Reportable

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

(Exercising its Admiralty Jurisdiction)

Appeal Case No: AR469/2017

Admiralty Case No: A23/2015

Name of ship: **MT "PRETTY SCENE"**

In the matter between:

GALSWORTHY LIMITED **APPELLANT**

and

PRETTY SCENE SHIPPING SA **FIRST RESPONDENT**

MT "PRETTY SCENE" **SECOND RESPONDENT**

Full Court Appeal Case No: AR157/2018

Admiralty Case No: A65/2016

Name of ship: **MT "PRETTY SCENE"**

In the matter between:

PRETTY SCENE SHIPPING SA **FIRST APPELLANT**

MT "PRETTY SCENE" **SECOND APPELLANT**

and

GALSWORTHY LIMITED **RESPONDENT**

JUDGMENT

Delivered: 4 March 2019

Mbatha J (Madondo DJP and Van Zyl J concurring)

Introduction

[1] This is an appeal from judgments delivered on 31 October 2016 and 22 September 2017 by Vahed J and Henriques J, respectively, in the KwaZulu-Natal Local Division of the High Court, sitting as a court of admiralty, in terms of the Admiralty Jurisdiction Regulation Act[1] (the Act).

1.1 In the first judgment under case number A23/2015 on 31 October 2016 Vahed J in an application brought by Pretty Scene Shipping SA and MT "Pretty Scene" (jointly referred to as 'the Pretty Scene parties') against Galsworthy Limited made the following orders in favour of the applicant:

'(a) The writ of summons *in rem* and the warrant of arrest issued out of this court in respect of MT "Pretty Scene" are set aside;

(b) The MT "Pretty Scene" is released from arrest forthwith;

(c) The Sheriff of this Court is directed to effect the release of the MT "Pretty Scene" from the arrest by service of a warrant of release to be issued by the Registrar of this Court; and

(d) The respondent is directed to include the costs of two counsel where employed and are to include all costs reserved on previous occasions.'

1.2 In the second judgment under case number A65/2016 involving the same parties, Henriques J dismissed the application by Pretty Scene Shipping SA and MT "Pretty Scene" to set aside the arrest of the MT "Pretty Scene" at the instance of Galsworthy Limited and dismissed the counter-application for security brought by Pretty Scene Shipping SA arising from the arrest of the MT "Pretty Scene". The applicant was ordered to pay costs in respect of both applications.

[2] In both matters leave to appeal was sought but the applications for leave to appeal were dismissed by Vahed J and Henriques J, respectively. However, having petitioned the Supreme Court of Appeal (the SCA) leave to appeal was granted to the Full Court, KwaZulu-Natal Division of the High Court, Pietermaritzburg, in respect of both matters. The two appeals were consolidated for hearing before the full court.

[1] Admiralty Jurisdiction Regulation Act105 of 1983.

The background to both the matters

[3] On 16 April 2015 Galsworthy Limited, under case number A23/2015, caused to be issued out of the KwaZulu-Natal, Division of the High Court, Durban, exercising its Admiralty Jurisdiction, a writ of summons *in rem* against Pretty Scene Shipping SA and the vessel MT "Pretty Scene" as the defendants. A warrant of arrest supported by a Certificate in terms of Rule 4(3) of the Admiralty Rules (the Rules)[2] was issued simultaneously with the writ of summons *in rem*. To ensure the arrest of the vessels belonging to Pretty Scene Shipping SA similar anticipatory orders were obtained from the Western Cape and Eastern Cape High Courts, in the event that the vessels failed to dock at the Durban Harbour. Fearing that it may become common knowledge that such processes were issued, with the result that the cited vessels may not dock in the aforementioned harbours, the applicant sought an order that the details thereof not be published and be kept in a secure place by the registrar of the court. The matter served before Mnguni J on 16 April 2015, who granted the order authorising the registrar to issue the warrants of arrest and writs of summons *in rem*; that the details of the application not be published and the court files in each of the actions be kept in a secure place and not to cause the details of the applications and the actions *in rem* to be entered into the court records and that they be made available for public inspection only upon written confirmation received from Galsworthy's attorneys or in the event of the court so ordering.

[4] Subsequently thereafter Galsworthy brought an application on 29 March 2016 in terms of s 1(2)*(b)*(iii) of the Act read with Rule 6(1)*(a)* where it sought orders to extend the period of validity of the writs and the periods within which the summons and the warrant of arrest may be served up to the 15 April 2018. This matter served before Radebe J in this division, who extended the orders. All the courts who previously granted the anticipatory orders, extended the orders.

[5] On 19 June 2016 the MT "Pretty Scene" being one of the vessels cited in the writ of summons docked within the jurisdiction of this court and Galsworthy caused the vessel to be arrested and summons was served in accordance with the Rules. The service of the warrant of arrest and the issuing of the summons on 16 April 2015 commenced the action against MT "Pretty Scene", as the defendant.

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[2] Rules regulating the conduct of the admiralty proceedings of the several provincial and local divisions of the supreme court of South Africa, GN R571, *GG* 17926, 18 April 1997.

[6] On 1 July 2016 an application was brought by Pretty Scene Shipping SA and the vessel MT “Pretty Scene”, who sought an order setting aside the arrest of the MT “Pretty Scene”. The application which was opposed by Galsworthy and this application came before Vahed J who on 31 October 2016 set aside the writ of the summons *in rem* and the warrant of arrest on the basis of the applicant’s failure to comply with the provisions of Rule 2(1)(b) and Practice Directive 27, of the KwaZulu-Natal High Court. He found this ground to be dispositive of the matter and did not consider other grounds advanced in the alternative by Pretty Scene Shipping SA and the vessel MT “Pretty Scene”.

[7] The application before Vahed J was argued on 12 August 2016 and judgment was reserved. Whilst the judgment of Vahed J was awaited, Galsworthy caused a second warrant of arrest and summons *in rem* under case number A65/2016 to be issued against the vessel on 18 August 2016. This was also done *ex parte*, without any notification to Pretty Scene Shipping SA and the vessel MT “Pretty Scene” in the matter before Vahed J and also without any notification to the Judge himself as he was seized with the matter. This application was granted by the Registrar of the High Court.

[8] Galsworthy did not immediately serve the processes until 28 October 2016, when the parties were informed that Vahed J’s judgment would be delivered on 31 October 2016. Having received such a notification, Galsworthy, before delivery of the judgment caused the warrant of arrest and the summons to be served upon the vessel MT “Pretty Scene” for the second time. On 31 October 2016, when the judgment of Vahed J was handed down, neither the Pretty Scene parties’ attorneys nor the Judge concerned were advised of the second arrest of the vessel.

[9] As a consequence of the actions of Galsworthy, Pretty Scene Shipping SA and MT “Pretty Scene” brought an application to set aside the second arrest of the vessel under case number A65/2016. They also sought security in respect of a counter-application for damages for wrongful arrest, which they intended pursuing against Galsworthy in the action *in rem*. This application was heard before Henriques J, who dismissed the applications by Pretty Scene Shipping SA and MT “Pretty Scene” on a number of grounds, which I will deal with at a later stage. She confirmed the order for the arrest of the vessel in favour of Galsworthy.

The appeal against the judgment of Vahed J under case number A23/2015

[10] For the sake of convenience, I will deal first with the appeal arising from the setting aside of the writ of summons *in rem* and the warrant of arrest arising from Vahed J's judgment.

[11] Galsworthy by way of a writ of summons *in rem* and the warrant of arrest sought to enforce two arbitration awards made by an arbitration tribunal in London in its favour against Parakou Shipping PTE Ltd ("Parakou Singapore"):

(a) A first and final arbitration award in the sum of US$2,673,279.15 plus interest and costs dated 13 August 2010; and

(b) A second and final arbitration award in an amount of US$38,579,000.00 plus interest and costs dated 13 May 2011, and

(c) Alternatively, a claim for damages on the same amounts arising from a breach on the part of "Parakou Singapore" of the terms of the charterparty agreement that the arbitrators found had been concluded between the parties on or about 18 June 2008 (the original claim), which orders were authorised by Mnguni J.

[12] Pretty Scene Shipping SA and the vessel MT "Pretty Scene" brought an application to set aside the writ of summons *in rem* and the warrant of arrest. The Pretty Scene parties advanced the following grounds:

(a) Galsworthy's failure as regard the writ of summons, to comply with Rule 2(1) and Practice Directive 27 as the summons did not contain "a clear, concise statement of the nature of the claim" and "a statement of the facts upon which the claim is based" and "a statement of facts on the basis of which it is stated that the ship is an associated ship".

(b) They advanced that Galsworthy's alternative claim has prescribed and is res judicata.

(c) The provisions of s 299(1) of the Singapore Companies Act[3] have imposed a moratorium on the enforcement of the appellant's claims, which moratorium came into effect after the commencement of the winding-up of "Parakou Singapore".

(d) Galsworthy's failure to demonstrate that the MT "Pretty Scene" is an associated ship in relation to the MT "Jin Kang", because of the misplaced reliance by Galsworthy upon the deeming provisions of s 3(7)(c) of the Act, as "Parakou Singapore" was not the charterer of the ship concerned, the MT "Jin Kang", when the appellant's claim arose.

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[3] Singapore Companies Act, Cap 50, available at https://sso.agc.gov.sg/Act/CoA1967, accessed 26 February 2019.

(e) Galsworthy has failed to demonstrate that the MT "Pretty Scene" was an associated ship in relation to the MT "Jin Kang", by reason of the intervening liquidation of "Parakou Singapore", at the time of which Galsworthy's cause of action for the enforcement of the second arbitration arose, which it is claimed that was when the second award was made on 13 May 2011.

(f) The Pretty Scene parties further asserted that Por Liu, the person alleged to be in control or being the owner of the MT "Pretty Scene", was not in control of "Parakou Singapore", as control had been transferred to the liquidators when the winding-up of the Parakou Singapore company commenced.

[13] In his judgment Vahed J found that the first ground relied upon by the Pretty Scene parties was dispositive of the matter and that the other grounds were preferred as arguments in the alternative. He then went on to consider the first ground.

[14] Vahed J set aside the arrest for non-compliance with Rule 2(1)(a) and (b), which provides that:

'(1) *(a)* A summons shall be in a form corresponding to Form 1 of the First Schedule and shall contain a clear and concise statement of the nature of the claim and of the relief or remedy required and of the amount claimed, if any.

(b) The statement referred to in paragraph *(a)* shall contain sufficient particulars to enable the defendant to identify the facts and contentions upon which the claim is based.'

This should be read with the provisions of s 1(2) of the Act which provides as follows:

'(2) *(a)* An admiralty action shall for any relevant purpose commence—

(i) by the service of any process by which that action is instituted;

(ii) by the making of an application for the attachment of property to found jurisdiction;

(iii) by the issue of any process for the institution of an action *in rem*;

(iv) by the giving of security or an undertaking as contemplated in section 3 (10) *(a)*.

(b) An action commenced as contemplated in paragraph *(a)* shall lapse and be of no force and effect if—

(i) an application contemplated in paragraph *(a)* (ii) is not granted or is discharged or not confirmed;

(ii) no attachment is effected within twelve months of the grant of an order pursuant to such an application or the final decision of the application;

(iii) a process contemplated in paragraph *(a)*(iii) is not served within twelve months of the issue thereof;

(iv) the property concerned is deemed in terms of section 3 (10)*(a)*(ii) to have been released and discharged.'

Vahed J's judgment rested on the leading judgment on the subject, the *Galaecia*,[4] a judgment by Combrinck J, which places emphasis on sufficient compliance with the requirements of Rule 2(1)*(b)*.

Was the nature of the claim established?

[15] In general, when one is proceeding to enforce a maritime claim the plaintiff issues a writ of summons *in rem* as prescribed in terms of s 3(4) of the Act and Rule 2(1). One applies to the Registrar, of the High Court, (not the court) for the issuing of an arrest warrant supported by a Rule 4(3) Certificate either signed by the applicant or his attorney. The registrar is empowered to issue such process unless if he/she feels that the matter should serve before a judge.

[16] The requirements of Rule 2(1)(b) are peremptory in nature. To restrict any abuse of the process for a party to obtain a warrant of arrest *in rem* pursuant to the issue of the summons in the action *in rem*, hence a certificate in terms of Rule 4(3) signed by the applicant or his attorney must be filed therewith. The contents of the certificate serve as a safeguard to the respondent as it has to contain the following averments: (a) that the claim is a maritime claim; (b) that it is a claim in respect of which the court has or will have jurisdiction on the effecting of the arrest; (c) that the property to be arrested is property in respect of which the claim lies or that it is an associated ship, (d) whether security or an undertaking has been given in respect of the claim or to procure the release, or prevent the arrest or attachment of the property sought to be arrested and if so, what security or undertaking has been provided and the grounds for seeking the attachment order despite such security having been given; and (e) that the contents of the certificate are true and correct to the best of the knowledge and belief of the signatory and what the source of the knowledge and information is.

