

SOUTH AFRICA / JUDGMENT

Saga Welco AS v MV "Guo Shun" (A79/2017) [2017] ZAKZDHC 43 (16 November 2017) [2017] ZAKZDHC 43

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Olsen

CASE / FILE NUMBER

A79/2017

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO.: A79/2017

Name of Ship: MV "OSHIMANA"

In the matter between:

SAGA WELCO AS APPLICANT

and

MV "GUO SHUN" RESPONDENT

Application in terms of Uniform Rule 6 (12) for reconsideration of order granted for the arrest of the MV "Guo Shun" on 30 October 2017.

REASONS

FOR JUDGMENT

OLSEN J

- [1] On 8 November 2017 I heard argument at the request of the owner of the respondent, which set this matter down for reconsideration of an order made on 30 October 2017 for the arrest of the respondent in the absence of its owner. I made an order deleting the order granted on 30 October 2017, and dismissing the application for authority to arrest the respondent, directing the applicant to pay the costs of the respondent's owner. These are my reasons for having done so.
- [2] On 15 July 2016 the applicant, in its capacity as the then disponent owner of the MV "Oshimana", time chartered that vessel to China Pacific Maritime Inc ("CPMI"). At that time the vessel was owned by Masterbulk (Pte) Ltd of Singapore which had time chartered the vessel to Westfal-Larsen Shipping AS; which in turn had time chartered the vessel to the applicant.
- [3] On 23 July 2016, whilst the vessel was on charter to CPMI, a cargo of steel products was taken on board at Shanghai, China for delivery to Venezuela. On arrival in or about October 2016 it was found that the cargo had been damaged en route and the cargo interests made a claim against Masterbulk for compensation. That claim was passed down the line to the applicant which claims in turn against CPMI.
- [4] These maritime claims will be dealt with in a London arbitration. Security in an amount of \$3 million has been provided to each claimant in the line except the applicant, which sought in these proceedings to arrest the MV "Guo Shun" (the respondent) for the purpose of providing security to the applicant for its claim against CPMI. On the date upon which the reconsideration of the order was argued before me the respondent had been under arrest for 9 days.
- [5] CPMI was the deemed owner of the MV "Oshimana" when the claims arising out of the cargo damage arose. The applicant sought in the present application to establish that the "Guo Shun" is an associated ship as contemplated by s 3(6) and s 3(7) of the Admiralty Jurisdiction Regulation Act, 1983 (the "Act"). In particular, and relying on s 3(7)(a)(iii) of the Act, the applicant sought to establish the association by proving on a balance of probabilities that at the time the claim arose CPMI (the deemed owner of the ship concerned) was controlled by one Wang Min Gang ("Mr Wang"); and that at the time of the proposed arrest of the respondent (the alleged associated ship) in October 2017, the owner of that vessel was also controlled by Mr Wang. It is common cause that the owner of the MV "Guo Shun" is Guo Shun Shipping Company Limited, which was represented in the reconsideration proceedings by Mr Wragge SC. The only issue raised by Mr Wragge is the question as to whether the applicant had discharged the onus of establishing that the respondent is an associated ship as alleged by the applicant. None of the other requirements for an arrest was challenged. The owner asked that the order be reconsidered on the applicant's papers.

GENERAL ISSUES RELATING TO THE APPLICANT'S EVIDENCE.

