (C) at 429. A Court would be even more reluctant to make such an order where, as in the present case, the issue is not whether the Court would have jurisdiction at the instance of a *peregrinus* over another *peregrinus* whose property is the subject-matter of the attachment, but rather whether the Court would, by virtue of s 3 (6) of the Act, have jurisdiction over a third *peregrinus*.

Because of the provisions of s 3 (6), issues such as that with which the Court is concerned in the present proceedings, will, inevitably, arise. In appropriate cases a Court might exercise its discretion and direct a *peregrinus* to give oral evidence in terms of the Rules. I do not, however, consider this to be such a case. I am, moreover, not persuaded that the balance of probabilities would be materially disturbed by oral evidence. (Cf *Wiese v Joubert en Andere* 1983 (4) SA 182 (O) at 202B-C. I am accordingly not prepared to exercise my discretion and order that oral evidence be given.”

A distinguishing feature between the present case and the two Natal cases referred to earlier is that in both those cases security had been given and the ship released from arrest. (See *MV Kardiga 5*; *J A Chapman & Co Ltd (In Liquidation) and Kardiga Denizcilik Ve Ticaret* a judgment by THIRION J at page 2 thereof.) In the present case no security has been given and the ship still lies under arrest.

Mr *Stewart* has said that no doubt security would be given if this matter is referred to oral evidence and that there is no question of the ship being allowed to rot in Richards Bay harbour while this question is decided by oral evidence. This suggestion by Mr *Stewart* is however pure speculation. It is, I believe, a cogent consideration that the referral to oral evidence may protract the arrest for several months, if not years, before a suitable court date might be found for what promises to be a fairly protracted hearing.

A further consideration in my view is that the South African legislation provides *peregrini* with an extraordinary right to approach South African Courts to impound the possessions of a further *peregrinus* to enforce claims against yet another *peregrinus* for security for a case not to be heard in a South African Court but in a foreign jurisdiction, normally London.

I believe that very strong indications must be present before a Court will refer such a matter to the hearing of oral evidence and there must be strong indications that the hearing of oral evidence will materially affect the probabilities of the case. In both the "*Kadirga*" and the "*Leros Strength*" cases the Courts went to great length to show what the evidence was and how suspicious the circumstances of the various ships was. In both cases the Courts seemed to find that although the probabilities had not been established on the papers there was reason to believe that cross-examination of the respondent's deponents would disturb the overall probabilities.

Mr *Stewart* in this case has argued that this is true also for the present case. It is common cause that the third respondent, Ambient Shipholding Company (“Ambient”) is the owner of the mv “Pioneer Trader” and that the second respondent, Sea Transport Contractors Ltd (“STC”) is the deemed owner of the mv “Future Confidence” by virtue of section 3(7)(c) of the Act. It is also common cause that the ownership of STC vests in one Anastasios Raissis who owns 100 per cent of the shares in that company. It is also common cause that Anastasios owns 70 per cent of the shares in Marachart Shipping Company Ltd and is the managing director of that company.

The applicants contend that the control of Ambient vests, through Marachart Shipping Company, in Anastasios or in Anastasios and his father, George, and his brother, Leonidas, in combination.

The respondents contend that the control of the mv “Pioneer Trader” vests in either Leonidas or in Leonidas and George to the exclusion of Anastasios and they rely on the fact that Anastasios has no shareholding in Ambient nor is he an officer or employee of this company.

Mr *Stewart* has gone to great pains to show that there is a group of companies that he refers to as the Raissis Group. He has referred the Court to websites wherein such a group was referred to and has pointed to other indications of the existence of such a group. The existence of such a group has been denied by the respondents.

At the best for the applicants however, and if one assumes that such a group does exist, that fact does not necessarily point to control. It may mean that the group exists as a group of companies holding common business interests or associated business interests, but does not show that the one company in the group controls the other.

Mr *Stewart* has made much of the fact that Marachart was the corporate guarantor of the debts of Ambient to Laiki Bank (Hellas) SA in the sum of 7 million US dollars.

Mr *Stewart* has argued, and there is evidence to that effect on the papers, that a guarantee is generally not forthcoming unless the management company, in this case Marachart, has ownership of the borrowing company or a significant equity interest therein.

Mr *Stewart* argues that "the respondents would have the Court believe that Anastasios, who owns 70 per cent of the shares in Marachart and is the managing director of that company, agreed that Marachart guarantee the 7 million US dollars debt of Ambient even though he has no interest in Ambient and no control over its direction."

This indeed is a suspicious circumstance, but it must be remembered that a further actor on the stage is the father of these two brothers, namely Mr George Raissis, who still owns 25 per cent of the shares in Marachart but

who may well in his personal capacity be the guiding force of his sons' business deals.

The latter comment is further strengthened by the fact that George Raissis also owns 20 per cent of Pampero Ship Management which is the company that controls Ambient the owner of "Pioneer Trader". He therefore has a very real interest in the affairs of the "Pioneer Trader" but without necessarily having control over it.

In sum, the only two links between STC and Ambient are the fact that there is a family involved, namely, the Raissis family, and the bank guarantee by Marachart in respect of a loan by Ambient.

What the law requires is *de jure* power of control and not simply acquiescence by the sons out of filial piety.

All in all I believe that there are insufficient grounds to refer this matter for the hearing of oral evidence and that Mr *Stewart's* request in this regard should not be allowed.


The result of this is of course that the applicants have not satisfied the *onus* that rests upon them and that the arrest should be set aside.

Mr *Gordon* for the respondents has also claimed counter security for damages sustained by the unlawful arrest of the "Pioneer Trader". I do not

think that this application should detain us for long because I believe that, when the arrest was authorised, there was good cause shown at least on a *prima facie* basis for such arrest and in any event now that the arrest has been uplifted I do not believe that this Court has jurisdiction over the applicants to make such an order.

In the result the following order is made:

1. The arrest of the mv "Pioneer Trader" is set aside.
2. The applicants are to pay the costs of the application jointly and severally.

  
20/5/08

DATE OF HEARING : 6 May 2008

DATE OF JUDGMENT : 21 May 2008

FOR THE APPLICANTS : Mr A M Stewart SC  
with Mr G R Thatcher

INSTRUCTED BY : Cox Yeats  
12<sup>th</sup> and 13<sup>th</sup> Floors, Victoria Maine  
71 Victoria Embankment  
DURBAN

FOR THE RESPONDENTS : MR D A GORDON

INSTRUCTED BY : Garlicke & Bousfield  
24<sup>th</sup> Floor, Durban Bay House  
333 Smith Street  
DURBAN