[17] In terms of Rule 4(2)(a) the registrar is empowered to issue the summons *in rem* and the warrant of arrest *in rem* without the authorisation of the court. However, as a safeguard, the registrar may refer the application to the court as to whether the process may be issued or not. The registrar will do so if it appears from the

[4] *Vidal Armadores SA (Owner of the MFV "Galaecia") v Thalassa Export Co Ltd* 2006 JDR 0379 (D).

certificate filed or where he/she has knowledge that security or an undertaking to give security in terms of the relevant provisions of the Act is to prevent the arrest or attachment of the property in question. In these circumstances a warrant can only be issued by the registrar once it has been authorised by the court.

[18] I defer to Vahed J's judgment, where he states as follows:

'[14] When the *Pretty Scene* was arrested the warrant of arrest was accompanied by the writ of summons and a certificate in terms of rule 4(3) of the Admiralty Rules. The writ of summons consisted of 20 numbered paragraphs, a format very similar to a simple summons issued out of the courts parochial. The first paragraph described the respondent and the second paragraph described the second applicant simply as a vessel ". . . which is expected to call at a port within the jurisdiction . . . at some time in the future". The third to fifteenth paragraphs described the first and second arbitration awards and concluded in a claim for their enforcement. The sixteenth paragraph set up the alternative claim. Nowhere in what was set out in the third to sixteenth paragraphs was there any reference or allegation connecting the *Pretty Scene* or its owner to the claims made. In the seventeenth paragraph a statement is made concerning the deeming of ownership of the *Jin Kang* by Parakou Singapore. The nineteenth and twentieth paragraphs contained allegations that the claims were Maritime claims and the claims for payment interest and costs.

[15] The eighteenth paragraph was formulated in the following terms:

"The [*Pretty Scene*] is an associated ship of the mv 'Jin Kang' as defined in terms of Section 3(6) and (7) of the Admiralty Act. The Plaintiff's claims accordingly are enforceable by an action *in rem* against the Defendant."

[16] In its material provisions the accompanying certificate made the identical claim as to association.

[17] Annexed to the writ of summons were copies of the first and second arbitration awards. Those documents contained nothing connecting the *Pretty Scene* or its owner to the claims made.'

And compare it with paras 1 and 2 in the *Galaecia:*

'[1] On 20 February 2006, the respondent issued a summons in an *in rem* action against the mfv "Galaecia". The vessel called at Durban and on 14 March 2006 was arrested pursuant to a writ issued in the *in rem* action. The applicant, the owner of the vessel, applied on notice for the setting aside of the arrest. The application was opposed by the respondent. After hearing argument, I set aside the arrest on the basis that the respondent's claim was not a maritime claim as defined in section 1 of Act 105 of 1983. I indicated that I would hand down my reasons later. These are the reasons.

[2] The arrest was effected in terms of Admiralty Rule 4(3) a summons having been issued in terms of Admiralty Rule 2. In the summons, the respondents claim is worded thus:

"1. Payment of the sum of US$1,825,330.00 being damages suffered by the Plaintiff arising from the purchase of a cargo of frozen sea bass ex the motor fishing vessel "Carran" on or about 1 April 2004.

2. The Plaintiff's claim is a maritime claim within the meaning and definition of section 1(1)(g) and/or section 1(1)(v) and/or section 1(1)(ee) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983 as amended ("the Act").

3. The Defendant is an associated ship of the mfv "Carran" within the meaning and definition of sections 3(6) and 3(7) of the Act.

WHEREFORE the Plaintiff claims:

1. Payment of the sum of US$1,825,330.00 (One Million Eight Hundred and Twenty Five Thousand Three Hundred and Thirty United States Dollars);

2. Interest on the above mentioned amount according to law;

3. Costs of suit.

4. Further and/or alternative relief."'

The certificate in terms of Rule 4(3) by the Pretty Scene parties'attorney which has to accompany the arrest warrant reads as follows:

'I the undersigned, MALCOM CHARLES HARTWELL, do hereby state:

1. I am an attorney of the High Court of South Africa, Natal Provincial Division, practicing as a director of Deneys Reitz Inc. 4th Floor, The Marine, 22 Gardiner Street, Durban.

2. To the best of my knowledge, information and belief the contents of this certificate are true and correct. The source of my knowledge arises, *inter alia* from Roger Field of Webber Wentzel Bowens, the Plaintiff's attorneys who received instructions and documentation from Benoit Lenoir, Director, Thalassa Export Co Ltd. Mauritius.

3. The Plaintiff's claim is a maritime claim within the meaning and definition of section 1(1)(g) and/or section 1(1)(v) and/or section 1(1)(ee) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983 as amended ('the Act').

4. The motor fishing vessel "*Carran*" is the maritime property against which the Plaintiff's claim lies. The Defendant is an associated ship of the "*Carran*" within the meaning and definition of sections 3(6) and 3(7) of the Act.

5. No security or undertaking to pay has been given in respect of the Plaintiff's claim.

6. The Honourable Court has jurisdiction to determine this matter by virtue of section 2(1) of the Act read with sections 1(1) (g), 1(1)(v), 1(1)(ee), 3(6) and 3(7) of the Act.'

[19] In the *Galaecia*, the court set aside the arrest of the vessel on the basis of procedural defects in the summons *in rem*, where the arrest of the ship was in terms of Rule 4(3). The summons *in rem* was found to be non-compliant with Rule 2(1); in that it did not contain sufficient particulars to enable the defendant to identify the facts and contentions upon which the claim was based; it merely contained conclusions of law. The court took exception to the deprivation of a person of valuable property on a bare skeleton of a summons *in rem* and an inadequate certificate, as it would have caused enormous prejudice to the owner of the ship concerned. This is the state of affairs that made Combrinck J in para 4 to question such a "procedure which allows a person to be deprived of the possession of his property without a court order", as it may not be constitutionally sound. This was echoed against the backdrop of s 25 of the Constitution[5] which provides that no law may permit arbitrary deprivation of property. This is clear from the wording of the Rules that the applicant needs to discharge the onus on a balance of probabilities to show that he has a prima facie case on the merits. This is the first hurdle that the applicant has to cross before consideration is given as to whether the applicant is entitled to enforce the claim against the respondent in line with s 3(6) read with s 3(7) of the Act.

[20] Though acknowledging the concerns raised by Combrinck J the learned author John Hare,[6] holds the view that there should be no constitutional difficulty upon an arrest granted by the registrar upon a Rule 4(3) Certificate, '*properly prepared*' (my emphasis). He goes on to state that '[procedurally], the powers of the bench are delegated to the registrar in limited circumstances, with the safeguard that the registrar's order may be set aside upon the motion of any interested party thus giving that party a "fair public hearing before a court."'[7] The concerns raised in the *Galaecia* are genuine as the authorisation of these processes are final in nature, if no application is made to set aside the warrant of arrest. In terms of the common law and our civil jurisdiction an *ex parte* order is provisional until confirmed on the return date after service upon the respondent, which is not the case with the Rule 4(3) certificate procedure.

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[5] The Constitution of the Republic of South Africa, 1996.
[6] John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2ed at 83 para 2-2.2.2.
[7] Hare fn6 at 83 para 2-2.2.2.

[21] The high court exercising admiralty jurisdiction, subject to the provisions of the Act, is empowered to exercise jurisdiction to hear and determine any maritime claim irrespective of where it arose, the place of registration of the ship concerned, or the residence, domicile or nationality of its owner (s 2(1)). This is confirmed in *Lawsa* where it is stated that '[admiralty] jurisdiction is therefore said to be a jurisdiction based on the nature of the claim in dispute, without regard to the grounds on which courts generally exercise civil jurisdiction.'[8] It goes on to state that the opening phrase in s 2(1) which states "subject to the provisions of the Act" means that there is a qualification to the courts' exercise of admiralty jurisdiction based on the maritime nature of the claim in dispute.'[9] That being the case the nature of the claim must be established in the summons *in rem* and all the processes relating to the enforcement of the maritime claim. It is common cause that the first two maritime claims relied upon by Galsworthy is the arbitration awards. Therefore a reference to s 1(1)(aa) of the Act and any alternative maritime claim should be alleged in the summons *in rem*. This requirement has been highlighted in a number of judgments including, *Windrush Intercontinental SA & another v UACC Bergshav Tankers AS*[10] where in an application the defendant sought to set aside the deemed arrest of the vessel, the court held that there must have existed a maritime lien for crew wages to entitle the plaintiff to arrest the ship. An applicant must satisfy the court if it has a maritime claim recognised in terms of the Act and enforceable by an action *in rem*. It is therefore imperative that the facts, though concise, give the basis of what case the respondent has to meet.

[22] In *MV Cape Courage Bulkship Union SA v Qannas Shipping Co Ltd & another*[11] the court confirmed in the application for the arrest of the vessel, brought *ex parte*, that the appellant had to show: '(a) that the *MV Cape Courage* is susceptible to arrest *in rem* in respect of its claim; and (b) that it has a prima facie case in respect thereof.' In respect of the first issue the appellant had to establish its case on a balance of probabilities while on the second case it had only to establish that there was evidence which, if accepted, would establish a cause of action. It is therefore significant that the summons passes this jurisdictional hurdle before the

[8] GB Bradfield 'Shipping' in WA Joubert and JA Faris 25(2) *Lawsa* 2ed para 5.
[9] Bradfield fn8 para 5.
[10] *Windrush Intercontinental SA & another v UACC Bergshav Tankers AS* [2016] ZASCA 199; [2016] JOL 37018 (SCA).
[11] *MV Cape Courage Bulkship Union SA v Qannas Shipping Co Ltd & another* 2010 (1) SA 53 (SCA) para 4.

arrest is authorised. The plaintiff has to satisfy the first leg of the enquiry by setting out facts to establish that it has a maritime claim against the respondent as decided in *Windrush*. In the absence of a maritime claim the court cannot exercise its admiralty jurisdiction. It flows from this that the arrestor has to show the existence of a maritime claim.

[23] Vahed J found that there was non-compliance by the appellant of the provisions of s 1(2) of the Act read with the provisions of Rule 2(1*)(b)* and the failure to abide by the *Galaecia* judgment, which has never been set aside and which is binding in this Division and of great importance as it was adopted in this Court's Practice Directive 27. The Directive should not be read in isolation from the Act and the Rules. Rule 2(1)(a) which states that '[a] summons …shall contain a clear concise statement of the nature of the claim and of the relief or remedy required and of the amount claimed, if any' and Rule 2(1)(b) states that '[the] statement referred to in paragraph *(a)* shall contain sufficient particulars to enable the defendant to identify the facts and contentions upon which the claim is based.' The grammatical language used in the provisions is clear that though this may be a concise statement it must identify the facts and contentions upon which the claim is based.[12] When one applies the purposive interpretation as stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[13] one discerns that the intention of the Legislature is that the defendant ought to know what case he has to meet. This is even more relevant in this matter, as the defendants are part of a huge shipping enterprise.

[24] Vahed J also found that the status of the MT "Pretty Scene" as an associated ship as described in s 3(6) and 3(7) of the Act made in para 18 of the summons and the certificate were conclusions of law. Galsworthy contends that the facts establishing that the MT "Pretty Scene" as an associated ship were known to the Pretty Scene parties as they had already been canvassed in previous proceedings relating to the arrest of another vessel related to the MT "Pretty Scene"; that Parakou Singapore was the charterer of the "Jin Kang" and therefore deemed to be the owner of the vessel in terms of s 3(7)(c) of the Act; that at the time when the Galsworthy claim arose; Parakou Singapore was controlled by Por Liu, the registered owner of the majority of the shares in the company; that the Pretty Scene parties did not dispute that all of the shares in the company which owned the MT "Pretty Scene"

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[12] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[13] *Natal Joint Municipal Pension Fund v Endumeni Municiaplity* fn12 para 18.

were owned by Parakou Tankers Inc and that Por Liu in turn owned all of the shares in that company. Therefore in that regard, the facts relating to the ownership of the MT "Pretty Scene" were 'predictable' and established.

