

SOUTH AFRICA / JUDGMENT

## Destinar Limited v NTS Shipping PTE Limited and Others (AC07/2020) [2020] ZAWCHC 26 (28 April 2020)

[2020] ZAWCHC 26

COURT

Western Cape High Court, Cape Town

BEFORE

Francis, AJ

CASE / FILE NUMBER

AC07/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN

CAPE DIVISION, CAPE TOWN

(EXERCISING

ITS ADMIRALTY JURISDICTION)

REPORTABLE

Case

No: AC07/2020

In

the matter between:

DESTINAR  
LIMITED APPLICANT  
and  
NTS  
SHIPPING PTE  
LIMITED  
FIRST RESPONDENT  
THE  
MOTOR VESSEL  
“EKARMA” SECOND  
RESPONDENT  
RS  
BULK  
LIMITED THIRD  
RESPONDENT

## JUDGMENT

DELIVERED ON 28 APRIL 2020

FRANCIS, AJ

- [1] The motor vessel Ekarma, the second respondent, is fully laden and was engaged in a voyage around the Cape, bound for three discharge ports in West Africa, in Lagos (Apapa) in Nigeria, Kamsar in the Republic of Guinea, and Abidjan in the Ivory Coast. The vessel called at the port of Cape Town to take on bunkers and other provisions and was arrested in rem pursuant to a warrant of arrest issued out of this court on 13 March 2020 at the instance of the first respondent, NTS Shipping PTE Limited (“NTS Shipping”). Summons in respect of the in rem action was also issued out of this court on 13 March 2020 in which NTS Shipping claims payment of the sum of USD 2,039,628, interest on the aforesaid amount, and costs.
- [2] NTS Shipping’s primary claim is for the enforcement of a partial final arbitration award handed down on 22 April 2019 and subsequent subsidiary awards handed down during June, August, and September 2019. The awards were made by Mr Ian Gaunt who was appointed as sole arbitrator in terms of a Memorandum of Agreement concluded on 30 June 2016 pursuant to which Erushi Offshore Limited (“Erushi”) sold the motor vessel named the Sam Purpose to FFS 16 Hylie AS, later named Sam Purpose AS. The award was made in favour of NTS Shipping as the assignee of the claims of Sam Purpose AS.
- [3] NTS Shipping also advanced a claim, in the alternative, based on the original cause of action that gave rise to the arbitration awards.
- [4] The Ekarma was arrested and the action in rem instituted against this vessel as an associated ship of the Sam Purpose.
- [5] Pursuant to the arrest of the Ekarma, Destinar launched the present proceedings as matter of urgency, seeking an order setting aside the arrest of the motor vessel. The Ekarma is owned by R S Bulk Limited (“RSB”), the third respondent, which had entered into a charterparty with Destinar. However, Destinar is unrelated to Erushi or to RSB and brings this application by reason of Destinar’s “interest” in the vessel, relying on Admiralty Rule[1] 8(2) which provides that where summons has been issued in an action in rem, any person having an interest in the property concerned may give notice of intention to defend and may defend the action as a party.
- [6] The application is being opposed by NTS Shipping. Notice of these proceedings were served on RSB but it has not entered the fray.
- [7] The urgency of the present application is not in issue. It is not in dispute that the Ekarma has been detained at the port of Cape Town since at least 14 March 2020[2]. Destinar demanded the release of the vessel on 17 March 2020 and the demand was rejected on the same day by NTS Shipping. This application was then brought and the matter set down for

hearing on 7 April 2020. Subsequent to this application being set down, the Covid-19 lockdown[3] ensued and the parties were then informed by the Senior Judge on duty that the matter was not of such urgency that it required to be heard before the anticipated ending of the lockdown on 17 April 2020. The parties then agreed that the matter be postponed for hearing to 20 April 2020. However, the lockdown was extended to 30 April 2020. Nonetheless, I decided to hear this matter in interests of justice as the facts made out a case for urgency, both parties were ad idem that the matter was urgent, and the matter was in all respects ripe for hearing.

- [8] Mr P Van Eeden SC (with Mr J Mackenzie) represented Destinar whilst Mr Wragge SC represented NTS Shipping. I am indebted to counsel for their extensive heads of argument which I found very helpful.