- [6] There are two sources of hearsay evidence which play a central role in the applicant's case, and with which I experience some discomfort. They should be dealt with first.
- [7] In May 2012, and under case number A56/2012, this court granted an order for the arrest of the MV "Sino West" to provide security in an arbitration involving CPM Corporation Limited ("CPM") of China. The owners of the "Sino West" applied for an order setting aside what had become the deemed arrest of the vessel. The central question in the case was whether Mr Wang controlled both CPM and the owner of the arrested vessel, Sino West Shipping Company Limited. When the matter was argued in December 2012 it was on affidavits delivered by both sides. The learned Judge who heard the argument considered the evidence placed before him on affidavit and concluded that at the time of the events which gave rise to the claim (July 2009) Mr Wang controlled CPM. This conclusion was reached after considering circumstantial evidence which in the court's view rendered it more plausible and probable, despite the the evidence put up against the proposition, that Mr Wang was in control of CPM at the relevant time. Having found that Mr Wang also controlled the company which owned the "Sino West", the learned Judge refused the application to set aside the arrest. However, he subsequently granted leave to appeal, presumably because he took the view that another court might reasonably reach a different conclusion. According to the founding affidavit in this case the earlier matter (which I will call the "Sino West case") was then settled on terms not disclosed by the applicant in these proceedings.
- [8] Large portions of the affidavits of Mr Norton, the attorney for the successful party in the Sino West case, were put up as annexures to the founding affidavit in this matter (which was not attested to by Mr Norton). A few pages of the opposing affidavit of Mr Reddy in the Sino West case were put up, the applicant proclaiming that it adopted the evidence given by Mr Norton but not that given by Mr Reddy. (I was informed from the Bar that a full set of the papers in the Sino West case were placed before the learned Judge who granted the order in this matter on 30 October 2017.)
- [9] The founding affidavit in the present matter describes the Sino West case as "circumstantially relevant to the question of association in this matter". I favour the proposition (which was not strenuously resisted on behalf of the applicant by Mr Fitzgerald SC, who appeared together with Mr Wallis) that, assuming that it is not unjust to receive this level of hearsay evidence from the earlier case, the weight to be attached to it is not substantial. The evidence was given in 2012 (5 years ago) with respect to a state of affairs with regard to CPM which obtained in 2009 (8 years ago). Nevertheless it is what is relied upon by the applicant in the present matter
- (a) to establish at least a connection between Mr Wang and CPM, if not control by him of CPM;
 - (b) to assert that Mr Wang is a person who can be identified as a central player in, and indeed a potential controller of, companies which fall into what the applicant calls "the Wang Group". (The terminology employed in the founding affidavit aside, there is no evidence of any collection of companies customarily being referred to as the "Wang Group".)

[10] There is no current evidence before me (i.e. evidence which originates in the present case, and not in the Sino West case; and which concerns the present state of affairs) which suggests that, if there is a single controlling shareholder of the various companies mentioned in the papers, it must be Mr Wang. The “group” the applicant seeks to have recognised comprises entities with names which include the words “China Pacific Maritime” or “CPM”, various entities with names including the word “Vasteast”, and various single ship owning companies.

[11] The other source of evidence put forward by the applicant which causes me discomfort is the evidence derived from a website

maintained by an organisation called “The International Consortium of Investigative Journalists” (ICIJ) which has what

is called an “off-shore leaks database”. The information given in the web page reports taken from the ICIJ site,

and which are produced and relied on by the applicant, appear to be sourced extensively if not exclusively from a set of leaked documents called “The Panama Papers”. In the founding affidavit the deponent says this of the information which she derives from searches of that database: “Such information is not guaranteed as being correct but is the best available in the circumstances”.

[12] What the Panama papers are is not explained in the founding affidavit – it appears that the court is expected impermissibly to take judicial notice of their nature and origin. The applicant has not described the process of collation of the information, the identities or qualifications of the persons who undertook that task, or the nature of the documents from which the information was drawn (official documents ordinarily inaccessible, or correspondence, and so on). One would have thought that if the information derived from the ICIJ was to play as central a role as it does in the applicant’s case, at the minimum the particular “papers” from which the information is derived would have been put up. (I observe, but cannot be sure, that there appear to be links to the Panama papers endorsed on the printed web page reports which are annexures to the founding affidavit.)

[13] Mr Fitzgerald has argued that the court’s task in considering the application is to take account of all the evidence, individual elements of which may be questionable as to their reliability and accuracy, to see whether on an overall conspectus the applicant has established on a balance of probabilities that Mr Wang controls both CPMI and the owner of the respondent. As it turns out, Mr Wragge in his argument approached the evidence very much in the manner suggested by Mr Fitzgerald, and argued, correctly in my view, that the conclusion to be drawn from that exercise is that the evidence does not establish the requisite association. In the circumstances I do not need to consider the question as to whether the information derived from the ICIJ website should be admitted in evidence at all. Neither do I have to pay too much attention to my concern that if that evidence is admissible, given the failure of the applicant to establish its reliability, the weight of it must

be less than substantial. This latter observation applies also to the historical hearsay evidence introduced through the papers in the Sino West case.

- [14] Relying on the cases of *Hasselbacher Papier Import and Export (Body Corporate) and Another v MV “Stavroula”* 1987 (1) SA 75 (C), *Strydom v Engen Petroleum* 2013 (2) SA 187 (SCA) and *Ex Parte The Minister of Justice: in re Rex v Jacobson & Levy* 1931 AD 466, it was argued that the applicant should be allowed a degree of latitude as regards the factual allegations upon which it

relies, because they have not been answered or disputed in opposing papers. In particular Mr Fitzgerald referred to the principle

(for which *Jacobson & Levy* was cited as the principal authority) that prima facie evidence can become conclusive proof if it is not answered by the other side.