[25] Furthermore, Galsworthy asserted that those facts were by way of an affidavit placed before Mnguni J, who authorised the issue of the writ of summons and warrant of arrest. Similarly, the same facts were put before Radebe J for the extension of the writ of summons and the warrant of arrest. Therefore the facts relating to the association were before the court at all times. It was submitted on behalf of Galsworthy that it was not contended that the alleged failure on the part of Galsworthy to comply with the provisions of Rule 2(1) rendered the action *in rem* a nullity, unlike in *Northern Assurance Co Ltd v Somdaka*.[14] The facts in *Somdaka* are distinguishable to the facts before this court as the summons was complete and regular and all that was missing was the power of attorney to sue and the court had condoned the irregularity. The defect relied upon in this matter lay in the lack of particularity in the summons and the certificate, particularly in failing to establish the association in terms of Rules 3(6) and 3(7). The non-compliance with Rule 2(1)(b) goes to the heart of the pleadings; it is not just a mere omission which can be regulated by the provision of an omitted document.

[26] The bone of contention was that the order authorised by Mnguni J, who Vahed J, believed that had Mnguni J been aware of the *Galaecia* judgment and the Practice Directive would not have authorised the issue of the summons and the warrant of arrest. It is my view that whether or not Mnguni J was aware of the *Galaceia* and the Practice Directive, Galsworthy had to comply with the Rules, as the Rules provide the safeguards put up by the Rules, which are peremptory in their nature.

[27] I accept the contention by Galsworthy that the purpose and the effect of the Practice Directives is that they are not binding and should be understood not to fetter the exercise of the judge's discretion in appropriate cases. It is my view that Practice Directive 27, is not just a guideline but an embodiment of Rule 2(1)*(a)* and 2(1)*(b),* which is couched in peremptory provisions. The Practice Directive was borne out of a binding decision of this court. It serves only to highlight to the practitioners and judges of the court the significance of the provisions of Rule 2(1)*(a)* and 2(1)*(b)*. It

[14] *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) at 595B.

cannot be said to be some kind of a regulatory procedure, like the other directives in the division, which set out the time frames and procedures relating to the filing or attending to certain issues for purposes of 'proper governance' and control of the matters that serve before this court. Practically, only one party is before the court asking the court to constrain another's rights. Ordinarily in these matters the absent party is a foreigner who may not be aware of the allegations against them and who will only be able to salvage their fortune after the fact so to speak. The absent party must therefore be put in a proper position regarding to what the allegations relate and the extent of their relevance to the possible remedies. How far such details must extend depends on the facts of each case. The directive sought to emphasise how the Rules ought to reflect the Rules in these circumstances.

[28] It is my view that it was not only the failure to comply with the Practice Directive, as suggested by the Pretty Scene parties but the failure to comply with Rule 2(1)*(b)*, which, if not complied with, impugns on the constitutional rights of the Pretty Scene parties. In fact the Practice Directive, highlights the requirements of the provisions of Rule 2(1)*(a)* and *(b)* and rule 4(3) and does not impose any new obligations on the party seeking an arrest. Its purpose is to emphasise that parties should comply with the material requirements of the aforesaid provisions. It provides as follows: (I have inserted the alphabetic paragraph numbers for convenience)

'27. Admiralty arrest warrants in terms of Rule 4(3)

(a) The attention of practitioners is drawn to the fact that Rule 2(1)(a) provides for a clear and concise statement of the nature of the claim. The certificate with regard to the warrant in terms of Rule 4(3) provides for a statement by the giver of the certificate that the contents of the certificate are true and correct to the best of the knowledge, information and belief of the signatory. The source of any such knowledge and information must be given.

(b) As the matters to be certified include a statement that the claim is a maritime claim and that the property sought to be arrested is the property in respect of which the claim lies or, if the arrest is an associated ship arrest, that the ship is an associated ship which may be arrested, it is inherent in the nature of the certificate that the signatory should believe on proper grounds that there is a claim and also that it is enforceable by the arrest of the property to be arrested. It follows therefore, in the case of an associated ship arrest, that the certifier believes that the ship is an associated ship. It is therefore necessary that the summons should contain a statement of the **facts** upon which the claim is based and a statement of the **facts** on the basis of which it is stated that the ship is an associated ship.

(c) It is desirable that the certificate should be signed by an attorney practising in the Court out of which the warrant is issued. In order to deal with cases of difficulty Rule 4(2)(b) provides that the Registrar may refer to a judge the question whether a warrant should be issued. In the vast majority of cases this is neither necessary, practicable nor desirable. It should be done in any case of difficulty either in regard to the claim or in regard to a question of association. In order to assist the Registrar the responsibility for identifying cases that should be referred to a judge will in the first instance rest on the attorney providing the certificate. When requesting a warrant, therefore, the attorney should submit in addition to the certificate required by Rule 4(3) a statement that the attorney knows of no circumstances making it desirable to refer the issue of the warrant to a judge. In the absence of such a statement, the Registrar will refer the matter to a judge under Rule 4(2)*(b)*.'

[29] Paragraph (a) above draws the attention of the practitioners to the requirement of 'a clear and concise statement of the nature of the claim'. Paragraph (b) refers to 'a statement of the **facts** upon which the claim is based' and 'statement of the **facts** on the basis of which it is stated that the ship is an associated ship'. The words 'facts' appear in bold in the directive. The Oxford South African Concise Dictionary[15] defines 'facts' as 'information used as evidence or as part of a report'. If one attributes such a meaning to a summons it could only mean facts as would have been placed in the summons in line with Uniform rule 18. This is in line with Rule 2(1)*(b)* of the Act which refers to a statement which 'shall contain sufficient particulars to enable the defendant to identify the facts and contentions upon which the claim is based'. The bold part in the directive emphasises that 'facts' and 'not conclusions of law' are required. Furthermore, paragraph (b) above does not take the powers of the registrar away, but highlights only that the registrar is not a judge who can identify difficult issues and places the responsibility on the attorney to identify such a difficult case to the registrar.

[30] I cannot understand Galsworthy's submission that it was not competent for Vahed J to set aside the order of Mnguni J, as it had been placed before a judge and not the registrar of the court. In the *Galaecia*, Combrinck J picked up the same defects as Vahed J did in setting aside the application. If the matter 'slipped through', for whatever reasons it can be set aside where there is a procedural or substantive challenge. In *Transol Bunker BV v MV Andrico Unity & others; Grecian-Mar SRL v*

[15] *Oxford South African Concise Dictionary* 2ed (2010).

MV Andrico Unity & others,[16] the court held that in an application to set aside an arrest, the party who obtained an order may advance any ground to justify the arrest, irrespective of whether or not such ground was relied upon in initially obtaining the order. This persuasive judgment was endorsed by the Supreme Court of Appeal (the SCA) in *Cargo Laden & Lately Laden on Board – the MV Thalassini Avgi v MV Dimitris*[17] and *MV Wisdom C United Enterprises Corporation v Stx Pan Ocean Co Ltd.*[18] This means that an applicant can reply to a respondent's application to set aside the arrest. This gives an applicant an opportunity to cure defects in the original application. In the *Thalassini*[19], the SCA confirmed in an application made in terms of s 3(3) of the Act that since the onus is on the applicant who brought the application for arrest to justify the arrest and prove that he satisfied the requirements for an arrest he may file a replying affidavit or a further affidavit to support his case. The same approach was adopted by Wallis J, in *Golden Meats & Seafood Supplies CC v Best Seafood Import CC & another*[20] in an arrest made in terms of s 3(4) (b) of the Act.

[31] The suggestion by Galsworthy is that the Pretty Scene parties failed to invoke Uniform rule 42 to have the order made by the judge set aside or varied as erroneously granted is misplaced. I do not believe that that rule 42 is applicable here. Rule 42 would have been applicable if there had been no procedural defects to the process before the court. Though this process has the effect of a final judgment if it is unopposed, the Uniform Rules provide for the setting aside of the order, whether it is on procedural or substantive grounds.

[32] Previously where an order for an arrest which has been granted by the registrar, has been set aside, there is no order having operation which may be suspended in terms of Uniform rule 49(11) and s 18 of the Superior Courts' Act, which have been repealed. The effect of the order in terms of s 4(3) of the Act is that it is final if not challenged. It is my view that since the Rules allow for the applicant to

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[16] *Transol Bunker BV v MV Andrico Unity & others*; *Grecian-Mar SRL v MV Andrico Unity & others* 1987 (3) SA 794 (C) at 798D-800E, this decision was confirmed in the *Transol Bunker BV v MV Andrico Unity & others; Grecian-Mar SRL v MV Adrico Unity & others* 1989 (4) SA 325 (A).

[17] *Cargo Laden & Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 834F-G.

[18] *MV Wisdom C United Enterprises Corporation v Stx Pan Ocean Co Ltd* 2008 (3) SA 585 (SCA) paras 15 – 16.

[19] *Cargo Laden & Lately Laden on Board the MV Thaslassini Avgi v MV Dimitris* fn17 at 833A-D.

[20] *Golden Meats & Seafood Supplies CC v Best Seafood Import CC & another* 2011 (2) SA 491 (KZD) para 5 at 495C-D.

supplement his application, there is no bar to the respondent to challenge the procedural defects in the summons.

[33] According to Hofmeyr:[21]

'A party wishing to set aside an arrest can seek to do so in terms of Uniform Rule 6(12)*(c)*. The Rule provides that a person against whom an order was granted in its absence in an urgent application may by notice set down the matter for reconsideration of the order.'

He goes on to say that 'once these threshold requirements have been met the Rule confers a wide discretion on the court to reconsider the original order'.

Rule 25 provides that:

'(1) The court may in any admiralty proceedings *mero motu* or on the application of any party or other person having a sufficient interest give any directions which it considers proper for the disposal of any matter before it.

(2) Any such direction may deviate from or supplement any provision of these rules, or of the Uniform Rules, or of any other rules relating to the division in question.'

It is clear that the provision gives a discretion to the court. In *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd & others*[22] the court held that Rule 25(2) should not be applied to compel an applicant to disclose the existence or non-existence of documents to which a respondent claimed no proprietary or other right or interest simply for purposes of assisting it, in an interlocutory application, to establish the jurisdiction of the court to arrest a ship, still less to order their production for inspection and copying.

[34] Admiralty Rule 20 provides for the courts' inherent powers:

(a) Rule 20(1) provides that "The court may strike out any proceedings which are vexatious or an abuse of the process of the court."

(b) Rule 20(2) provides "If it appears to the court on application that there have been any irregular proceedings by any party, or non-compliance with the rules, or any order of court, it may make any such order as appears to it to be just with regard to the said proceedings, or non-compliance, including an order that any such party be deemed to be in default or that judgment be given against any such party.

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[21] Gys Hofmeyer *Admiralty Jurisdiction: Law and Practice in South Africa* 2ed at 170 para X.40.

[22] *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* & others 1999 (3) SA 500 (C) at 511D-E.

(c) In terms of Rule 25(1) the court may in any admiralty proceedings mero motu, or on application of any party or any other person having a sufficient, interest give any directions which it considers proper for the disposal of any matter before it.

This did not require any rectification of the process, as the deficiencies struck at the core of the proceedings. The section confers an unfettered discretion to the court, which may strike out the matter as being vexatious and/or an abuse of the process of court.[23] It has not been shown that the court a quo failed to exercise a judicial discretion. The court of appeal has limited powers in this regard[24] and cannot therefore interfere with the courts' exercise of discretion.

[35] What is a just order? The Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd & others v CEO, South African Social Security Agency, and others*[25] dealt with the approach that the court should take when dealing with an irregularity. The issue of mandatory and material conditions were dealt with by the SCA in *Dr JS Moroka Municipality v Betram (Pty) Ltd*[26] where it held that failure to comply with a mandatory requirement can be condoned and the tender can be accepted if it would be in a public interest.

[36] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another*[27] the Constitutional Court, set out the principles which serve as guidance to a court, where the exercise of a discretion is challenged. My view is that Rule 20(2) should be read in line with the specific purpose of the provisions of the Act which should be complied with.

[37] As every pleading must contain a clear and concise statement of the material facts upon which the party relies upon for his/her claim the provisions of Rule 9 of the Rules are applicable. In terms of rule 9(5)(b)(i) where the pleadings lack such averments to sustain a cause of action or defence, the opposing party may deliver an exception to such pleading within 10 days of receipt thereof and may set down the exception for hearing. Be that as it may, the provisions of Rule 9(1) do not affect the court's powers in terms of Rule 20 in dealing with vexatious and irregular

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[23] *Golden International Navigation SA v Zeba Maritime Co Ltd; Zeba Maritime Co Ltd v MV Visvliet* 2008 (3) SA 10 (C) at 13G-18D.
[24] *Ex parte Neethling & others* 1951 (4) SA 331 (A) at 335H.
[25] *Allpay Consolidated Investment Holdings (Pty) Ltd & others v CEO, South African Social Security Agency, and others* 2014 (1) SA 604 (CC) para 22.
[26] *Dr J S Moroka Municipality v Betram (Pty) Ltd* [2013] ZASCA 186; 2013 JDR 2728 (SCA).
[27] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* 2015 (5) SA 245 (CC) paras 82-89.

proceedings. The court is imbued with the exercise of a discretion, and it is competent for the court to give any of the orders as stated in the Rule 20. Uniform rule 6(8) applies in admiralty proceedings. It allows any person against whom an order was granted *ex parte* to anticipate the return day upon delivery of not less than 24 hours' notice. This confirms that the order granted by Mnguni J was not appealable.

