

SOUTH AFRICA / JUDGMENT

International Marine Transport v MV "Le Cong" and Another (80/2005) [2005] ZASCA 106 (23 November 2005)

[2005] ZASCA 106

COURT

Supreme Court of Appeal

BEFORE

Scott, Brand, Jafta, Ponnann, Combrinck

CASE / FILE NUMBER

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable Case no: 080/05

In the matter between: INTERNATIONAL MARINE TRANSPORT SA APPELLANT and M V 'LE CONG' RESPONDENT GUANGZHOU OCEAN SHIPPING COMPANY INTERVENING RESPONDENT _____
Coram : SCOTT, BRAND, JAFTA, PONNAN JJA et COMBRINCK AJA
Date of hearing : 2 November 2005
Date of delivery : 23 November 2005
Summary: Ships owned by 'state-owned enterprises' established at different levels of government in the People's Republic of China not 'associated' ships within the meaning of s 3(6) of Act 105 of 1983. _____

JUDGMENT

SCOTT JA/...SCOTT JA:[1] The appellant is a company registered and incorporated in accordance with the laws of the Republic of Panama. It is the owner of the mv Gaz Progress. On 12 March 2002 it applied for, and was granted ex parte, an order in the High Court, Durban, for the arrest of the mv Le Cong which was then at berth in the port of Durban. The arrest was sought in terms of s 5 (3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act'). Its purpose was to provide security for a claim which the appellant intended to enforce by way of arbitration proceedings in London against Shantou Sez Chemical Industry and Petroleum Gaz General Company ('Shantou Sez'). The claim was for the payment of charter hire in respect of two periods of charter by Shantou Sez of the appellant's vessel, the Gaz Progress. In terms of the charterparty, disputes were to be determined by arbitration in London and in accordance with English law. The claim is a maritime claim within the meaning of s 1(1)(j) of the Act.[2] The Le Cong is owned by Guangzhou Ocean Shipping Company ('Guangzhou'). When the appellant's claim arose Shantou

Sez was the charterer by demise of the Gaz Progress. By reason of the provisions of s 3(7)(c) of the Act, Shantou Sez is accordingly deemed to be the owner of the Gaz Progress for the purposes of the associated ship provisions contained in s 3(6) of the Act. The basis upon which the arrest of the Le Cong was sought and granted was that both Shantou Sez and Guangzhou were 'state-owned enterprises' of the People's Republic of China and that the Le Cong and the Gaz Progress were accordingly associated ships within the meaning of s 3(6).