- [15] In the *Stavroula*, Burger J had to consider an application made by the owners of that vessel for its release from an arrest authorised on application

without notice. The relief was sought by the owner of the ship in a counter-application supported by an affidavit of its attorney, Mr Herholdt. The issue in the case relevant for present purposes was the question as to whether a certain Captain Lelakis had control of the respondent. In a replying affidavit Mr Herholdt stated that the respondent had deliberately not dealt with “any relationship, or lack thereof” between Captain Lelakis and the respondent company as it did not regard itself as obliged to do so. He argued that because the onus of proof of establishing the requisite association had not been discharged by the applicant on a balance of probabilities, no evidence in rebuttal was required. The learned Judge referred to the principle that less evidence is ordinarily required to establish a prima facie case where the matter is peculiarly within the knowledge of an opposing party, with the result that “it is proper to put the failure to deny into the scale before one decides that a prima facie case has been established”. The application to set aside the arrest was refused. (It is not clear to me why in the *Stavroula* the learned Judge was concerned with whether a prima facie case had been established. Counsel for the applicant were unable to assist me in that regard.)

- [16] Counsel argued that the decision in the *Stavroula* had been approved in *Strydom v Engen*, but I do not agree fully with that proposition. The learned Judge in *Strydom*’s case placed a reference to the *Stavroula* in a footnote containing authorities for the proposition 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. The context in *Strydom* was quite different, and it cannot be regarded as an endorsement of the overall approach adopted in the *Stavroula* to an enquiry into whether an association between ships has been proved.

- [17] Reference to Jacobson & Levy was made in both the Stavroula and in Strydom's case. The subject in Jacobson & Levy was a burden of proof cast upon an accused person, and what was required to discharge it. The following appears at pages 478 to 479.

“ ‘Prima facie’ evidence in its more usual sense, is used to mean prima facie proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus. It is not, however, in every case that the burden of proof can be discharged by giving less than complete proof on the issue; it depends upon the nature of the case and the relative ability of the parties to contribute evidence on that issue.”

- [18] On these authorities Mr Fitzgerald argued that if it should appear that the applicant's evidence establishes no more than a prima facie case, that should be regarded as having ripened into proof on a balance of probability because the owner of the respondent has not delivered an affidavit denying the existence of the association which the applicant has sought to establish. However in my view the present case is one of those mentioned in the above passage from the judgment of Stratford, J.A. in Jacobson and Levy, which in its nature is one that does require “complete proof on the issue” to be furnished by the applicant. Complete proof in this case is proof of the standard required by our law, that is on a balance of probabilities. The respondent's owner has come before the court not with an application to set aside the original order, but exercising its right to have the original order reconsidered because it constituted final relief granted without hearing the respondent. The question is whether the order ought to have been made on the applicant's papers. The owner's right to approach this court for reconsideration of the order in that fashion is not challenged by the applicant. The manner in which the respondent has engaged the court distinguishes the present case from the Stavroula.

- [19] Orders for the arrest of vessels are ordinarily for good reason granted without notice. It is self-evident that a judge

confronted with such an application, and the requirement that the requisite association must be established on a balance of probabilities, cannot authorise the arrest of a vessel on lesser evidence, throwing into the mix that it is unchallenged. The procedure adopted excludes any possibility of a challenge, and accordingly the requisite standard must be met by the applicant without the benefit of it being endorsed or supported by the absence of a challenge to its veracity by the respondent. That does not mean, however, that there is not room for the application of the principle that less evidence will suffice if the relevant facts are peculiarly within the knowledge of the alleged associated parties.

- [20] Mr Fitzgerald argues that whilst conceding the right of the respondent's owner to approach the court on the basis that it has in this case, the fact that the respondent has chosen to do that instead of applying to have the arrest set aside in an application (or counter-application), supported by affidavits addressing the case made by the applicant, should be regarded as a circumstance lending support to acceptance of the applicant's evidence and

assertions based on it. (As I understood this argument it is the choice of procedure made by the respondent's owner which should be placed in the mix.) In my view that cannot be done without undermining the right of the respondent to be heard on the question as to whether the arrest ought ever to have been granted on the papers placed before the court by the applicant. In any event, as Mr Wragge argued, there is a substantial practical difference between the two available procedures. When the case came before me the vessel had been under arrest for 9 days. Mr Wragge points out that if the respondent had decided to approach the court on affidavit, given the time required to complete a full set of affidavits, and the state of the rolls in this court, the matter would not have come before the court for about 2 months. Correctly in my view, that estimate was not challenged by the applicant. I conclude that it would not be proper to afford the applicant more generosity in the assessment of its case because of the fact that the respondent has chosen to exercise its right to ask for the reconsideration of the case on the applicant's papers alone.