[38] I cannot find any relevance in the submission that similar orders were granted by the Western Cape and the Eastern Cape High Courts, without any challenge to the alleged procedural defects. This did not bar the applicants to challenge the arrest in those courts too. It must be borne in mind that maritime law matters are not your everyday civil matters in South Africa and these applications are sought from a specialised court on an urgent basis, mostly on an *ex parte* basis. It would lead to a miscarriage of justice and tardiness on behalf of Galsworthy in not complying with Rule 2(1)(a) and (b) if missed by the court, would allow the applicant to get away with murder.

[39] The submission that the inadequacies in the summons did not cause the respondents' to suffer any prejudice is misplaced. The *Galaecia* expressly states that there are massive commercial losses that are suffered by the defendants as a result of wrongful arrests. This is supported by the provisions of s 3(10) of the Act which caters to counteract such prejudices by the provision of security to avoid the arrest of the vessel. The provisions of s 3(10) provide as follows:

'(10) (*a*) (i) Property shall be deemed to have been arrested or attached and to be under arrest or attachment at the instance of a person if at any time, whether before or after the arrest or attachment, security or an undertaking has been given to him to prevent the arrest or attachment of the property or to obtain the release thereof from arrest or attachment.

(ii) Any property deemed in terms of subparagraph (i) to have been arrested or attached, shall be deemed to be released and discharged therefrom if no further step in the proceedings, with regard to a claim by the person concerned, is taken within one year of the giving of any such security or undertaking.'

A further remedy, to curtail the commercial damage, provided in the Act is that any vessel deemed to be under arrest, is deemed to be released if no proceedings are pursued within a period of one year of giving security or an undertaking.[28] The

[28] *MT Cape Spirit Owners of the Cargo Lately Laden on board the MT Cape Spirit and others* 1999 (4) SA 321 (SCA).

provision of security therefore prevents the physical arrest of the vessel, and this minimises prejudice to the ship owner.

[40] The court in the exercise of its admiralty jurisdiction may receive statements which may be inadmissible in general civil proceedings in terms of s 6(3) of the Act. The weight to be attached to such evidence is at the discretion of the court.[29] I am highlighting this aspect because it impacts on what the applicant can include in the Rule 4(3) certificate to persuade the court to authorise the warrant of arrest. In such certificates even double hearsay evidence is admissible as in most cases the information supplied by the attorneys is made in respect of what he has been informed of by someone who could also have established the information from another source. In this regard the courts take into consideration the urgency and access to such information.[30] Galsworthy, before Vahed J, relied on the affidavit in a different case, in case number A20/2015 as having been used in support of the application before Mnguni J. Vahed J held that no reference was made to the affidavit in the papers before Mnguni J, though it was submitted that the affidavit which dealt with the issue of association formed part of the papers before Mnguni J. Vahed J ruled that the affidavit did not form part of the matter before his court as it related to another matter. There was no certainty that it formed part of the proceedings before Mnguni J. I fully agree with Vahed J in that regard.

[41] Galsworthy contends that the cause of action was known by the respondents as the facts upon, which the underlying claim is based, are fully set out in the arbitration awards. The basis for this is set out in para 13.3.2 of Reddy's affidavit a deponent to Galsworthy's affidavit that

'Mr Por Liu, who is described in paragraph 3.1 of Mr Hartwell's affidavit as a director and president of the Owner, and from whom Mr Hartwell has obtained his instructions and the information set out in the affidavit is also the person who controlled Parakou Singapore from the end of 2008 until its liquidation in March 2011 and would therefore be fully aware of the manner in which the Owner and Parakou Singapore were operated at the relevant times, as well as the details of Galsworthy's claim and the arbitration awards which date from August 2010 and May 2011.'

It is further stated in para 13.3.3 that had there been any question

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[29] *The Wave Dancer: Nel v Toron Screen Corporation (Pty) Ltd & another* 1996 (4) SA 1167 (A).
[30] *Thalassini* fn17 at 841C-843D.

'regarding the factual basis for Galsworthy's allegation that the vessel is an associated ship as described in sections 3(6) & (7) of the Act, I would have expected that an immediate enquiry would have been made by or on behalf of the owner. No such enquiry was made.'

These are the contentions that Galsworthy relied on as the basis upon which it contends that the ships are associated. However, the Pretty Scene parties' contention was that 'at the time of the issue of the summons and issue of the warrants', the details relating to the association as required in terms of rule 2(1)*(a)* and *(b)* were missing, thus making the processes procedurally flawed.

[42] Notwithstanding that Vahed J's judgment states that counsel for Galsworthy conceded that the application was procedurally defective, it was advanced that Vahed J failed to exercise his discretion judiciously in line with Admiralty Rule 20(2), therefore this court is entitled to exercise its own discretion regarding the matter at present. In this regard they referred this court to *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another*.[31] The most interesting development was that after the application was argued before Vahed J, Galsworthy did not waste time in amending its original papers, in line with the views expressed by Vahed J in his judgment. The writing must have been on the wall when the matter was argued as this was done long before the judgment was delivered. Had Galsworthy felt that all was kosher, there would have been no need for it to amend its summons *in rem* and the certificate in terms of s 4(3) and await the expected outcome of the application.

[43] The Act provides for two measures: the arrest in terms of s 3(4) which deprives a person of a property without being given notice or a hearing and the arrest of the associated ship, not the ship concerned, in line with the provisions of s 3(6) and s 3(7). Both processes require the plaintiff/applicant to prove on a balance of probabilities the entitlement to such orders, because of the drastic nature of the procedures. In my view, the court cannot just ignore procedural defects or irregularities when considerable harm may be suffered if a wrong entity is arrested.

[44] The issue of the exercise of the court's discretion takes me back to the *Galaecia*,[32] where Combrinck J in dealing with the summons in an action *in rem*, that did not comply with the express provisions of Rule 2(1)(b), stated that not only is the

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[31] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* fn27 paras 82-89.

[32] *The MFV "Galaecia"* fn4 para 4.

owner of the vessel arrested severely prejudicing his ability to have the arrest set aside, but the practice also gives rise to procedural difficulties, and referred to similar the remarks of Hugo J in *SY Sandokan.*[33] The prejudice he alluded to is that the owner has to bring an application to have the warrant set aside and this requires payment of harbour fees and of course requires legal representation. He referred to the following remarks of Didcott J in *Katagum Wholesale Commodities v The MV Paz:*[34]

'It is a serious business to attach a ship. To stop or delay its departure from one of our ports, to interrupt its voyage for longer than the period it was due to remain, can have and usually has consequences which are commercially damaging to its owner or charterer, not to mention those who are relying upon its arrival at other ports to load or discharge cargo. Especially when the attachment is sought *ex parte*, as can be and almost always is done, the Court must therefore be given sufficient information to show that a measure with results so harmful to others is nevertheless necessary for the protection of the applicant's legitimate interests. It will therefore want to assure itself, for instance, that his claim in the main proceedings is apparently no spurious one, that he is not bent on merely harassing the other side in these or gaining a tactical advantage in relation to them, that his need for security is both genuine and reasonable, that no alternative and less disruptive opportunity for obtaining such has been or is likely to become available to him and, if one has already been lost, that this was not his fault or, I should rather say, not his fault to such a degree as to be fairly held against him. The Court must be told enough to put it at its ease on all these scores.'

Combrink J stated that the same criticism of the contents of the summons were made in the English Court judgments of "*The Tuyuti*"[35] and "*The Jangmi"*.[36]

Was the association established?

[45] It is a requirement of an action *in rem* that ownership of the *res* as an associated ship by the defendant must be established, as the *res* must be linked to the ownership of the ship concerned. The processes issued in terms of s 3(4) of the Act being final in nature, require an adequate concise statement of facts as to the establishment of the association between the arrested vessel and the claim.

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[33] *SY Sandokan: Owner of the SY Sandokan v Liverpool and London Steamship Protection and Indemnity Association Ltd* 2001 (3) SA 854 (D) at 827D-828J.
[34] *Katagum Wholesale Commodities v The MV Paz* 1984 (3) SA 261 (N) at 269H-270A.
[35] "*The Tuyuti*" [1984] 2 Lloyd's Rep 51; [1984] 2 All ER 545.
[36] "*The Jangmi" known as the "Grigorpan"* [1988] 2 Lloyd's Rep 462.

[46] Galsworthy submitted that Vahed J misdirected himself by failing to follow the approach in the *Andrico Unity*, confirmed in the *Thalassini*, which requires the court to consider all the facts placed before it and should not have set aside the writ of summons and warrant of arrest.

[47] In the exercise of the court's admiralty jurisdiction, the courts are enjoined to apply s 3(6) read with s 3(7) of the Act. Section 3(6) provides that:

'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.'

It is trite that whether it's an arrest *in rem* or a security arrest, that the arrestor has to prove that the property/vessel to be arrested is the ship concerned or an associated ship of the ship concerned.[37]

[48] Section 3(7)*(a)* of the Act recognises three scenarios where the ship is considered to be an associated ship:

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

(i) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or

(ii) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned, when the maritime claim arose; or

(iii) owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.

(b) For the purposes of paragraph *(a)*-

(i) ships shall be deemed to be owned by the same persons if the majority in number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons;

(ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company;

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

(c) If at any time a ship was the subject of a charter-party the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to

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[37] *Thalassini* n17.

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.'

[49] *Euromarine International of Mauren v The Ship Berg & others*[38] was the first case, which recognised the uniqueness of the associated ship arrest principle as providing for an action *in rem* against different defendants owned or controlled by the owner of the ship concerned. "*The Ship Berg*" has been followed in a number of maritime cases, including the judgment of the SCA in *MV Heavy Metal; Belfry Marine Ltd v Palm Base Maritime SDN BHD*[39] which dealt with the interpretation of the provisions of s 3(7)*(a)*, *(b)* and (c) of the Act. The court carefully analysed s 3(7)*(a)*(i), (ii) and (iii) and the circumstances in which ships were to be regarded as associated and the deeming provisions in s 3(7)*(b)*(i), (ii) and (iii) which were obviously designed to defeat defensive strategies which ship owners devise deliberately to ward off potential arrests of associated ships by disguising their ownership or control of such ship.

[50] In the *Heavy Metal* judgment the court, in considering the aforementioned provisions of the Act, had regard to the language used, the purpose of the provision, its context and the object of the Act as a whole. It held that the object of the associated ship provisions were enacted to enable the associated ship to be arrested in respect of the maritime claim and the purpose was to afford the claimant with an alternative defendant to enforce its claim. It held that the subsection distinguishes between "direct" and "indirect" control and that power can be exercised by a person who was wielding power behind the scenes "*de facto*" or by a person who was in *de jure* control of the company. The court[40] recognised this as '[the] extension of *de jure* power to *de facto* power is in line with the objective of the section: to prevent the true 'owner', by presenting a false picture to the outside world, from concealing his assets from attachment and execution by his creditors.'

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

[51] In a more recent SCA judgment, *MV Silver Star: Owners of MV Silver Star v Hilane Ltd*[41] the court held that:

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[38] *Euromarine International of Mauren v The Ship Berg & others* 1984 (4) SA 647 (N) fn38.
[39] *MV Heavy Metal, Belfry Marine Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA).
[40] *Heavy Metal* fn39 para 30.
[41] *MV Silver Star: Owners of MV Silver Star v Hilane Ltd* 2015 (2) SA 331 (SCA).

51.1 The Silver Star was an associated ship arrested in terms of s 3(6) read with s 3(7) of the Act. In this matter Hilane had an arbitration award from London which it sought to enforce by an action *in rem* in South Africa brought against the Silver Star as an associated ship of the Sheng Mu. The question before the court was whether Hilane established the association on a balance of probabilities. It held that the section caters for claims against the demise charterer not the owner for claims arising from a bill of lading or goods supplied to the charterer. Therefore such claims can be pursued by associated arrests; however, the court further held that it does not cater for a time charterer responsible for the supply of bunkers or provisions to the vessel.

