IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 68393

DOLE FRESH FRUIT INTERNATIONAL LTD APPELLANT

VERSUS

MV KAPETAN LEONIDAS AND ANOTHER RESPONDENT

CORAM: CORBETT CJ, EM GROSSKOPF, SMALBERGER
VAN DEN HEEVER JJA et NICHOLAS AJA

DATE HEARD: 14 MARCH 1995

DATE DELIVERED: 29 MARCH 1995

NICHOLAS AJA

J U D G M E N T

NICHOLAS AJA:

The proceedings which gave rise to this appeal had their origin in the arrest in Durban of The Kapetan Leonidas. a motor vessel owned by Boothia Maritime Inc, in terms of s. 5(3)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Act"). The order for the arrest was made in the Durban and Coast Local Division of the Supreme Court on an application dated 5 April 1992 by Dole Fresh Fruit International Limited, a corporation which carries on business as a fruit trader in Costa Rica. The purpose of the arrest was to obtain security in respect of a maritime claim to be pursued in arbitration proceedings in

London against Saful Navigation Inc, which is the owner of The Chios Clipper. Dole Fresh Fruit alleged that The Kapetan Leonidas was an "associated ship" of The Chios Clipper as defined in s 3(7)(a) and (b) of the Act.

On 7 April 1992 The Kapetan Leonidas furnished security for the payment of Dole Fresh Fruit's claim and the vessel was released from arrest. Thereafter The Kapetan Leonidas made application on 5 October 1992 for an order inter alia setting aside the order granted on 5 April 1992. As owner of The Kapetan Leonidas. Boothia Maritime Inc joined as intervening applicant in seeking the same relief. The application was heard by Thirion J who on 25 March 1993 made the following order:

"1. The Order of this Court granted on the 5th April 1992 in terms of which the Acting Sheriff for Durban was authorised and directed to arrest the m.v. Kapetan Leonidas and certain further relief was granted, is hereby set aside.

2. The respondent is ordered to return to the intervening applicant the security furnished to secure the release of the applicant from arrest.

3. The respondent is ordered to pay the intervening applicant the sum of US$ 3 825,00.

4. The respondent is ordered to pay the costs of the application."

(Order 3 related to the costs incurred in furnishing the security.)

Leave having been granted by the court a quo. Dole Fresh Fruit appealed to this court against that order, and in a cross-appeal The Kapetan Leonidas and Boothia Maritime sought a variation of order 3.

The main facts are summarized in the affidavit made by Alan Victor Goldberg on which Dole Fresh Fruit's application was founded:

"BACKGROUND TO THE APPLICANTS CLAIM AGAINST SAFUL NAVIGATION INC.

10 By a charter party on the Baltime form dated 15 November 1990, Saful Navigation Inc, described as disponent owners, agreed to let and the Applicant, as charterer, agreed to hire the refrigerated vessel, the mv 'Chios Clipper' for a minimum of 140 days to a maximum of 190 days from not before 0001 hours, 1 January 1991, for the employment of the vessel on lawful trades as defined in lines 17 - 20 of the Charter Party, a copy of which is annexed hereto marked 'AVG.3'. Clause 68 of the additional clauses to the charter party provides for the application of English Law in determining the rights and responsibilities under the charter party.

11. I further annex hereto marked 'AVG4' a copy of the Addendum to the Charter Party, which provides that all disputes shall be resolved by way of London Arbitration.

12. Pursuant to the charter party, on 28 January 1991, the 'Chios Clipper' arrived at Port Moin, Costa Rica, to load a cargo of bananas, owned by the Applicant, for discharge at Hamburg. At approximately 13h00 on 3 February 1991, loading in all four holds of the vessel commenced, starting with the lower decks. Loading ceased at 23h45 on the same day and approximately one and a half hours later, fire broke out in the hold of No 1 Deck A. The fire was brought under control by 06h00 the following morning and at

19h00 that day, loading was resumed. Approximately two thousand five hundred boxes of bananas, which had already been loaded into hold No 1 Deck A, were destroyed in the fire.

13 Shortly after the re-commencement of loading operations, a second fire broke out at approximately 01h45 on 5 February 1991, this time in the accommodation block of the vessel. The fire spread rapidly and was soon out of control and the vessel was towed out to sea on the directions of the port authorities. Approximately 126 628 boxes of bananas had been loaded when the second fire commenced and, during the period that the vessel was towed out to sea and until the fire was brought under control, the refrigeration compartments of the vessel were inoperative, which resulted in a reduced shelf life of the boxes of bananas ... with the result that the bananas would ripen prior to the vessel reaching the markets in Europe.