#### RELEVANT FACTUAL BACKGROUND

- [9] The arbitration award, and the alternative claim advanced in the summons which is the subject of the arbitration award, arises out of an indemnity contained in a Memorandum of Agreement (“MOA”) pursuant to which Erushi sold and delivered the Sam Purpose to Sam Purpose AS during 2016. The MOA was concluded on 30 June 2016 and the Sam Purpose was delivered to Sam Purpose AS on 1 July

2016. The Sam Purpose was arrested in Lagos by Ancomarine on or about 25 October 2016 and subsequently by Noah Marine on or about 5 January 2017. Sam Purpose AS suffered losses as a result of the arrest of the vessel and sought indemnification from Erushi in terms of clause 9 of the MOA. The relevant part of clause 9 of the MOA for the purposes of the arbitration award and the alternative claim in the summons in rem issued out of this court, reads as follows:

*“(Erushi) hereby undertake to indemnify (Sam Purpose AS) against all consequences of claims made against (the Sam Purpose) which have been incurred prior to the time of delivery”.*

- [10] When that indemnification was not forthcoming, the arbitration proceedings commenced. The arbitrator found NTS Shipping (as an assignee of Sam Purpose AS) to be entitled to indemnification by Erushi. This was by reason of the fact that the respective claims had arisen before the delivery of the vessel to Sam Purpose AS.
- [11] As stated above, NTS Shipping arrested the Ekarma on an associated ship basis. It contends that the vessel is an associated ship of the Sam Purpose, being the Ekarma in respect of which NTS Shipping’s claim arose.
- [12] Sub-sections 3(4) to 3(7) of the Admiralty Jurisdiction Regulation Act, 105 of 1983 (“the Admiralty Act”), being the relevant provisions for present purposes, provide as follows:

*“3(4) Without prejudice to any other remedy that may be available to a claimant or to the rules to the joinder of causes of action a maritime claim may be enforced by an action in rem-*

- (a) if the claimant has a maritime lien over the property to be arrested; or
- (b) if the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned.

3(5) An action in rem shall be instituted by the arrest within the area of jurisdiction of the court concerned of property of one or more of the following categories against or in respect of which the claim lies:

- (a) The ship with or without its equipment, furniture, stores or bunkers;
- (b) The whole or any part of the equipment, furniture, stores, or bunkers;
- (c) The whole or any part of the cargo;
- (d) The freight;
- (e) Any container, if the claim arises out of or relates to the use of that container in or on a ship or the carriage of goods by sea

or by water otherwise in that container;

- (f) A fund.

3(6) An action in rem, other than an action in respect of a maritime claim referred to in paragraph (d) of the definition of ‘maritime claim’, may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.

3(7)(a) For the purposes of subsection (6) an associated ship means a ship, other than the ship in respect of which maritime claim arose –

- (i) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose: or
- (ii) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose: or
- (iii) Owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled

the company which owned the ship concerned, when the maritime claim arose.” (own underlining).

- [13] In summary, sub-sections 3(6) and 3(7) are to the effect that in order to qualify as associated ships, there must be common control of the associated ship (the Ekarma) and the ship concerned (the Sam Purpose) by the same person when the relevant maritime claim arose. In addition, the requisite control must, in the case of the associated ship (the Ekarma), be shown to exist at the time of the arrest, and in the case of the ship concerned (the Sam Purpose), be shown to exist at the time the claim arose.
- [14] NTS Shipping bears the onus to demonstrate the association on a balance of probabilities and this onus is retained even in the face of a challenge to the arrest of the associated ship in these proceedings (*Transol Bunker BV v The Andrico Unity* 1987 (3) SA 794 (C). See also, *The Silver Star* 2015 (2) SA 331 (SCA)).
- [15] According to NTS Shipping, the arrest of the Ekarma and the action in rem against the vessel as an associated ship, are based on the following:
- [15.1] At the time that NTS Shipping's claim arose, the Sam Purpose was owned by Erushi and Mr Rakesh Tulshyan controlled or had the power to control Erushi; and
- [15.2] At the time of her arrest, the Ekarma was owned by RSB and Mr Rakesh Tulshyan also controlled or had the power to control RSB.
- [16] NTS Shipping also denies that Destinar has the requisite locus standi to bring this application to set aside the arrest.
- [17] Destinar disputes that the Ekarma is an associated ship of the Sam Purpose, within the meaning of sub-sections 3(6) and 3(7) of the Admiralty Act. In this regard, Destinar avers that:
- [17.1] NTS Shipping has not demonstrated that at the time that its claim arose, the Sam Purpose was controlled by Mr Rakesh Tulshyan and that;
- [17.2] By the time that NTS Shipping's claim arose, which was based on the indemnity provided in clause 9 of the MOA, as a matter of law and fact Erushi had already sold and delivered the Sam Purpose to its new owner, Sam Purpose AS.
- [18] In so far as the attack on its locus standi is concerned, Destinar submits that it has a significant interest in the vessel as it is still operating the Ekarma as a "de facto" demise charterer even though the charter period has lapsed, and that Destinar has an obligation to purchase the Ekarma in terms of what it refers to as a "hire-purchase" agreement. Thus, according to Destinar, it has the requisite locus standi to defend the action in rem as an interested party and to bring this application to set aside the arrest of the Ekarma.