[3] Subsequently, on 20 March 2002, a letter of undertaking on behalf of Guangzhou was furnished to the appellant and the Le Cong was permitted to leave port. In terms of s 3(10)(a) (i), however, the vessel was deemed to remain under arrest.[4] The order granted on 12 March 2002 made provision for an application being made for the setting aside of the arrest after security had been furnished. The letter of undertaking similarly provided for such an application. It was launched on 4 July 2002 by Guangzhou which sought leave to intervene and an order setting aside the arrest. The merits of the appellant's claim against Shantou Sez were not placed in issue. Indeed, it appears that during the proceedings the arbitration was held in London and a final award was made in favour of the appellant for USD 3 831 233, together with interest and costs. Ultimately, the sole question in issue was whether in the circumstances the Le Cong was an 'associated ship' of the Gaz Progress. The matter was heard by Hurt J who found for Guangzhou and set aside the arrest with costs. The present appeal is with the leave of the court a quo.[5] It is necessary to quote ss 3(6) and 3(7) of the Act in full – '3(6) Subject to the provisions of subsection (9), an action in rem, other than such an action in respect of a maritime claim contemplated 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 purpose 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 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 sub-charterer, 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.[6] It is common cause that both Guangzhou and Shantou Sez are state-owned enterprises. Although not incorporated as companies according to the law of the People's Republic of China, they are nonetheless juristic persons capable of owning property. As previously stated, Guangzhou is the owner of the Le Cong, while Shantou Sez is deemed to be the owner of the Gaz Progress. In the absence of a commonality in ownership the appellant was accordingly obliged to rely on the provisions of s 3(7)(a)(iii) of the Act (read with s 3(7)(b)(iii)) to establish that the vessels were 'associated ships' within the meaning of s 3(6). The enquiry is therefore whether both state-owned enterprises are controlled by the same person. The appellant says that they are and that that person is the State of China. Guangzhou says they are not. The issue involves a consideration of the constitutional law of the Peoples Republic of China. Both sides filed affidavits by experts on Chinese law. There was a sharp dispute between them.[7] The Act contains no definition of 'power to control'. The nature of the power to control contemplated in s 3(7) was, however, considered in *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA). In that case the court was concerned with a situation in which the majority shareholder in each of two ship-owning companies was the same person who was a nominee holding the shares in each company for different persons. Nothing like that arises in the present case. What was common to all three of the judgments delivered in the *Heavy Metal* was the acceptance that it is not the power to control a company in the sense of managing its operations that is relevant, but the power to control its 'direction and fate'. In this regard Smalberger JA, who delivered the majority judgment, said in para 8 at 1105J – 1106A: "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". In the South African context, both would vest in the same person where the majority shareholder of a company is also its director. But the power to control the fate and direction of a company is typically the power which vests in the majority shareholder of a company or, in the case of a subsidiary, the majority shareholder in its holding company.[8] Before turning to the evidence it is necessary to make two further observations. The first is that although Guangzhou was the applicant in the setting-aside proceedings, the appellant bore the onus of establishing that its original application for the arrest of the Le Cong was correctly granted. See eg *Weissglass NO v Savonnerie Establishment* [1992] ZASCA 95; 1992 (3) SA 928 (A) at 936F-G. The second is that

the onus which the appellant bore of proving that the Le Cong was an associated ship within the meaning of s 3(6), unlike proof of its claim against Shantou Sez in respect of which a prima facie case was sufficient, had to be discharged on a balance of probabilities. See *Bocimar NV v Kotor Overseas Shipping Ltd*

[1994] ZASCA 5; 1994 (2) SA 563 (A) at 581B-D. [9] The evidence of Guangzhou's experts, which formed the basis upon which it was sought to set aside the arrest order, was shortly the following. While Guangzhou and Shantou Sez were described as 'state-owned enterprises' and said to be owned 'by the whole people', the concept of ownership in this context in Chinese law is a complex one, is largely abstract and does not correspond to the concept of civil ownership in western legal systems. Of greater significance, however, was the distinction between the levels of government at which the two enterprises were established and funded. Guangzhou was established and funded at the level of the central government; Shantou Sez was established and funded at municipal level. In this regard, (and this was common cause, or not in dispute) Guangzhou is one of several ship-owning state-owned enterprises established by China Ocean Shipping (Group) Company, itself a state-owned enterprise, which in turn was established and funded by the central government. Shantou Sez, on the other hand, was established by an enterprise called City Petroleum Chemical Industry Company (later renamed Shantou Wuzhou (Group) Company) which in turn was established and funded by the Shantou City Municipal Government. Each level of government is elected by popularly elected bodies. These are, in the case of the central government, the National People's Congress and in the case of the lower tiers of government, local people's congresses. In accordance with its Budget law China implements a system of central and local taxation with each level of government having its own independent financial status and being vested with exclusive rights in relation to the capital funds within its own particular budget. A state-owned enterprise established at a particular level of government, eg at municipal level, would be established with funds emanating from the budget at that level and such an enterprise would be subject to the control of the government at that level. Accordingly, in the present case, so the evidence went, the power to control Shantou Sez vests in the Shantou City Municipal Government and is exercised through Shantou Wuzhou (Group) Company. The central government is in law precluded from exercising control in respect of Shantou Sez or any of its assets. The powers of the central government are limited to those which one would expect to be vested in the central government of a largely unitary state and would relate typically to the promulgation of administrative rules of a general nature.[10] The response of the appellant's experts was to the effect that the funding of the organs of state at different levels did not establish independence between them; that there was no warrant for giving the words 'state-owned enterprise' anything other than their simple express meaning and that the reality of the People's Republic of China was that the central government controlled the provincial and municipal arms of the government which enjoyed no independence under the constitution.[11] It appears from the papers that the meaning given to 'power to control' in *Heavy Metal* was brought to the attention of the