14. I am advised by Clyde & Company [sc. the instructing London solicitors] that there was no local salvage market for the damaged boxes of bananas and an attempt to sell the bananas to pulp producers failed and, in the end, all the parties concerned therefore reached the reluctant conclusion that the bananas would have to be dumped. The Applicant's claims for the loss of bananas and other expenses arising from the breach of the charter party, details of

which will be set out shortly, may be summarised as follows :-

5. $1 444 454,05 based on the sound arrived market value of the bananas;

6. ballast bonus of $183 915,28;

7. difference between the rate of hire in the Charter Party and the market rate in January 1991 of $183 107,88.

THE BREACH OF THE CHARTER PARTY

15. The relevant clauses in the charter party are as follows :-

> '1. The owners let and the charterers hire the vessel ... she being in every way fitted for refrigerated cargo service ... 3. The owner to ... maintain her in a thoroughly efficient state in hull and refrigerated and other machinery during service ... 13. The owners only to be responsible ... for loss or damage to goods on board, if such ... loss has been caused by want of due diligence on the part of the owners or their managers in making the vessel seaworthy and fitted for the voyage or any other personal act, omission or default of the owners or their managers. The owners not to be responsible in any other case, nor for damage or delay whatsoever and howsoever caused, even if caused by the neglect

or default of their servants ...

Owners will at all times maintain the vessel in good condition and her machinery and equipment in good operating order.'

16. The Applicant has thus far been unable to determine the cause of either of the fires, but it is submitted that the occurrence of the fires give rise to an inference of fact that the fires were caused by unseaworthiness or failure to maintain on the part of the ship owners. There is authority in English Law for the proposition that where a vessel breaks down or sinks shortly after leaving the port and without any apparent reason, the mere fact that the vessel has broken down or has sunk, gives rise to an inference of fact that the vessel was unseaworthy and that the onus of rebutting the inference of unseaworthiness rests on ship owners. A principle in South African law analogous to this would, it is submitted, be res ipsa loquitur. I do not propose amplifying this, save to state that argument will be addressed to this Honourable Court on the relevant authorities in English Law at the time when this Application is brought.

17. It is accordingly submitted that the fact that the mv 'Chios Clipper' caught fire without any apparent reason, gives rise to an inference of fact that she was unseaworthy, which unseaworthiness thereby

caused the Applicant to suffer damages as set out in paragraph 14 of this Affidavit."

In a supplementary affidavit made by Bertram Robert Greenhalgh, further evidence relating to the fires was submitted, namely -

(i) a report on an "on-hire" survey of The Chios Clipper carried out by a Captain Klaus Förster at Hamburg on 16 January 1991, immediately before the commencement of the charter of the vessel to Dole Fresh Fruit; (ii) a report of a "field survey" carried out on the vessel by a Captain Rudolph Klotz after the fire on 3 February 1991; and (iii) a report to the charterers by the master of the vessel regarding the non-use of a C02 fire extinguishing system fitted in the holds of the vessel.

None of these reports is of any real assistance in ascertaining the cause of the fires.

In the application for the release of The Kapetan Leonidas

the founding affidavit was made by Simeon Palios. He is the president and a director but not a shareholder of Saful Navigation. He denied that The Kapetan Leonidas was an associated ship of The Chios Clipper, and submitted that Dole Fresh Fruit had not established a prima facie case in respect of its claim against Saful Navigation.

The principles which were applicable to Dole Fresh Fruit's application dated 5 April 1992 are clear. In Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris 1989(3) SA 820(A) ("The Thalassini Avgi") Botha JA said at 832I-833A:

> "A claimant applying for an order for the arrest of a ship in terms of s 5(3)(a) [of the Act] for the purpose of obtaining security in respect of a claim which is the subject of contemplated proceedings to be instituted in a foreign forum is required to satisfy the Court (a) that he has a claim enforceable by an action in rem against the ship in question or against a ship of which the

> ship in question is an associated ship; (b) that he has a prima facie case in respect of such a claim, which is prima facie enforceable in the nominated forum or forums of his choice ...; and (c) that he has a genuine and reasonable need for security in respect of the claim."

Although The Kapetan Leonidas and Boothia Maritime were the applicants in the setting aside proceedings, Dole Fresh Fruit continued to bear the onus of proving that its application for the arrest was correctly granted.

> "The principle is that a party cannot by obtaining ex parte an order in his favour secure a more advantageous position than he would have been in if the other party had, consequent upon notice, had an opportunity of opposing."