## ISSUES

- [19] The parties are in agreement that there are two issues for determination by this court with regard to this application:

[19.1] whether Destinar has locus standi to bring this application to set aside the arrest; and

[19.2] whether the claims advanced in the writ or summons in rem “arose” in the context of subsection 3(7) of the Admiralty Act before or after 1 July 2016, being the date that the Sam Purpose was delivered to Sam Purpose AS.

#### LOCUS STANDI

[20] In order to appreciate the grounds upon which the challenge relating to locus standi are based, it is necessary to make some reference to how Destinar came to be in possession of the Ekarma as well as the relationship between Destinar and RSB. Much of the factual background relating to the issue of locus standi was either common cause or not seriously placed in dispute by the parties.

[21] RSB concluded an agreement with Destinar on 12 December 2014 pursuant to which RSB (as buyer) purchased the Ekarma from Destinar (as seller).

[22] On the same day, 12 December 2014, a charterparty was concluded between RSB (as owner) and Destinar (as charterer) in respect of the Ekarma, using an amended Bimco Standard Bareboat Charter Code Name: “Barecon 2001” form (“the bareboat charter”).

A copy of the bareboat charter, including additional clauses 32 to 57 of Part II thereof, was attached to Destinar’s founding

affidavit. From this agreement, it is apparent that:

[22.1] the duration of the charter period was 60 months, terminating on 16 January 2020;

[22.2] the hire charge payable for the Ekarma was USD 4,479 per day, payable in 60 monthly instalments;

[22.3] the bareboat charter included a purchase component. Additional clause 35 states that on expiration of the charter period, Destinar was obliged to purchase the vessel at the amount of USD 4,200,000 (defined as “the Purchase Obligation Price”)

- the Purchase Obligation Price was subsequently changed in a supplementary agreement to an amount of USD 2,123,449.

[22.4] Part IV of the bareboat charter also provides that on payment of the final payment of hire, Destinar was obliged to purchase the Ekarma on an “as is where is” basis and states that the vessel shall be delivered by RSB and taken over by Destinar on payment of the Purchase Obligation Price;

[22.5] Part IV of the bareboat charter provides further that RSB guarantees that the Ekarma, at the time of delivery, would be free of all encumbrances and maritime loans or any debts whatsoever other than those existing from anything done or not done by Destinar or any existing mortgage agreed not to be paid by the time of delivery. It is not disputed that no agreement was reached between the parties relating to any existing mortgages which did not need to be paid off.

- [23] The Ekarma was delivered to Destinar under the bareboat charter and Destinar operated the vessel for a period of 60 months until the charter period ended on 16 January 2020.
- [24] According to Destinar, it was ready in all respects to take delivery of the Ekarma from RSB upon termination of the charter period, including paying the Purchase Obligation Price. However, RSB failed to secure the release of the current mortgages registered over the vessel and was, accordingly, not in a position to comply with its obligations arising in terms of Part IV of the bareboat charter.
- [25] Given the fact that RSB is unable to procure the release of the current mortgages registered over the vessel, Destinar refuses to pay the Purchase Obligation Price, and to take delivery of the vessel as purchaser, until RSB complies with its obligation to deliver an unencumbered vessel. However, Destinar has not re-delivered the Ekarma to RSB and nor has it agreed to an extension of the charter period. In this regard, Ms A Whelan, the deponent to Destinar's founding affidavit, states as follows:

*"22. The applicant's commercial managers have been in discussions with the owner's representatives. The owner wanted an extension of the charter period, but the applicant requires the owner to comply with its obligations, and to deliver an encumbered vessel against payment of the Purchase Obligation Price. There has thus far been no resolution of the matter."*

- [26] Destinar, nonetheless, continues to possess and operate the Ekarma as if it is still the bareboat charterer. In this regard, Ms Whelan states as follows:

*"23. The applicant has, in the time since 16 January 2020, continued to manage, operate and exploit the vessel as a de facto bareboat*

charterer, although it has, in light of the dispute with the owner, not paid any further hire. The applicant is operating and managing

the vessel in all respects, including, for example: maintaining the vessel's class (including the periodical dry-docks) and flag documents; paying and providing for protection and indemnity, and hull and machinery insurance; employing the crew and dealing with the International Transport Federation etc; securing the vessel's compliance in respect of ISM/ISPS requirements etc. The owner does not operate the vessel nor does it derive any income from the operation thereof under present conditions."