51.2 The court further held that, the provisions of s 3(7)*(c)* relating to the charterer in respect of a maritime claim arising during the course of the charter to be the deemed owner of the vessel concerned. The only exception is pointed out as follows:[42]

'[When] the maritime claim did not give rise to a maritime lien against a particular vessel, and in personam claim did not arise in respect of a particular ship, there could be no action in rem against a particular ship because the requirements of s 3(5) of the Act could not be satisfied.'

51.3 The court concluded that in respect of the maritime claims arising from the charterparty between the Sheng Mu and Phiniqia, which was liable in respect of those claims, Sheng Mu was deemed to be the owner for purposes of the arrest of the associated ship. The fact that it pursued the claim by way of arbitration is of no consequence and does not alter the status of the claim. It found that an association must be proved on the balance of probabilities as advocated in the *Thalassini*. It held further that though the claimant bears the onus of proof, the court can draw an adverse inference from a mere assertion of a bare denial from the debtor.

51.4 This judgment supports Vahed J's findings that the association of the MT "Pretty Scene" to the ship concerned was not proved on a balance of probabilities. There was only a conclusion of law that it was an associated ship.

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[42] *The Silver Star* fn41 para 20.

[52] In *Galsworthy Ltd v Pretty Time Shipping SA & others, Pretty Time Shipping SA & others v Galsworthy Ltd*[43] the summons *in rem* and the warrant of arrest were set aside by the court on the basis that control was not proved on a balance of probabilities. The court held that:

'The founding affidavit read with the various annexures that were put up simply did not make out a case that CC Liu by virtue of his shareholding of Parakou exercised control over that company. The applicants clearly relied on the documentation it had put up. It made its bed and is forced to lie on it. No case whatsoever was made in the alternative to suggest that Mr CC Liu notwithstanding that he did not control Parakou by virtue of his shareholding nevertheless was still the puppet master pulling the strings and controlling that company as well.'

Admiralty practice allows hearsay evidence which parochial courts do not, so extra caution must be taken to at least set out such 'hearsay' as fully as it may enable the party who learns of the basis of the rem arrest *ex post facto*, so to speak.

[53] I agree with the Pretty Scene parties' contention that due to the 'draconian' procedure provided by the Act, the procedural safeguards require strict observance; the arrestor bears the onus to prove compliance with all procedural and substantive issues. In our law a summons which propounds the plaintiff's own conclusions and opinions instead of the material fact is defective. 'Such a summons does not set out a cause of action'.[44] Galsworthy had no grounds to effect the arrest as it failed to show the facts leading to the conclusion that the MT "Pretty Scene" was associated to the ship concerned. The lack of averments, particularly as to the association of the vessels strikes at the core of whether the MT "Pretty Scene" was an associated ship to the MT "Jin Kang". The simplistic averments in the summons *in rem* in dealing with the proof of the association in para 18 merely stated that 'the defendant is an associated ship of the MT "Jin Kang" as defined in terms of s 3(6) and s (7) of the Admiralty Act. The plaintiff's claims are therefore enforceable by an action *in rem* against the defendant.' This is not sufficient proof on a balance of probabilities of an association.

[54] As aforesaid the Act provides for three broad scenarios of association. These three broad scenarios can be one of the following:

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[43] *Galsworthy Ltd v Pretty Time Shipping SA & others, Pretty Time Shipping SA & others v Galsworthy Ltd* [2009] ZAKZDHC 10 para 20.

[44] *Buchner & another v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA 215 (T); see also *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1080 (SR) at 1082; and *Trope & others v South African Reserve Bank* 1993 (3) SA 264 (A) at 273A-B.

(a) The arrest of the ship in the same ownership in respect of which the claim arose – the so called sister ship arrest (s 3(7)*(a)*(i)).

(b) By the arrest of a ship owned by a company controlled by the person who controlled the company which owned the concerned ship (s 3(7)*(a)*(ii)).

(c) A combination of the two, where either the ship concerned or, the associated ship is owned personally by the beneficial owner and the other by him through a company (s 3(7)*(a)*(iii)).

None of the specific subsection of either s 3(6) & (7) was referred to in the summons for the judge seized with the *ex parte* application to consider.

[55] Section 3(7)*(c)* is also of significance as it provides for the three different scenarios for 'beneficial ownership' being deemed ownership. The appellant's case is based on s 3(7)*(c)* of the Act which provides as follows:

'If at any time a ship was the subject of a charter-party the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the subcharterer, and not the owner, is alleged to be liable.'

[56] The Rule 4(3) certificate bore a similar averment that 'The property sought to be arrested, the MT "Pretty Scene" is, in terms of s 3(6) and s (7) of the Act, an associated ship of the ship in respect of which the claim lies.' Having made such bold conclusions of law Galsworthy sought to rely on an affidavit made in respect of a different matter under a different case number (A20/2015) of which it made no reference to in the present summons nor incorporated it by reference to the matter which was before Vahed J. This was a new action *in rem* where Galsworthy sought to arrest a new defendant and all the facts had to be presented before the court in line with the provisions of the Act and the Rules. I am not persuaded by the submissions made on behalf of Galsworthy and the appeal must fail.

The second appeal

[57] The basis for the appeal against the judgment of Henriques J are as follows:

57.1 Whether English Law was applicable in the enforcement of the arbitration awards;

57.2 Whether the MT “Pretty Scene” was an associated ship of the MT “Jin Kang” (the ship concerned) and if Galsworthy demonstrated compliance with procedural and substantive requirements for the arrest of the associated ship;

57.3 Whether the court erred in not finding that the second arrest by Galsworthy (the respondent in this appeal) of the MT “Pretty Scene” whilst she was still under arrest was an abuse of the process of court;

57.4 The effect of the intervening liquidation of Parakou Singapore on 23 March 2016;

57.5 Whether the application for counter security for the wrongful arrest was correctly dismissed;

57.6 The effect of the provisions of s 299(1) of the Singapore Companies Act[45] on the enforcement of Galsworthy claims; and

57.7 Whether an association has been established between the owner of the ship concerned and the associated ship.

The application of English Law

[58] Galsworthy claims against Parakou Singapore were referred to arbitration by virtue of a choice of law clause in the charterparty. This was by virtue of the provisions of s 6(5) of the Act which provides that:

‘The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute.’

[59] The Pretty Scene parties and Galsworthy are *ad idem* that English Law did not apply because of the provisions of s 6(1) of the Act, as found by Henriques J, but because of the provisions of s 6(5) of the Act. Section 6 of the Act provides as follows:

‘**6. Law to be applied and rules of evidence.**—(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall—

(*a*) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;

[45] Singapore Companies Act fn3.

(*b*) with regard to any other matter, apply the Roman Dutch law applicable in the Republic.
(2) The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection.
(3) A court may in the exercise of its admiralty jurisdiction receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such directions and conditions as the court thinks fit.
(4) The weight to be attached to evidence contemplated in subsection (3) shall be in the discretion of the court.
(5) The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute.'

[60] I now turn to deal with the provisions of the Act, case law and the relevant charterparty clause in the determination as to which law is applicable. Clause 17 of the charterparty provided as follows:
'That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at London one to be appointed by each of the parties hereto, and the third by the two so chosen, their decision or that of any two of them, shall be final and for the purpose of enforcing any Award, this agreement may be made a rule of the Court. English law to apply. The Arbitrators shall be commercial shipping men.'
Therefore a South African court will apply English Law as at 1 November 1983 in respect of English maritime claims as at that point and time, which law will be applicable in respect of the new maritime claims or heads of jurisdiction as provided for in the Act. The provision of s 6(5) allows the parties to contract out of the statue regarding the law which applies to them.
[61] The court in *Bouygues Offshore SA & another v Owners of the MT Tigr & another*,[46] held that the onus is on the defendant raising the defence to establish on a balance of probability that there is another more appropriate court or tribunal. If the defendant succeeds the evidential burden shifts to the plaintiff to show special circumstances by reason of which justice trial requires that the nonetheless to take place in the forum chosen by the plaintiff. In the *MV Spartan-Runner v Jotun–Henry Clark Ltd*[47] the court also held that where the parties have agreed that disputes are to be referred to a foreign tribunal, the onus rests upon the plaintiff in the South

[46] *MT Tygr: Bouygues Offshore SA & another v Owners of the MT Tigr & another* 1998 (4) SA 740 (C).
[47] *MV Spartan-Runner v Jotun-Henry Clark Ltd* 1991 (3) SA 803 (N).

African court to show why the court should not stay the proceedings before it should give effect to the agreement between the parties.

[62] In an article appearing in the South African Law Journal by Staniland, the following extract provides clarity on the point:[48]

'Section 6(1)(a) of the 1983 Act does not, however, have the effect that English law is invariably applied. This is because s 6(5) of the Act provides that the provisions of s 6(1) "shall not supersede any agreement relating to the system of law to be, applied in the event of a dispute". The intention underlying s 6(5) appears to be to reverse the right of the parties to agree on the law to be applied. Thus the parties are free to agree on the application of English or Roman-Dutch law or, indeed, any other system of law. But where the parties decide to agree on the law to be applied, the trade practice is that they are highly likely to stipulate for the application of English law and arbitration in London. Only if there is no such stipulation does s 6(1)(a) provide for the application of English law.'

[63] In *Representative of Lloyds v Classic Sailing Adventures*[49] the following was held: that Section 6(2) and s 6(5), which latter provision provides that the provisions of s 6(1) shall not supersede any agreement relating to the system of law to be applied, must be read together, so that s 6(5) is qualified by s 6(2). The result will be that where parties agree upon the system of law to govern disputes arising between them, this does not serve to oust any law of the Republic referred to in s 6(2), where that law is peremptory.[50] Hofmeyr's[51] view contends that this interpretation cannot be supported, '[as] s 6(2) is simply declaratory of the position which applied before the commencement of the Act that although the court in the exercise of its admiralty jurisdiction applied admiralty law, that law remained subject to local statutes.' He goes on further to say '[s] 6(2) does not qualify s 6(5) which deals with the right of the parties to agree that a legal system of their choice should govern any disputes that arise between them.' He goes on to state that s 6 was not intended 'to prescribe the limits of party autonomy where the court exercises its admiralty jurisdiction.' He states that the party autonomy is only subject 'to two fundamental limitations, namely where the local statute in question provides, either expressly or by necessary implication, that its provisions cannot be ousted or where the local statute regulates

[48] H Staniland 'What is the law to be applied to a charterparty dispute?' (1992) 109 *SALJ* 528 at 534.
[49] *Representative of Lloyds v Classic Sailing Adventures* 2010 (5) SA 90 (SCA).
[50] *Representative of Lloyds v Classic Sailing Adventures* fn49 para 26 – 29.
[51] Hofmeyr fn21 at 87 para 11.6.

matters for public policy, interest of a right.' I support the reasoning advocated by Hofmeyr.

[64] The following principles need to be taken into account when one considers which law to apply:

64.1 The *Andrico Unity* judgment held that the law to be applied to the resolution of a disputed claim in admiralty falls to be determined, by reference to s 6 of the Act;

64.2 It has to be established whether there is a statute or statutory provision, applicable to the issue in dispute and if there is that it will generally apply;[52]

64.3 If no statute or statutory provision is applicable, the courts will generally give effect to an agreement, if any, between the parties as to the law to be applied in terms of s 6(5) of the Act;

64.4 Certain statutory provisions may however, restrict the parties' freedom to choose the law to govern their legal relationship, for example s 3 of the Carriage of Goods by Sea Act.[53] It could also be that the provisions of the law applicable may not be waived by agreement, for instance, s 3(1) of Carriage of Goods by Sea Act provides that where a cargo is carried in terms of a bill of lading or similar documents of title to a destination in SA, whether final or not the consignee or the holder of the bill of lading may enforce the claim in a competent division of the High Court exercising admiralty jurisdiction, irrespective that the carriage contract contains a clause purporting to oust the jurisdiction or confers exclusive jurisdiction to a foreign court;

64.5 If no statute or statutory provision is applicable and the parties to a dispute have not agreed on the applicable law, the law to be applied is the law provided in s 6(1), which differentiates between the maritime claims existing before 1 November 1983 and those governed by the provisions of the Act. The Act caters for the preserved maritime claims and the new added heads of jurisdiction. In respect of the preserved heads of jurisdiction, the applicable law is the law of the Supreme Court of England and Wales exercising its admiralty jurisdiction which would have applied as at 1 November 1983.[54] In respect of the new heads of jurisdiction the Roman Dutch Law would apply.[55]

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[52] See *MV Stella Tingas: Transet Ltd t/a Portnet v The Owners of the MV Stella Tingas & another* 2003 (2) SA 473 (SCA) and *Representative of Lloyds v Classic Sailing Adventures* n49.
[53] Carriage of Goods by Sea Act 1 of 1986.
[54] Hare fn6 paras 1-7.1; 1-7.2 and *Lawsa* n8 para 3.
[55] *Andrico Unity (C)* fn 16 and *Stella Tingas* fn52.