(per Nestadt JA in Weissglass NO v Savonnerie Establishment 1992(3) SA 928(A) at 936 F-G. See also The Thalissini Avgi (supra) at 834 D, and Bocimar NV v Kotor Overseas Shipping Limited 1994(2) SA

563(A) at 578G - 579B.

Accordingly, there were two main issues for decision by Thirion J:

8. Whether Dole Fresh Fruit had shown that it had a prima facie case against The Chios Clipper in respect of the damage to its bananas sustained on 3-5 February 1991; and

9. Whether The Kapetan Leonidas was at the time when the claim arose an associated ship of The Chios Clipper.

The learned judge held that Dole Fresh Fruit had failed to make out a

prima facie case in regard to the first issue. It was accordingly

unnecessary for him to consider the second issue.

1. The prima facie case.

Basic in this regard is clause 13 of the charter-party, the

material words of which are:

"Responsibility and Exemption.

13. The Owners only to be responsible for delay in delivery of the Vessel or for delay during the currency of the Charter and for loss or damage to goods on board, if such delay or loss has been caused by want of due diligence on the part of the Owners or their Manager in making the Vessel seaworthy and fitted for the voyage or any other personal act or omission [or] default of the Owners or their Manager. The Owners not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants. ..."

In Goldberg's affidavit Dole Fresh Fruit approached the case on the basis that under clause 13 it bore the onus of showing prima facie that the fires were caused by unseaworthiness or failure to maintain on the part of Saful Navigation. In the affidavit of Simeon Palios, Boothia Maritime adopted the same approach. And that was the basis on

which the case was decided by the court a quo.

Lacking direct evidence as to the cause of the fires, Dole Fresh Fruit was driven to rely on reasoning by inference similar to that comprehended in the maxim res ipsa loquitur. Thirion J said in his judgment:

> "The obstacle in the way of applying some such doctrine as res ipsa loquitur to the present case is that in terms of the charter party the liability of the owners for damage suffered by the charterers through the operation of the vessel, was extremely limited.
> The owners were not responsible for the negligence of the crew or master of the vessel. There is no evidence which would indicate that the fires were caused by a mechanical fault as opposed to some human agency. In the circumstances of this case there is no room for the application of the doctrine of res ipsa loquitur."

In this court, counsel for Dole Fresh Fruit submitted that in terms of the charter-party there existed an absolute undertaking by Saful

Navigation of seaworthiness on delivery and a continuing obligation during service; and that it was to be inferred from the fact that the two fires broke out that Saful breached this undertaking.

In limine a member of the court raised the question whether it was correct that Dole Fresh Fruit bore the onus of showing that Saful Navigation was liable in terms of clause 13 of the charter-party, under which English law was to be applied when determining the rights and responsibilities of both owners and charterers. Reference was made to Halsbury's Laws of England. 4th ed Vol 43 paras. 447-450, and to The Roberta (1938) 60 Ll.L. Reports 84 (CA). In that case the English court of appeal was concerned with the effect of clause 12 of a charter-party. (Clause 12 was the predecessor of clause 13 of the charter-party in the

present case. They are in substantially identical terms.) In the course of

his judgment (in which MacKinnon LJ and Bennett J concurred) Greer

L.J. said at 85 that if the charterer places goods on board, and those

goods have been delivered damaged, there is an onus upon the

shipowner to account in some way for the damage.

> "... [He] would be a bailee of those goods, receiving them in good order and delivering them in bad order, and he would be called upon to give some explanation to account for the fact that they were delivered in bad order."

He agreed with the trial judge that the question of onus was a question of English law, under which the onus rests upon the defendant shipowner to bring himself within one of the exceptions: unless he did so he was liable as bailee of the goods. Clause 12 meant that if the ship-owner could establish that the loss or damage was not caused by want of due

diligence on his part, then he would bring himself within clause 12, but if he did not establish that and he did not give an account of how he came to deliver damaged goods he did not bring himself within the exception.

If the law of England on the question of onus is correctly stated in Greer LJ's judgment, then in the absence of evidence by the owner (Saful Navigation) that the loss or damage sustained by the charterer (Dole Fresh Fruit) was not caused by want of diligence on its part (and there was no such evidence) then it did not bring itself within the exemption contained in clause 13.

The incidence of the onus is crucial to the proper decision of the first issue. Nevertheless, I do not think that this should now be

decided. The approach of both parties in the proceedings was that Dole Fresh Fruit bore the onus and that was the basis on which the court a quo decided the matter. Moreover, this court has not had the benefit of full argument regarding the English law on the point, and more particularly on the submission made by counsel for Boothia Maritime that on a proper construction clause 13 was not an exemption or exception to the owner's common law liability as bailee of goods placed on board, but was a comprehensive statement of the grounds on which the owner would be liable to the charterer.