- [27] Destinar has concluded various contracts with sub-charterers and/or cargo interests relating to the voyage on which the vessel is presently engaged.
- [28] In summary, then, Destinar entered into a bareboat charter which came to an end on 16 January 2020. This bareboat charter has not been extended beyond 16 January 2020. Destinar retains possession of the vessel on the basis that it has a right to purchase the Ekarma and has tendered performance but the owner, RSB, is unable to deliver the vessel unencumbered which it is obliged to do in terms of the agreement of purchase and sale entered into between the parties. Destinar continues to operate the Ekarma as "de facto"

demise charterer entirely at its (Destinar's) own cost and for its sole benefit and intends doing so until such time as RSB complies with its obligation to free the vessel from any encumbrances.

#### BRIEF SURVEY OF APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

- [29] Destinar has brought this application to set aside the arrest of the Ekarma. Accordingly, it bears the onus to prove that it has legal standing to bring the application. In this regard, it has to establish that it has an "interest" in the Ekarma. The question whether a litigant's interest is sufficient to clothe it with locus standi must, of course, be determined in light of the factual and legal circumstances of the case (see, *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 (4) SA 71 (SCA)).
- [30] The issue that has to be determined is what is the nature of the "interest" that has to be established for standing in admiralty matters and whether this interest has been established on the facts of this case.
- [31] Mr Van Eeden submitted that the interest required is something other than what is usually required in civil actions under the Uniform Rules regulating proceedings in the High Court, which would be a direct and substantial interest in the action between NTS Shipping and RSB. He argued that in admiralty legal proceedings, such as the matter in hand, one is dealing with a ship as opposed to the consequences of any suit between a possible claimant and an owner. It is the litigant's "interest" in the ship that is paramount. This argument, however, does not take the matter much further because it still does not shed light on the nature of the interest in the ship that would be necessary to clothe a litigant with standing. In any event, it is somewhat artificial in this case to draw a distinction between the Ekarma and the underlying action which gave rise to its attachment for the attachment is merely part of a process which commenced with the initiation of an action based on a claim, the adjudication of that claim, and the enforcement of an arbitration award arising from the adjudication of the claim. It certainly appears that South African courts have tendered not to draw such a distinction when determining the issue of locus standi (see, for example, *United Watch & Diamond Co (Pty) Ltd And Others v Disa Hotels Ltd And Another* 1972 (4) SA 409 (C), and *Gross & Others v Pentz* [1996] ZASCA 78; 1996 (4) SA 617 (A)). Mr Van Eeden was unable to point me to any authority for his contention that the "interest" required is something other than what is normally required in civil actions under the Uniform Rules.
- [32] Mr Wragge cited a number of authorities in support of his contention that the common law rule relating to locus standi in civil matters applied equally to proceedings brought under the Admiralty Act. He was likewise unable to draw my attention to any South African case specifically on point on the issue of the locus standi of an interested party - other than a creditor, bareboat charterer, or an owner- to bring an application for the setting aside of the arrest of a ship. He did cite the case of *MT Fotiy Krylov v Owners of the MT Ruby Deliverer* [2008] ZAWCHC 3; 2008 (5) SA 434 (C) in support of his view that a direct and substantial interest is required but this case only dealt tangentially with the issue. In *MT Fotiy Krylov*

MT, the issue of locus standi was raised but Davis J did not have to make a finding on this issue as the parties eventually agreed that the applicant, a bareboat charterer, did, in the circumstances of that case, have standing to set aside the arrest.

- [33] In the limited time at my disposal, I have not been able to find authority on the nature of the interest required of a party, such as Destinar, to clothe it with the necessary standing to bring an application for the setting aside of the arrest of a ship.

Nonetheless, it appears to me that what is required is an interest similar to what is required under civil actions in terms of the Uniform Rules.