experts on both sides. Ultimately the essential difference between them related to the seat of this power. The appellant's experts (an associate professor of law at the University of Hong Kong and an assistant professor of law at the City University of Hong Kong) contended that this power to control was vested in the central government and that in the instant case the Shantou City Municipal Government exercised no more than certain supervisory powers over Shantou Sez whose management attended to its day to day activities. Guangzhou's experts (a practising lawyer of Shenzhen in the Guangdong Province and a professor of law at Beijing University) maintained that the power of control in the above sense vested in the Shantou City Municipal Government. Professor Xing of Beijing University, in a replying affidavit, expressed his view as follows: 'I understand that reference to "control" in section 3(7) of the Act is a reference to the power to ultimately determine the fate and destiny of the legal person to which the control relates. Such control would include, for example, the ultimate power to cause the legal person to be wound up, to require that it merge with some other entity or dispose of major assets and the like in much the same way as the beneficial owner of the majority of shares or voting rights in a limited liability company has ultimate control notwithstanding the existence of a Board of Directors. It is that sense that I maintain that such ultimate control of SHANTOU SEZ vests in the SHANTOU Municipal Government (or the SHANTOU CITY PEOPLE'S CONGRESS) and not the Central Government or the NATIONAL PEOPLE'S CONGRESS. Neither the Central Government nor any of its Ministries or Departments could exercise any of the powers of the nature referred to above with regard to SHANTOU SEZ.' [12] The content and effect of foreign law is a question of fact and like any other fact must be proved (*Standard Bank of SA Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A) at 294G). Where the content and effect of foreign law is in issue in motion proceedings the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) must therefore be applied. In other words, regard must be had in the first place to the averments as to the foreign law contained in the applicant's affidavits (the respondent's affidavits in proceedings to set aside an arrest) which are admitted by the respondent (the applicant in setting aside proceedings) together with the averments as to the foreign law made by the respondent (the applicant in setting-aside proceedings). Where, however, the foreign law is statutory in nature a court will not simply accept the allegations made in the affidavits without question, especially if there is disagreement, but will itself examine the statute in the light of those allegations and as far as possible arrive at its own conclusion. See the *Standard Bank* case, *supra*, at 294H. In this court counsel for the appellant submitted that neither the constitution of the People's Republic of China (a copy of an English translation of which was included in the papers) nor the statutory enactments quoted in the affidavits supported the contentions advanced by Guangzhou's experts. In particular, he argued that merely because the different tiers of government may have been shown to be financially independent of each other, did not mean that they were not ultimately under the control of the central government. He accordingly submitted that even applying the rule in *Plascon-Evans*, the appellant had succeeded in discharging the burden of proving a commonality in control between Shantou Sez and Guangzhou which