THE ALLEGED CONTROL OF CPMI (THE DEEMED OWNER OF THE MV "OSHIMANA") BY MR WANG DURING OCTOBER 2016

[21] It was not disputed in argument that the control in issue here is the power to determine the direction and fate of the companies with which we are concerned. Nor, as I understood counsel, is there any dispute about the proposition that the direct and indirect power referred to in s 3(7)(b)(ii) of the Act must be understood to be as described in paragraph 10 of the judgment of Smalberger JA in *MV Heavy Metal : Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) at 1106.

[22] Relying on the outcome of a search of the ICIJ database, the applicant contends that the sole shareholder of CPMI is a company

called Beltruno Limited. Relying on a search on Beltruno Limited the applicant has found one Li Bao Jun noted as a shareholder

of that company. A search on Li Bao Jun shows that he was once a shareholder in a company called CPM Inc registered in British Anguilla (ie not CPMI), but strangely enough that search does not record a link between him and Beltruno Limited.

[23] No other information is available in order to establish where de jure control over CPMI resides (now or in October 2016). That being the case, to succeed on this leg of its argument, the applicant had to establish that Mr Wang exercised de facto control over CPMI in the sense that he exerted authority over the person who exercised de jure control over the company (be it Beltruno Limited or any other person or entity). No evidence at all of Mr Wang being involved in the business of CPMI at any level has been produced by the applicant. There is no established connection between Mr Wang and Beltruno Limited.

[24] Instead, the applicant has sought to rely principally on the emergence of companies bearing the name "Vasteast" in the Sino West case, and a co-incidence of accountants and addresses (in the latter case not always accurately stated in the founding papers). The applicant also

points to the email address of CPMI which, according to what is said to be a “domain name system tree review”, has a common IP address with a number of other companies or entities having names which are iterations of China Pacific Maritime (or CPM) or Vasteast. As I understand the argument put up by the applicant, it is that the learned Judge who decided the Sino West case decided that Mr Wang controlled the company which was material in that case (CPM) and the company bearing the name Vasteast. As to the second of these propositions I am not sure that it is correct. Be that as it may, insofar as CPM was concerned, what was sought to be proved in the Sino West case was that in 2006 Mr Wang controlled that company. The case sought to be made then was that he exercised de facto control. In my view one cannot deduce from the fact (if it be a fact) that Mr Wang exercised de facto control over CPM in 2009 that he must have exercised de facto control over a different company, CPMI, seven or more years later in October 2016. In saying that I am all too aware, as I was urged to be by Mr Fitzgerald, of the difficulties confronted in proving an alleged association on a balance of probabilities. (See *MV Silver Star: Owners of the MV Silver Star v Hilane Ltd* 2015 2 SA 331 (SCA) at 346, para [39].) But, equally, when considering evidence of the kind now placed before the court by the applicant,

- (a) the drastic consequences of an incorrect finding of control should not be overlooked; and
- (b) the generation of suspicion, which is often a feature of cases like the present, is not sufficient to justify the arrest of a vessel.

(As to the foregoing see *Bulk Joyance : Elstead Limited v Bulk Joyance* 2013 SCOSA C219 (D) at C228, paras [41] and [43].)

MR WANG’S ALLEGED CONTROL OF GUO SHUN SHIPPING COMPANY LIMITED OF HONG KONG, THE OWNER OF THE RESPONDENT

[25] The respondent is managed by Shanghai Vasteast International. This the applicant establishes with reference to the Equasis web based information system relating to shipping, the reliability of which appears to have been satisfactorily established by the applicant in its founding papers. A printout produced by the applicant for Shanghai Vasteast International lists eight ships managed by it. For reasons which are not perfectly clear to me the applicant deals with three of those vessels, the Tai Rui, the Guo Rui and the respondent, as requiring some analysis. I say that it is not clear to me because, although these three companies follow a similar naming convention, no connection whatsoever is established between Mr Wang and the owners of the Tai Rui and Guo Rui. There is no evidence that Mr Wang controls any of the other companies listed as managed by Shanghai Vasteast International.