- [34] Rule 8 of the Admiralty Rules deals with the entering of an appearance to defend. The relevant provisions of rule 8 provides as follows:

*“(1) The provisions of rule 19 of the Uniform Rules, other than the proviso to rule 19(1) of the Uniform Rules, shall.... mutatis mutandis apply to a notice of intention to defend an action in admiralty proceedings.*

- (2) Where summons has been issued in an action in rem, any person having an interest in the property concerned may, at any time before the expiry of 10 days from the service of the summons, give notice of intention to defend and may defend the action as a party.”

- [35] Rule 8(1) of the Admiralty Rules makes express reference to rule 19 of the Uniform Rules which deals with the entering of an appearance to defend by defendants in civil actions and it seems to me that there is no good reason why the common law rules relating to an “interest” in civil actions should not be equally applicable to admiralty proceedings. Indeed, as Mr Wragge submitted,

if the legislature had intended that some other type of interest was applicable, it could have made this quite apparent when the Admiralty Rules were drafted. In any event, at the very least, it cannot be reasonably argued that the type of interest that is required to be shown by a party wishing to partake in admiralty proceedings is not a legal interest but some other interest such as a moral, commercial, or purely financial interest.

- [36] In civil proceedings, a party could inter alia join a matter as a defendant or apply to intervene in such proceedings. Intervention is closely linked to the issue of joinder and intervention proceedings are often treated as a particular facet of joinder (see, *United Watch & Diamond Co (Pty) Ltd And Others*, supra, at 415C). Whichever avenue is utilised to participate in proceedings, the requirement of locus standi is the same: a direct and substantial interest in the subject matter of proceedings (see, *Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (AD)* and *SA Riding for Disabled Association v Regional Lands Claims Commissioner & Others 2017*

- (5) *SA 1 (CC)*). As to what constitutes a direct and substantial interest has been aptly summarised by Corbett J (as he then was) in *United Watch & Diamond Co (Pty) Ltd*, supra, at 415H, where the learned judge states as follows:

*“This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this division (see Brauer v Cape Liquor Licensing Board, 1953 (3) SA 752 (C) – a Full Bench decision which is binding upon me – and Abrahamse and Others v Cape Town City Council, 1953 (3) SA 855 (C)), and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgement of the Court.”*

- [37] It is also settled law that to qualify as an interest for the purpose of locus standi, the interest must not be purely financial, or too remote, and must be a current interest and not a hypothetical one (see, Erasmus: Superior Court Practice (2nd edition) D1-186).
- [38] In this case, it is common cause that the bareboat charter came to an end on 16 January 2020. Accordingly, Destinar is no longer a charterer. I, therefore, agree with Mr Wragge that no reliance can be placed by Destinar on the bareboat charter per se to claim a legal interest in the Ekarma. The issue that then arises is whether Destinar, as purchaser, has a sufficiently direct and substantial interest in the Ekarma to clothe it (Destinar) with legal standing to challenge the arrest of the Ekarma initiated by NTS Shipping.
- [39] Mr Van Eeden submitted that the agreement entered into between Destinar and RSB is in the nature of a hire-purchase agreement and is similar to what in common parlance is known as an instalment or credit-sale agreement. Destinar thus sought to rely on Smit v Saipem 1974 (4) SA 918 (A) where the then Appellate Division held that a person who possesses immovable property as purchaser in terms of a credit-sale agreement or lease agreement will generally have a right to sue a wrongdoer who has caused damage to such property. However, it appears to me that the agreement between Destinar and RSB is not an instalment or credit-sale agreement as commonly understood. RSB does not feature as a credit grantor and the hire charges paid were for the hire of the Ekarma and were not paid towards the liquidation of the Purchase Obligation Price. In my view, Destinar and RSB in fact entered into two discreet agreements which, although dealing with the same subject matter, are governed by distinct terms. The bareboat charter is an agreement for the hire of the Ekarma for a fixed period, at a fixed hire charge, and on fixed terms and conditions regulating the hire of the Ekarma. The second contract is one of purchase and sale which regulates what is to happen with the Ekarma after the charter hire period has ended.
- [40] Even if the agreement between Destinar and RSB could be construed as an instalment or credit-sale type agreement, this would still not assist Destinar. The expansion of the remedy to institute actions for damages by claimants who are not owners of property is premised on the dual requirement of the claimant being in possession of the property and bearing the risk in respect of the property in question (see, Refrigerated Transport (Edms) Bpk v Mainline Carriers (Edms) Bpk 1983 (3) SA 121 (A) at 125 B-C). In this case, Destinar is in possession of the property but the bareboat charter has come to an end. Thus, Destinar has no risk-bearing responsibility in terms of the bareboat charter. Furthermore, it has no risk-bearing responsibility in terms of the purchase and sale agreement because the sale is not yet perfecta (see, Commercial Union Insurance Co of SA Limited v Lotter [1998] ZASCA 103;