64.6. The court in the *Andico Unity* considered the rules in English private international law in that a foreign contract is given the same legal consequences as it would be accorded under its proper law. The rationale of the rule, being that by its application the legitimate expectations of the parties to the contract as to their rights will not be defeated by any change of forum in which such rights may be defeated.

[65] In summary, the law to be applied if s 6(1)*(a)* of the Act is resorted to is the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied in November 1983, including case law, statutes and principles of English private law.[56] The caveat to this position is that English Law was to be applied only in so far as that law can be applied. South African statutes have superseded the English statutes. Counsel for the appellants' submitted that English law should apply because the chronology indicates that the MT "Jin Kang" was sold by Galsworthy in June 2009, the first arbitration award was delivered on 31 August 2010 and the second on 18 March 2011, a long time after the sale of the "Jin Kang" by Galsworthy, when the charterparty relied upon was no longer in existence. Therefore in applying the decision in *Indian Grace*,[57] this court should be bound to apply English substantive law and statutes. If the court is with them, claim 3 should fall away as it would be extinguished and res judicata would apply. Therefore the only claims to be considered should be the two arbitration awards only.

[66] If a question arises at any time if the claim is a maritime claim, the court shall determine if it is a maritime claim for the court to exercise its exclusive admiralty jurisdiction. Once the court has decided that it is a maritime claim the jurisdiction becomes exclusive, subject to the exercise of the court's discretion in terms of s 7(1)*(a)*, the matter will be heard in terms of s 7(2)*(a)*. In the *Wave Dancer*[58] the court held that s 7(2) is peremptory in nature and confers exclusive jurisdiction. The court can in the exercise of its discretion also stay proceedings for adjudication in a forum of choice. However, having accepted that the parties have 'contracted' out of

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[56] See *Andrico Unity* fn16 and *Marcard Stein and Co v Port Marine Contractors (Pty) Ltd & others* 1995 (3) SA 663 (SCA).
[57] *The Indian Grace* reported as *The Indian Endurance (No 2) Republic of India & another v India Steamship Co Ltd* [1997] 4 All ER 380 (HL); [1998] 1 Lloyd's Rep 1 (HL).
[58] *Wave Dancer* fn29 at 1188H-1189C.

the jurisdiction of any other court, Roman-Dutch law and South African statues are not applicable to the dispute. Galsworthy has failed to show that there are any exceptional circumstances which will persuade this court to apply the *lex fori*.

[67] In an action *in rem* in terms of the Act the defendant is either the ship, or the owner or both. In *The Indian Endurance (No 2) Republic of India & another v India Steamship Co Ltd*[59] ("*Indian Grace*") the court did not recognise *res judicata* as a defence. According to various authorities the *Indian Grace* should have no effect on Rule 8(3) which provides that the filing of a notice of appearance to defend an action *in rem* shall not by reason of the person filing it incur liability or be liable *in personam*, save for the payment of costs. A maritime lien gives rise to a claim *in rem*, therefore in terms of s 6(1) of the Act, the *lex fori* will be English law applicable to them as of 1 November 1983 as it recognises the maritime lien. If the arrest *in rem* arose out of a lien, not recognised by English law, the English law will not apply. In this case s 6(5) is what the parties determined before any dispute arose and will govern their dispute. In *MV Silver Star: Owners of MV Silver Star v Hilane Ltd*[60] the following was stated:

'The English cases are by no means unanimous in this regard. Sheen J, the admiralty judge, expressed a contrary view in *The St Anna*.[61] Relying on dicta in both the Court of Appeal and the House of Lords he held that there was no reason not to give the words in the statute their ordinary meaning or to constrain them in the light of the history of similar expressions in earlier statutes. He held that an action on an arbitration award is an action to enforce the contract contained in the contract embodying the submission to arbitration, in that case the charterparty, and therefore the claim was one arising out of an agreement for the use and hire of a ship. He added that he was pleased to reach that result because it enabled the court to do justice —

"in a way which would be denied to it if creditors could not bring proceedings in rem merely because they faithfully honoured their agreement to submit to arbitration a dispute which is clearly within the Admiralty jurisdiction".'[62]

[68] I need to consider the following submission by the Pretty Scene parties:

68.1 It was submitted on behalf of these parties that in the *Indian Grace,* Lord Steyn, abolished the difference between an action *in rem* and an action *in personam*.

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[59] *The Indian Grace* fn57.
[60] *MV Silver Star* fn41 para 29.
[61] *The St Anna* [1983] 2 All ER 691.
[62] *The St Anna* fn61 at 696.

He confined himself to s 34 of the Civil Jurisdiction and Judgments Act 1982, at 389 of the judgment which states that:

'The function of s 34 was to overcome the anomaly created by the fact that the doctrine of merger did not apply in the case of foreign, ie non-English, judgments. The rationale of the bar against proceedings caught by s 34 is that it is unjust to permit the same issue to be litigated afresh between the same parties … Given this legislative objective, it would in my view be wrong to permit an action in rem to proceed despite a foreign judgment in personam obtained on the same cause of action. The purpose of s 34 militates in favour of the bar created by it applying to the action in rem. That seems to me to be a factor weighing strongly against the arguments of the plaintiffs.'

68.2 In a book by Peter R Barnett[63] on the subject of foreign judgments and non-merger of the underlying claim he states as follows:

68.2.1 At common law a foreign judgment does not merge with the underlying claim, and so does not operate as a bar to further recovery. A successful party may elect either to enforce the judgment or if the foreign judgment remains unsatisfied sue again in England for further relief upon its claim. Even though the foreign law might consider its judgment has extinguished the cause of action, this does not decide the question for an English Court which indicates that the preclusive effect of a foreign judgment at common law, in so far as the cause of action preclusion is concerned, is a matter for English Law.

68.2.2 Section 34 was enacted to provide a plea which might prevent a party with a foreign judgment in his favour from reasserting the same claim in England and Wales or Northern Ireland as that upon which the foreign judgment had been given. In his view what was aimed at by s 34, is the extension of the English doctrine of merger to the judgments of all overseas courts of competent jurisdiction which are enforceable and entitled to recognition in this country.

[69] With due respect, I do not agree with Henriques J's view that the doctrine of merger should not apply as it is not in line with the Act and legal authorities. The doctrine applies in terms of the English law, the choice of law chosen by the parties to the charterparty.

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[63] Peter R Barnett 'Chapter 4: Causes of Action Preclusion' in *Res Judicata, Estoppel, and Foreign Judgments: The Preclusive Effects of Foreign Judgments*, (2001).

The validity of the second arrest

[70] In considering whether the second arrest was valid or not I have considered the following:

70.1 Before Henriques J it was argued that the appellant acted in breach of s 3(8) of the Act, by arresting the MT "Pretty Scene" whilst it was still under the arrest order of Mnguni J. It was submitted that this was an abuse of the process of court, was vexatious as the same issues and parties were brought before the court. The provisions of s 3(8) prohibits the arrest of the property more than once in respect of the same claim by the same claimant nor may security for it be given more than once, even if security was given in a foreign jurisdiction. This was confirmed in *MV Fortune 22: Owners of the MV Fortune 22 v Keppel Corporation Ltd.*[64] According to Hofmeyr[65] two jurisdictional facts must be present before the section is invoked. 'There must be an actual arrest or deemed arrest in terms 3(10)(a) and security must have been furnished' and further that '[the] arrest must have been legally valid and be a competent arrest and not an arrest which has been set aside for want of legal validity'.[66]

70.2 Section 3(8) links the arrest with the furnishing of security. A second arrest effected before security is lodged in respect of the first arrest will not be prohibited by s 3(8).[67] The second question is whether a judgment flowing from an arrest *in rem* constitutes, for the purpose of s 3(8), the same claim as the cause of action giving rise to the judgment. The issue was dealt with in *MV "Ivory Tirupati".*[68] In the *MV "Ivory Tirupati"* it was argued that the foreign judgment arising from the arrest *in rem* in respect of damage to cargo could not be enforced by the arrest of an associated ship in the Republic because it would have fallen foul of the provisions of s 3(6) which does not allow the bringing of an action *in rem* against the ship concerned and thereafter against the associated ship. The SCA held that the arrest of the associated ship did not fall to be set aside because the subsequent arrest of the associated ship, being in respect of an enforcement of a judgment, was not in respect of the same maritime claim as the earlier arrest in respect of the damage to

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[64] *MT Fortune 22: Owners of the MT Fortune 22 v Keppel Corporation Ltd* 1999 (1) SA 162 (C) at 166G-H.
[65] Hofmery fn21 at 118 para V. 4.
[66] See also *MV La Pampalouis Dreyfus Armateurs SNS v Tor Shipping* 2006 (3) SA 441 (D) para 39.
[67] *The Aven*: *The Owner of the Aven v Lona Trading* (*Pty*) *Ltd* 2002 SCOSA B165 (D).
[68] *MV Ivory Tirupati: MV Ivory Tirupati and another v Badan Urusan Logistik (aka BULOG)* 2003 (3) SA 104 (SCA).

the cargo which was erroneous. The court held that the judgment not only strengthened the main cargo claim but also gave rise to a new cause of action, enforceable in another court. The result being that the subsequent arrest of the associated ship was found not to be in conflict with s 3(6) and s 3(8) as these were different causes of action.

70.3 An exception to the rule arises from the provisions of s 5(2)(d) which states that notwithstanding the provisions of s 3(8) in addition to property already arrested or attached, more property may be arrested to provide for additional security. Similarly, where property has been arrested by a different claimant in connection with a maritime claim, another creditor for a different claim is not barred from arresting the same property. Similarly, property attached in terms of s 8(1) to found or confirm jurisdiction, may still be arrested in respect to specific direction by the court.

[71] Similarly, the question whether a defence of *res judicata* can stand, will depend on whether the dismissed decision was on the merits or not. In the *MV Wisdom C* judgment,[69] Farlam JA confirmed that what is decisive is not the form of the order, but the substantive question of whether the decision was on the merits or not. The same should apply in this matter as the challenge was on the procedure and not on the merits.

[72] The basis for an action *in rem* is the arrest of the *res*, as the claim lies against the *res* itself. In *The Argun*,[70] Farlam JA, held that once jurisdiction has been established, it continues to exist, until the case is finalised. This will be applicable to an action *in rem* where the arrest of the ship had lapsed in terms of a court order. It was held that the lapsing of an arrest did not result in the lapsing of an action. Even if an action *in rem* lapses in terms of the court order, once jurisdiction is established it continues to exist until the action is finalised. Therefore the lapsing of an arrest does not result in the lapsing of an action as held in *The Argun*.

[73] In this case the anticipatory arrest orders were made in terms of s 4(4)*(a)* and *(b)* of the Act which provides that the order may be carried into effect when the property comes within the jurisdiction of the court. In the case of an associated ship, the basis of the liability lies with the owner, which serves as a link to the associated

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[69] *MV Wisdom C United Enterprises Corporation v Stx Pan Ocean Co Ltd* fn18 paras 9 – 10.
[70] *MT 'Argun' v Master and Crew of the MT 'Argun' claiming under case number AC 126/99 and others* 2004 (1) SA 1 (SCA); [2003] 4 All SA 139 (SCA).

vessel, though a different defendant. In the case of a charter by demise, a ship in the hands of the charterer can be subject to proceedings *in rem* irrespective of the absence of a maritime lien or owner's personal liability. Section 1(3) provides that for purposes of an action *in rem* a charterer by demise shall be deemed to be, or to have been, the owner of the ship, during the period of the charter by demise.

[74] The judgment of *Bocimar NV v Kotor Overseas Shipping Ltd*[71] is authority for the rule that the applicant bears the onus of proof on a balance of probabilities in arrest applications in terms of s 3(4), (5) and (6) of the Act and attachment and security arrests in terms of s 5(3).