[26] The annual return of the Guo Shun Shipping Company Limited reveals that it’s shares are owned as to 5000 by Nepoch Holdings

Limited, 3900 by one Zhang Zu Liang and 1100 by one Zhuang Yangman. Zhang Zu Liang is listed as the Director of the company.

[27] Relying again on a web search of the ICIJ database, the applicant seeks to establish that the shareholders of Nepoch Holdings are one Liu Xiaoliang and Mr Wang, but the applicant is unable to establish the extent of their respective shareholdings. No evidence has been provided that Mr Wang controlled Shanghai Vasteast International in October 2017, when the respondent was arrested. Even if he did control that company, the fact that he controls the manager of the three vessels does not mean that he controls the owner of any of those vessels. There is no evidence to the effect that, despite the fact that it owns only 50% of the shares in the owner of the respondent, Nepoch Holdings controls Guo Shun Shipping Company Limited. (As to the implications of a “mere” 50% holding, see *MV La Pampa : Louis Dreyfus Armateurs SNC v Tor Shipping*

[2006] ZAKZHC 3; 2006 (3) SA 441 at 454, para 54.) There is no evidence of any activity on Mr Wang’s part signifying the exercise of control by him over the respondent’s owner. There is no evidence supporting the proposition that the other two shareholders of the owner are mere figureheads, or under the control and direction of Mr Wang.

[28] Having dealt with the evidence set out above (under the present heading), the founding affidavit then goes on to state that , according to the affidavit of Mr Reddy in the Sino West case, Liu Xiaoliang also goes by the name of Roy Liu, and that he was a mutual friend and business partner of Mr Wang. Having added that to the mix of evidence given, the founding affidavit proceeds

immediately to a submission that “it is overwhelmingly probable that Mr Wang controls Guo Shun Shipping Company and that Mr Liu, Zuang Zu Liang and Zhuang Yangman are simply nominees for that purpose, just as he controls both Tai Rui Co and Guo Rui Co.” In my view the premises upon which such an assertion could be made are near totally absent.

CONCLUSION

[29] Concerning what might be called the peripheral evidence in this case, such as common addresses (where they were correctly identified in the founding affidavit), common accountants and email addresses sharing a common server, those are phenomena which one would expect to find where there is common management. However common ownership, especially of the vessels to which reference is made in the papers, or control of them, is by no means a necessary condition for the existence of common management. Mr Fitzgerald submitted that these types of arrangements may legitimately be taken to signify a relationship between the participants in them (i.e. the ship owning companies and charterers under common management). In my view such a relationship, which might be convenient for the conduct of the business of any participating vessel, does not have as a required condition for its existence, that there should be common ownership or common control of participating companies. (See *The Theokeetor : Ssang Yong Shipping Co Ltd v The MV Theokeetor 1987 SCOSA C81 (D)* at C84 E-G; and *Transgroup Shipping v The Kyoju Maru 1984*

(4) SA 210 (D) at 215A and 216F-G.)

[30] CPMI did not feature at all in the Sino West case. Neither did the respondent or its owner. Mr Fitzgerald was constrained to concede that, given those facts and especially the fact that the papers in the Sino West case speak to events and circumstances which allegedly obtained some time ago, the link between what the applicant seeks to derive from those papers and what is sought to be established in the present litigation is somewhat tenuous. Nevertheless, Mr Fitzgerald urged that in this case a robust approach is called for. He urged on behalf of the applicant that an assessment of the cumulative effect of the available evidence would support a finding that the applicant discharged the onus on it to establish the requisite association.

[31] However, on the question of Mr Wang's alleged control over both CPMI and the owner of the respondent, and even overlooking the uncertain qualities of some of some of the evidence which is crucial to the applicant's argument, I find that the cumulative effect of the material provided by the applicant does no more than justify speculation along the lines that Mr Wang's role in the affairs of the various business entities and companies may be a controlling one in some respects. However a finding that the available evidence might justify such speculation does not justify a finding that the evidence is sufficient to prove the requisite elements of control on Mr Wang's part. It cannot be overlooked that there is an absence of any evidence regarding Mr Wang's activities since the events leading up to, and the conduct of, the Sino West case, in 2009 and 2012 respectively.

[32] For these reasons I made the order mentioned at the outset.

Date : 16 November 2017

Date of Hearing: WEDNESDAY, 08 NOVEMBER 2017 Date of Reasons for Judgment: 16 NOVEMBER 2017

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