1999 (2) SA 147 (SCA) AT 155F). Destinar cannot thus assume any risk in the absence of an express or implied agreement regulating this aspect after the

termination of the bareboat charter; no evidence of such an agreement appears from the facts before me.

- [41] For sure, Destinar may be said to bear some “risk” as long as the Ekarma is in its possession. However, this “risk” is merely an obligation to maintain and preserve the Ekarma whilst it is in Destinar’s possession. This obligation does not extend to act on behalf of the owner in defence of the vessel. In my view, the position of Destinar, as submitted by Mr Wragge, is similar to that of a gratuitous bailee who is in possession of the vessel pending physical repossession by the owner. The role of the bailee, or erstwhile charterer, is simply to keep the vessel safe and does not extend to taking action on behalf of an owner in respect of damage caused to the vessel by third parties (see, M Davis: Bareboat Charters (2nd edition (2005) at 29.2 and 29.3, page 166). In any event, an action for damages caused to a ship is very different from an action to protect the owner against third parties wishing to enforce a debt against the owner by attaching the vessel.
- [42] Destinar is not the owner of the Ekarma and may never become its owner. This much was acknowledged by Mr Van Eeden. Whilst Destinar has tendered the purchase price, RSB has not removed the encumbrances against the vessel and may never do so. There is certainly no indication on the papers before me that RSB will, in the foreseeable future, do so and, given its supine approach to these proceedings, its anyone’s guess if it ever will. It would be an insensible and unbusinesslike interpretation of the purchase and sale agreement to interpret it in such a manner that allows Destinar to continue to possess the vessel, to operate it as if it were the owner, and to participate in proceedings in order to protect rights of, or to, ownership which it does not have and may never have (cf. the comments of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603E to 608E). In my view, Destinar’s submission that it is a potential or future owner of the Ekarma postulates an interest that is too remote to satisfy the requirements of standing as its interest in becoming owner may well be hypothetical at best; certainly, there is no factual evidence before me to suggest otherwise. The fact that Destinar is able, without any contractual right, to continue to exploit the Ekarma albeit with the apparent knowledge of RSB, does not confer on Destinar the right to intervene in proceedings on behalf of the owner or to intervene in proceedings on the basis that it may eventually become the owner.
- [43] It is not disputed that Destinar is in possession of the ship and has been in such possession since the termination of the bareboat charter. It was argued on behalf of Destinar that it should be regarded as a bona fide possessor which would then give it the right to intervene in proceedings. However, this argument does not assist Destinar for the simple fact that it is not a “bona fide” possessor. To qualify as a bona fide possessor, a person should in good faith believe that he or she is the owner of the thing in his or her control (see, *Lydenburg Properties v Minister of Community Development* 1963 (1) SA 167 (T) 172C-D). In this case,

Destinar knows that it is not the owner.

[44] Destinar clearly has a financial interest in the continued operation of the Ekarma. It has contracts of carriage and various contractual commitments to cargo interests. However, Destinar's contractual commitments to third parties, including its crew, is not sufficient to qualify as a legal interest for the purpose of establishing locus standi in these application proceedings.

[45] For the foregoing reasons, I have come to the conclusion that Destinar has no direct and substantial interest in the application

for the relief sought by it and has, accordingly, failed to establish the locus standi necessary to bring the present application. This conclusion precludes me from considering the grounds advanced by Destinar to consider setting aside the arrest of the Ekarma.

#### ORDER

[46] Accordingly, I make the following order:

[46j.1] The application is dismissed with costs.

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- [1] Admiralty Proceedings Rules Regulating the Conduct of the Admiralty Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa.
  - [2] Destinar states that the vessel was arrested on 13 March 2020 and NTS Shipping states that the vessel was arrested on 14 March 2020 – this discrepancy is of no consequence in this application.
  - [3] In light of the global Covid-19 pandemic, a national disaster was declared in South Africa and one of the consequences was that only applications that were urgent and essential could be set down for hearing during the lockdown period.

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