[75] It is trite that the party seeking the arrest must identify the claim and establish it on a prima facie basis, as decided in the *Thalassini Avgi* judgment.[72] *Bocimar* re-affirmed the position that in an attachment to find or confirm jurisdiction the onus lies with the applicant to prove on a balance of probabilities that the property belongs to the defendant, similarly in an action *in rem* against the property. This affirms the dual purpose for an arrest to obtain security for the claim and obtain jurisdiction over the vessel. This requirement may be relaxed in exceptional cases to establish a prima facie case.[73] It is trite that at the stage of the arrest the court will not venture into the merits of the case, however, in *Dabelstein & others v Lane & Fey NNO*[74] the court emphasised that this is an extraordinary remedy where care and caution should be applied; regard may be had to the evidence of the applicant which is not contradicted by the respondent. The arrest serves to bring the defendants before the court. It is only upon effecting the arrest that the creditors' interests are secured.[75]

[76] In this case the *Mareva* injunctions sought in the Singaporean Court, provided security for the claims of all the creditors including Galsworthy. Galsworthy had no reason to pursue any further arrests in the South African courts.

Was the MT "Pretty Scene" associated to the "Jin Kang"

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[71] *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A); [1994] 2 All SA 245 (A).
[72] *Bocimar NV* fn71 at 580G or at 250.
[73] *MY Summit One: Farocean Marine (Pty) Ltd v Malacca Holdings Ltd & another* 2005 (1) SA 428 (SCA) para 15 at 437D-438C; *Owner of the MT Tigr and another v Transnet Ltd. t/a Portnet* [1998] 3 All SA 453 (A) at 459 – 460.
[74] *Dabelstein and others v Lane and another* [2000] ZASCA 71; 2001 (1) SA 1222 (SCA); [2001] 1 All SA 532 (A) para 7.
[75] Section 10 of the Act.

[77] The Pretty Scene parties' contended that Parakou Singapore was not the deemed owner of the "Jin Kang" as it never accepted delivery of the vessel and that the "Jin Kang" was sold by Galsworthy long before the arbitration awards were made.

77.1 The purpose of the Act, built on the Arrest Convention[76] and English law, provides for a far reaching mechanism that the loss fall where it belongs in terms of ownership or control and provides the claimant with the alternative defendant in the associated ship.[77]

77.2 In *October International Navigation Inc v MV Fayrouz IV*[78] the court held that it is not necessary that the ship concerned should still be owned by such a person or company at the commencement of the action. In the *Heavy Metal*[79] the court held that the intention of the legislature is found in s 3(7)*(a)*(i) of the Act which provides that an associated ship is a ship, other than the ship concerned, owned at the time the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose. All that is required, it was held that (a) they should have a common owner; (b) who was the owner of the ship concerned when the claim arose and (c) who is the owner of the associated ship when the action is commenced by the arrest of the associated ship. Therefore the sale of the "Jin Kang" to another party would have no effect on the existence of the action *in rem* against the defendant.

77.3 In the *Cape Courage*, the court held that the meaning of when the claim arose in s 3(1)(a) is to be decided in terms South African law, ie, at the time when the wrong gave rise to the maritime claim and not when the cause of action was completed.[80]

[78] In the matter before us in the arbitration Galsworthy sought an order enforcing the payment of the awards, which are maritime claims in terms of s 1(1)(aa), alternatively a claim based on the breach of the charterparty due to the failure to take delivery, which claim allegedly arose on 16 March 2009. The first award settled the issue whether Galsworthy had concluded a charterparty with Parakou Singapore or

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[76] International Convention Relating to the Arrest of Sea-Going Ships, Brussels, May 10, 1952 available at http://www.admiraltylawguide.com/conven/arrest1952.html, accessed 27 February 2019.
[77] *Euromarine International of Mauren v The Ship Berg & others* fn38; *MV Heavy Metal* fn39 at 1105G-H.
[78] *October International Navigation Inv V MV Fayrouz IV* 1988 (4) SA 675 (N).
[79] *MV Heavy Metal* fn39 at 1105G-H.
[80] Hofmeyr fn21 at 136 para IX.7.

not. The arbitrators found in favour of Galsworthy. Shortly after the first arbitration award Parakou Singapore was placed in liquidation by its shareholders. At the intervention of Galsworthy, the provisional liquidators appointed by Parakou were removed at the creditors' meeting and Galsworthy, as a major creditor, appointed new liquidators. This put Galsworthy into the driving seat.

[79] As of 21 November 2014, the liquidators suing in the name of Parakou Shipping PTE (in liquidation) sought Mareva injunctions against the shareholders and directors of Parakou in liquidation in Singapore. From the court order in the matter of *Parakou Shipping PTE (in liquidation) v Liu Cheng & others*,[81] the following issues emanate from that judgment:

(a) The first and second defendants were cited as Liu Cheng Chan and Chik Sau Kam, who were married to each other ("the parents");

(b) The third defendant is Liu Por, the son of the parents ("the son");

(c) The fourth defendant is Yang Jianguo ("the friend"), described as a friend of Liu Por. Both Liu Por and Yang Jianguo were said to have taken over the shipping business from the parents on 22 December 2008. This was before the arbitration awards.

(d) The fifth and sixth defendants, Parakou Investments Holdings (PTE) Ltd and Parakou Ship management (PTE) Ltd were described as companies owned by the first, second and third defendants ("the family").

(e) At the commencement of the liquidation Galsworthy had commenced proceedings against Parakou Singapore, the first award was made 31 August 2010 and second award on 13 May 2011.

[80] The injunction was sought by the Galsworthy liquidators on the basis of a fear that assets from Parakou may be diverted to the fifth and sixth defendants. The defendants' stance was that they were restructuring the companies, and this process had started long before the Galsworthy action commenced and that this was part of a group restructuring process. The injunction was nevertheless granted.

[81] In the second application in the Singaporean Court brought by Parakou (in liquidation) against the same defendants, the applicants sought to increase the limit of the Mareva injunctions to include the first, second and third defendants' 100%

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[81] *Parakou Shipping Pte Ltd (in liquidation) v Liu Cheng Chan and others* [2017] SGHC 91, available at *https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/s434-2014-parakou-shipping-pte-ltd-v-liu-cheng-chan-and-ors-(costs)-(final)-pdf.pdf*, accessed 27 February 2019.

shareholding in the fifth and sixth defendants. The sixth defendant (Parakou Shipping management PTE Ltd), was alleged to have been diminished by the transfer of the first, second and third defendants' shareholding in it to Parakou Tankers Incorporated for no consideration. It was further alleged that Parakou Tankers Incorporated was to merge with an unknown US entity which would result in the dissipation of the shares in Parakou Tankers Incorporation. This was considered by the liquidators to be a dissipation of assets in the guise of corporate restructuring by the defendants. The court found that since there was sufficient security in line with the purpose of the Mareva injunction, there was no evidence to show that there was dissipation of assets. The court found no evidence that the shares would be transferred to the merged entity and dismissed the applications with costs. That settled the matter. The respondent ought as recommended by the court in Singapore to have brought an application for the extension of security, if additional security was required by the liquidators of Parakou Singapore. Galsworthy liquidators were in the driving seat of the liquidation, which was then a creditor' liquidation, but further failed to apply for the increase in security.

81.1. I have also considered the arbitration judgments as well. The first arbitration determined if a charterparty was concluded between Galsworthy and Parakou Singapore. Parakou denied the existence of the charterparty between itself and Galsworthy as a result it refused to take delivery of the "Jin Kang". The dispute was referred to arbitration in terms of clause 17 of the charterparty. Oral evidence was led by both parties. Having heard the evidence from both parties, the arbitrators concluded that a charterparty dated 17 June 2008 existed between the parties. Its findings were legally binding on the parties. It was also reserved in the first arbitration that the arbitrators would be seized with the hearing for the determination of the quantum of damages due to the respondent, Galsworthy. Having dealt with the primary issues of liability in the first award, the arbitrators found in favour of the respondent and awarded damages to Galsworthy. The claim arose when Parakou breached the terms of the charterparty.

81.2 In the first arbitration Parakou Singapore was legally represented and all the contractual issues in dispute were ventilated. The confusion relating as to whether Parakou entered into a charterparty with Galsworthy or someone else was cleared. The arbitrators found that Parakou also ratified the charterparty. The second award on quantum was made on 13 March 2011. The arbitrators found that though at a

certain stage of the second arbitration Parakou was not legally represented due to the intervening liquidation, the evidence was already before the arbitrators and the arbitrators felt that it would prejudice Galsworthy if proceedings were adjourned at the instance of Parakou due to the liquidation process that was going on in Hong Kong. This led to the finalisation of the second arbitration award on 13 May 2011.

[82] It is common cause that this was not the first time that Galsworthy tried to enforce its claim against the respondent. On 30 April 2009, the arrest of the MT "Pretty Time" was set aside by Levinsohn DJP on the basis of the failure by the applicant to show that the vessel was an associated ship to "Jin Kang".[82] It must also be noted that at the time when Levinsohn AJP was seized with the matter the arbitration proceedings were pending in London. The application had sought to arrest the MT "Pretty Time" to obtain security for such proceedings. The arrest of the alleged associated ship was based on s 3(6) read with s 3(7) of the Act arising from the charterparty deeming Parakou Singapore as the owner of the "Canton Trader" (Jin Kang). An allegation had been made that CC Liu as the majority shareholder of Parakou, was therefore the deemed owner of the "Canton Trader", as he was the person who both owned and controlled the vessel. It turned out that the applicant, Galsworthy had misinterpreted the shareholders report. In fact as of 18 February 2009 Por Liu and Jian Guo Yang were the shareholders appointed on 18 December 2008 and their shareholding was reflected as 840 000 and 360 000 shares respectively. Therefore the allegation that CC Liu was in control at the time of the alleged breach of the charterparty was made in error. I must point out that at the time of the judgment there was no certainty if Parakou was the deemed owner of the "Canon Trader". That certainty was cleared by the first arbitration award. In the same judgment of Levinsohn DJP, the court held that Galsworthy had also not shown that CC Liu, notwithstanding that he was no longer the shareholder, that he 'was still the puppet master pulling the strings and controlling that company as well.'[83] The court having found that the Pretty Time, one of the entities owned by the first appellant was not owned by the deemed owner of the "Jin Kang", respondent still arrested an entity owned by the first appellant.

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[82] *Galsworthy Ltd v Pretty Time Shipping SA; Pretty Time Shipping SA v Galsworthy Ltd* fn43.
[83] *Galsworthy Ltd v Pretty Time Shipping SA; Pretty Time Shipping SA v Galsworthy Ltd* fn43 para 20.

[83] The following are the relevant facts appearing from the high court judgments in Singapore suit number 434/2014 and MT “Pretty Time” by Levinshon DJP, which are relevant in the determination of whether there is an association between the MT “Pretty Scene” and the “Jin Kang” which show the following:

83.1 That Parakou Shipping PTE Ltd (RC number 199 507 2739) was incorporated on 13 October 1995. At the time of incorporation, the parents cited as the first and second respondents, Liu Cheng Chan and Chik Sau Kam were directors and shareholders, and as of 31 December 2008, the son and Yang Jianguo took over as directors since 22 December 2008;

83.2 That prior to liquidation Parakou Singapore PTE, it was at all material times part of the Parakou Group, including Parakou Investment Holdings PTE Ltd; Parakou Shipping management PTE Ltd; Parakou Shipping Ltd; Parakou International Ltd and Parakou SA;

83.3 That at all material times the entities within the Parakou Group were managed by Liu Cheng Chan and his wife Chik Sau Kam. Liu Cheng Chan was the Chairman of the Parakou Group and had ultimate control of the entities within the group;

83.4 That as early as 31 December 2003 and at all material times thereafter the Parakou Shipping PTE Ltd (in liquidation) was insolvent. At the incorporation of the company in liquidation; the parents were directors and shareholders till 31 December 2008 and it has been so since its incorporation on 21 December 2008. The couple were Singapore citizens and married to each other. At incorporation they were equal shareholders. From 1 January 2015 the husband held 80%, the wife 8.33% and the son, Liu Por, 11.67%;

83.5 Pursuant to a resolution of 22 December 2008, the husband and wife transferred their shares to the son and his friend, Yang Jianguo. The couple also resigned as directors from 31 December 2008. These facts are almost similar to the facts presented before Levinsohn DJP, where the court found that Liu Por was the major shareholder in Pretty Scene Shipping SA;

83.6 It was alleged that notwithstanding their resignations and the transfer of their shares to their son and the friend, the parents retained control of the companies. The new shareholders consulted the former chairperson and deputy chairperson on all major decisions;

83.7 That the first, second and third respondents retained a 100% shareholding in Parakou Shipping SA (incorporated in Parakou) and they were involved as directors

in Pretty Diversity Shipping SA, Pretty Harvest Shipping SA, Pretty Concept Shipping SA, Pretty Scene Shipping SA, Pretty Rich Shipping SA, Pretty Jewelry Shipping SA, Pretty View Shipping SA, Pretty Time Shipping SA, Pretty Shipping SA, Pretty Urban Shipping SA and Pretty World Shipping SA; (the Pretty Entities);

83.8 That the son Liu Por with effect from 22 December 2008 was a director and shareholder of the company in liquidation and that as of 22 December 2008 he held 70% of the shareholding in that company. The son's involvement is mentioned in other Parakou companies in Singapore ranging from 10% to 30% shareholding in the liquidated company. It appears that his shareholding was that of a minority shareholder. This is an indication that the major shareholding and control remained with Liu Cheng Chang. This is clear from the shareholding in Parakou Investment Holdings PTE Ltd and Parakou Shipping management PTE Ltd where the shareholders were only the father, mother and son, holding 70-20-10 and 50-30-20 shares respectively;

83.9 That as of 11 January 2007 the "Pretty Vessels" collection was placed under management agreements for a period of 12 months. The "Pretty Vessels" collectively known as "Pretty Entities" were all single company owned vessels ie. the St Michaelis by Pretty Diversity Shipping SA; St Gabriel by the Pretty Harvest Shipping SA; Overseas Hercules by Pretty Concept Shipping SA; Pretty Scene by Pretty Scene Shipping S.A; Overseas Orion by Pretty Rich Shipping SA; Pretty Jewelry by Pretty Jewelry Shipping SA; Overseas Cygnus by Pretty View Shipping SA; St Johannis by Pretty Harmony Shipping SA; Pretty Time by Pretty Time Shipping; St Marien by Pretty Unity Shipping SA; Pretty World by Pretty World Shipping SA; and Overseas Sextans by Pretty Urban Shipping SA;

83.10 That the sole shareholder of the "Pretty Entities" was none other than Liu Por as found by Levinsohn DJP in MT "Pretty Time".