rendered the Gaz Progress and the Le Cong associated ships within the meaning of the Act. [13] The extent to which a court will be dependent on the evidence of experts when interpreting a statutory provision of a foreign country will to a large extent depend upon the system of law in question. The statutory provision must, of course, be interpreted as it would by a court of the country in which it is enacted. The closer the system is to ours the more readily a court will rely upon its own judgement when faced with a problem of interpretation. In the present case, however, the People's Republic of China not only has a legal system different from ours but its constitutional and social structures are vastly different, as is its political philosophy and culture, and it is in this context that its laws must be interpreted. Some examples will illustrate the point. Article 1 of the constitution describes the People's Republic of China as a socialist state 'under the people's democratic dictatorship'. Article 2 proclaims that 'all power . . . belongs to the people' while article 6 speaks of 'ownership by the whole people and collective ownership of the working people'. These are all concepts which are wholly foreign to our constitution and legal system.[14] The above notwithstanding, the broad structure of the state as outlined in the Chinese constitution can be stated with reasonable certainty. The highest organ of state power is said in article 57 to be the National People's Congress. It is constituted through 'democratic elections' as are a number of local people's congresses at various levels of government. The latter, in terms of article 95, are established 'in provinces, municipalities directly under the Central Government, counties, cities, municipal districts, townships, nationality townships, and towns'. (The reference to 'municipalities directly under the Central Government' is a reference to particular municipalities and is not a description of the power of the central government.) The National People's Congress has specified powers and functions (one of which is the election of the president) as does its standing committee. Provision is also made for a State Council which is said in article 67 to be 'the Central People's Government' and 'the executive body of the highest organ of state power'. The powers of this council are similarly specified.[15] It is necessary to quote certain provisions of the Constitution which, it would seem, have some bearing on the issue before this court. In terms of article 89 the State Council has the power: 'to exercise unified leadership over the work of local organs of state administration at various levels throughout the country, and to formulate the detailed division of functions and powers between the Central Government and the organs of state administration of provinces, autonomous regions, and municipalities directly under the Central government.' One of the powers conferred on the Standing Committee of the National People's Congress in terms of article 67 is the power: 'to annul those local regulations or decisions of the organs of state power of provinces, autonomous regions, and municipalities directly under the Central Government that contravene the Constitution, the law or the administrative rules and regulations.' Article 16 (as amended in 1993) deals specifically with 'state enterprises'. It provides: 'State enterprises have decision-making power with regard to operation and management within the limits prescribed by law, on condition that they submit to unified leadership by the state and fulfill their obligations under the state plan.' Both sides sought to rely on a sub-paragraph in article 3. It reads: 'The division of functions and powers

between the central and local state organs is guided by the principle of giving full scope to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities.' Counsel for the appellant emphasised the reference to the unified leadership of the central authorities while counsel for Guangzhou argued that this was consistent with what his experts had said and emphasised the preceding words of the provision.[16] It is also necessary to quote from the Chinese Budget Law. The provisions in question are some of those to which reference was made by Guangzhou's experts. Article 2 reads: 'The State implements one level government, one level budget. Budget is divided into five levels, ie the level of Central Government; the level of Provinces, autonomous regions or municipalities directly under the Central Government; the autonomous prefectures, the level of counties, autonomous counties, cities, cities without districts or districts under cities; and the level of townships, national townships or towns.' Article 8 reads: 'The State implements the separate system of central taxes and local taxes.' This provision is explained in article 6 of the Rules for the implementation of the Budget Law of the People's Republic of China, 1995, which provides: "The separate system of Central Taxes and Local Taxes" referred to in Art 8 of the Budget Law means that the financial administration system determines the extent of central and local expenditures on the basis of division of power between the Central and Local Governments, and divides the central budget income and the local budget income by virtue of the different types of taxes.' Finally it is necessary to quote article 23 of the Budget Law. It reads: 'The Government in the Upper Tier shall not use the capital within the budget of the Lower Tier. The Government in the Lower Tier shall not hold the capital within the budget of the Upper Tier.' [17] It will be apparent that none of the provisions quoted above affords a decisive answer to the issue in question, namely whether the power to control Shantou Sez in the sense referred to in para 7 above rests with the Shantou Municipal City Government or whether, as in the case of Guangzhou, the power rests with the central government. Given the obvious difficulties facing a South African court when attempting to interpret provisions of such a nature or those of the Chinese Constitution generally, it has not been shown in my view that they are inconsistent with or do not support the statement of the law as set out in the affidavits of Guangzhou's experts. Indeed, there is much to be said for their exposition of the law, especially when regard is had to the Budget Law. It follows that as the appellant bore the onus of proof, Guangzhou's version as to the Chinese law had to be accepted as correct on the application of the rule in *Plascon-Evans*. [18] The appellant accordingly failed to establish that the *Le Cong* is an 'associated ship' of the *Gaz Progress* within the meaning of the Act and the appeal must fail. [19] The appeal is dismissed with costs. _____ D G SCOTT JUDGE OF APPEAL CONCUR BRAND JAJAFTA JAPONNAN JACOMBRINCK AJA

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