[84] The aforementioned information shows who were acting as the controlling minds at all material times in respect of the various entities. I find that Liu Por was the *de jure* owner of Pretty Scene Shipping SA. It had also been advanced that based on the Equasis records that the MT "Pretty Scene" was owned by Pretty Scene Shipping SA. The Pretty Scene Shipping SA formed part of the various entities owned or controlled by Liu Por. I therefore come to the conclusion that it was

not associated to the "Jin Kang", as it was Liu Cheng Chang who controlled Parakou Singapore, when the claim arose.

[85] The application brought by Galsworthy is vexatious and an abuse of the process of court as it cannot continue pursuing any asset owned by the Pretty Scene parties on the basis that they are associated to the "Jin Kang". Our law places control of a company on the shareholders. This is a factual and a legal question. Hare[84] emphasises that the status of ownership or control of the ship concerned remains even when the ship concerned has been sold or lost. It is not always easy to establish who is in control where the company may be a shelf company or owned by a nominee who may just be an agent for a principal. This is also the case where the shareholding is 50/50 as was the case in *MV LA Pampalouis Dreyfus Armateurs SNC v TOR Shipping.*[85] The shareholders lose control when the company gets deregistered or is placed under liquidation. It is never easy to prove control, hence the Act in s 6(3) allows for the receipt of hearsay evidence. Our courts accept records from Lloyd's list of records and investigative reports to prove control as it was the case in the *Silver Star*[86] matter.

[86] Wallis[87] states that it is now possible to pursue claims relating to ownership or possession of a ship by way of an associated ship arrest. He goes on to say that this extension must be taken to have effect in relation only to monetary claims arising from the questions of ownership or possession of a ship, such as a claim for damages arising from late delivery of a vessel under an agreement of sale. Later in his thesis[88], and this is very significant, is that previously control was based on shareholding but the amended section, concentrates on the person in whom the power of control vests and providing that the same person controls both companies the association is established notwithstanding the presence of minority shareholders in either company, He goes on to say that this has the effect of rendering the presence of minority shareholders irrelevant, which may raise a constitutional challenge for instance, where A owns 60% shareholding in company X and B is a minority shareholder at 40% and in company Y the shareholding is reversed as it

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[84] Hare fn6 at 108.
[85] *MV La Pampalouis Dreyfus Armateurs SNC v TOR Shipping.*fn66.
[86] *MT Silver Star* fn41.
[87] MJD Wallis 'The Associated Ship and South African Admiralty Jurisdiction' unpublished LLD thesis (2010) at 199, available at http://researchspace.ukzn.ac.za/xmlui/bitstream/handle/10413/678/Wallis_MJD_2010.pdf?sequence=1; accessed 27 February 2019.
[88] Wallis fn87 at 202 – 203.

may involve an arbitrary deprivation of the property of the minority shareholder. Now in terms of s 3(7)(b)(i) ships are deemed to be owned by those persons who own the majority in number of the shares in the ships. The section is clear in that it does not speak of the majority owner of the shares but of owning the majority in number of shares. As stated in the *Heavy Metal* judgment,[89] the 'dominance of control' is the key to determining the association in such a situation. It is clear that the ownership and control of Parakou PTE (in liquidation) lay with Liu Cheng Chang and his wife only. The legal shareholder and controller of the Pretty Shipping Company is not Liu Cheng Chang but Liu Por. Lastly, the liquidators were in *de jure* control of Parakou Singapore.

[87] As a guideline I have extensively relied on the views of Wallis and other legal sources on the subject, which show that:

87.1 In regard to the associated ship the relevant date at which to determine ownership of the ship or control of the company is the date of commencement of the action. In relation to the ship concerned the relevant date is the date upon which the claim arose.[90] The date of the commencement of the action would be the actual date of arrest or deemed arrest of the associated ship.[91]

87.2 As the commencement of an action *in rem* may be instituted by the arrest of the associated ship in terms of s 3(6) of the Act instead of the ship concerned, it is not relevant whether the ship concerned no longer exists or that is has changed hands since the claim arose. This protects the rights of the claimants and is advantageous to the claimants as the ship concerned may have been lost at sea or destroyed. The associated ship provisions are also applicable to all forms of ownership in terms of s 3(7)*(b)*(iii), thus giving a wider protection to the claimants. In this case this would apply to the deemed ownership of the "Jin Kang".

87.3 Wallis in his thesis states that the language of s 3(7) differentiates between the owner and the demise charterer of the vessel[92]. Wallis states that s 1(3) which came into effect on 20 June 2003 specifically provides that for the purposes of an action *in rem* a charterer by demise is deemed to be or to have been the owner of the ship for the period of the charter. As a result thereof the same principle applies to all charterers being 'that the party that stands behind the debtor should be the party

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[89] *MV Heavy Metal* fn39 para 6.
[90] See Wallis fn87 at 203; *MV Cape Courage* fn11.
[91] See s (1)(2)(iii), s 3(10)(a) and s 3(5) of the Act.
[92] Wallis fn87 at 210.

behind the company that owns the associated ship.'[93]

[88] The main issue is to determine the owner of the associated ship, as determined at the date of arrest of the associated ship and the determination of whether it is the same owner that owned the ship concerned. It has not been proven on a balance of probabilities that Liu Cheng Chang was the deemed owner of the MT "Pretty Scene". The same dispositive factor which they encountered in the Pretty Time, where the court found that they have failed to prove that Liu Cheng Chang was the power behind the scenes. At the time when the claim arose, Liu Por was not a shareholder in the Parakou Singapore.

[89] Various legal authorities are in agreement that legal control or limited managerial control is not sufficient to support the arrest of an associated ship. It is therefore important to identify where actual control lies.

The intervening liquidation and application of section 299(1)

[90] The effect of intervening liquidation proceedings against Parakou would be determined in terms of the choice of law between the parties. Similarly, the same should apply to the effect of the maritime moratorium imposed in terms of s 299 of the Singapore Companies Act, which provides as follows:

'(1) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of a creditors' voluntary winding up shall be void.

(2) After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.'

When do the multiple arrests give rise to an action against Galsworthy?

[91] Section 3(8) provides that:-

'Property shall not be arrested and security therefor shall not be given more than once in respect of the same maritime claim by the same claimant.'

This provision is subject to the provision of s 5(2)*(dA)* which provides that:

'notwithstanding the provisions of section 3(8), order that, in addition to property already arrested or attached further property be arrested or attached in order to provide additional

[93] Wallis fn87 at 210.

security for any claim, and order that any security given be increased, reduced or discharged, subject to such conditions as to the court appears just.'

[92] The prohibition in s 3(8) relates only where there has been an arrest and security has been given.[94] This is in line with the purposive interpretation of the Act that you arrest for purposes of getting security for your claim. This is also clear from the deeming provisions of s 3(10)*(a)*(i) which states that once security has been provided there is no need for the actual arrest. The arrest cannot occur *in vacuo*, it has to be accompanied by the provision of security.

[93] Where there is no arrest, whether set aside by the court or no security in place, there is no arrest. The second arrest is permissible where the court sets aside the arrest on the basis of failure to make out a prima facie case. *Great River Shipping Inc v Sunnyface Marine Limited*[95]states that where the initial arrest has been set aside on the basis that the claimant failed to make out a prima facie case in respect of the causes of action on which it relied for that arrest, the second arrest, was permissible. Where there has been an arrest and no provision of security is made it is permissible to re-arrest save in circumstances under s 5(2)*(d)*.

[94] The legal authorities are in agreement in that the prohibition operates only where the claimant is in possession of valid security, given in respect of the maritime claim and given for the purposes of securing the release of the vessel from arrest or to prevent the arrest.

[95] The territorial scope of s 3(8), as interpreted by Wallis, is that '[section] 3(8) is likewise subject to territorial limitation but the limitation is even narrower than those under the Arrest Convention'.[96] The limitation is that it is only concerned with the arrest of property in South Africa in terms of the Act and the giving of security for that property, because the general principle in the interpretation of statutes is that legislation is presumed not to have an extra-territorial application. The language of the Act indicates that it is concerned with the arrest of the 'property' and s 3(5) sets out what property can be arrested. This is a limited group of property unlike under the Arrest Convention. The language used does not indicate that it is applicable elsewhere other than in South Africa; it is only applicable to arrests and the provisions of security only in South Africa.

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[94] Wallis fn87 at 330.
[95] *Great River Shipping Inc. v Sunnyface Marine Limited* 1992 (2) SA 87 (C).
[96] Wallis fn87 at 335.

[96] However, (a) *The Thalassini*[97] judgment made it clear that where the arrest is for purposes of obtaining security, the arrest will not be obtained where security has been provided. (b) In terms of s 5(2)(c) of the Act a court is empowered to order that any arrest be subject to such conditions as appears just whether as to the furnishing of security or liability for costs, or damage caused and likely to be caused. It is trite that security is restricted to those claims in respect of which the claimant is entitled to such security to pursue a claim in South Africa or in a foreign jurisdiction. Galsworthy has pursued its claim against Parakou in Singapore and there was no need for it to pursue the same claim in South Africa.

[97] On that basis I agree with the Pretty Scene parties that they have a prima facie case against the respondent for the wrongful arrest of the "Pretty Scene". This was a classic case of pursuing the same claims in two different jurisdictions.

[98] In a claim for damages for wrongful arrest s 5(4) of the Act provides as follows:

'Any person who makes an excessive claim or requires excessive security or without reasonable and probable cause obtains the arrest of property or an order of court, shall be liable to any person suffering loss or damage as a result thereof for that loss or damage.'

Previously before the amendment of the section the requirement was that 'good cause' be shown and not 'reasonable and probable cause'. This is a more stringent test.

[99] In the light thereof I find the arrests to have been wrongful. It is my finding that Galsworthy was not entitled to pursue any claim against the Pretty Scene parties.

[100] the Pretty Scene parties have satisfied this court that they have a genuine and reasonable need for security to pursue a claim for damages for wrongful arrests against Galsworthy.

[101] Accordingly, I propose the following orders:

1. The appeal in respect of case no. A23/2015 be dismissed with costs, to include costs of two counsel, where applicable.
2. The appeal in respect of case no. A65/2016:
   (a) be upheld with costs, costs to include the costs of two counsel where applicable.
   (b) The arrest is set aside.
   (c) The applicants counter application be upheld with costs, costs to

[97] *Thalassini* fn17 at 833A.

Include costs of two counsel, where applicable.

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Mbatha J

Date of hearing	:	1 August 2018 (A Court)
Date delivered	:	4 March 2019

Appearances:

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Instructed by	:	NORTON ROSE FULBRIGHT SA INC 3 Pencarrow Crescent, Pencarrow Park La Lucia Ridge c/o TATHAM WILKES INC 200 Hoosen Haffejee Street Pietermaritzburg
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