Consequently I do not make a finding on the first issue and proceed to consider the second issue. 2. "Associated Ship"

The Act provides in ss (4) of s 3 that a maritime claim may

be enforced by an action in rem in certain defined classes of case.

Ss (5) provides that -

> "An action in rem shall be instituted by the arrest within the area of jurisdiction of the court concerned of property of one or more of the following categories [one of which is 'the ship'] against or in respect of which the claim lies".

It is provided in ss (6) that (subject to certain exceptions which are not

now germane) -

> "... an action in rem ... may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose."

"Associated ship" is defined in ss (7) which, prior to the amendment

effected by Act 87 of 1992 (which came into operation on 1 July 1992)

provided that -

"(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 by the person who was the owner of the ship concerned at the time when the maritime claim arose; or (ii) owned by a company in which the shares, when the maritime claim arose, were controlled or owned by a person who then controlled or owned the shares in the company which owned the ship concerned. (b) For the purposes of paragraph (a) -

(i) ships shall be deemed to be owned by the same persons if all 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."

S 5(3)(ii) empowers a court in the exercise of its admiralty jurisdiction to order the arrest of any property if the claim is or may be the subject of arbitration. S. 9 provides -

> "A court may in the exercise of its admiralty jurisdiction at any time order that any property which has been arrested in terms of this Act be sold and the proceeds thereof be held as a fund in the court or otherwise dealt with."

S. 11 deals with the ranking of claims with regard to a fund in a court in terms of the Act.

The plain meaning of the words "the shares in the company" in ss (7)(a)(ii) is "all the shares in the company". Some of the shares in a company, even if they be the majority, are not "the shares in the company". That interpretation accords with the policy of the Act regarding associated ships. An associated ship may be arrested instead of the ship in respect of which the maritime claim arose, and it then becomes liable to be sold in terms of s 9 of the Act. The legislature could never have intended that a person owning shares in the company

which owns the alleged associated ship, but who is a stranger to the company which owns the ship in respect of which the maritime claim arose, should be deprived of his interest by its arrest as an associated ship. Compare subpara (i) of s 3(7)(b) -

> "(i) ships shall be deemed to be owned by the same persons if all the shares in the ships are owned by the same persons." (My emphasis)

It has been pointed out (in Admiralty Jurisdiction and Practice in South Africa (1987) by D J Shaw at 39-40) that there is an unfortunate lack of clarity in the provisions of s 3(7)(b)(ii): paragraph (a)(ii), to which the provisions of para (b)(ii) relate, does not refer to controlling a company - it refers to controlling the shares in a company.

A person may control a company without controlling all the

shares in the company. And control over a company can be exercised

even without a majority shareholding. See Zygos Corporation v Salen

Rederiema AB 1985(2) SA 486(C) at 489 B-D and National Iranian

Tanker Co v M V Pericles G C 1995(1) SA 475 A as 485 B-C. It was

pointed out in East Cross Sea Transport Inc v Elgin Brown & Hamer

(Pty) Ltd 1992(1) SA 102(D) at 107 E-F that there is a vast conceptual

and factual difference between control of the management of a company's

affairs and control of its shares.

In its literal meaning para (b) (ii) does not perform any

function. Unless therefore it is to be treated as pro non scripto, it

should be interpreted as if it read -

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

control the shares in the company." Such an interpretation would complete what seems to be an ellipsis in para. (b)(ii). And it would maintain the symmetry of para (a) of ss (7) (which deals with two factual situations (i) and (ii)) and para (b) (which contains two deeming provisions (i) & (ii) for the purposes of para (a)). In Dole Fresh Fruit's founding affidavit, Goldberg set out the results of company searches in Piraeus, Greece and Panama made during the short period available to him for the gathering of information in regard to the association between the two vessels. This information indicated that The Chios Clipper was owned by Saful Navigation Inc, which was incorporated according to the laws of Panama, and was managed by Diana Shipping Agencies SA of Piraeus, Greece; and that

The Kapetan Leonidas was owned by Boothia Maritime, which was incorporated according to the laws of Panama and managed by Diana Shipping Services SA of Piraeus, Greece.

The founding affidavit in the setting-aside application was made by Simeon Palios, the president and a director of, but not a shareholder in Boothia Maritime. He disputed that The Kapetan Leonidas was an associated ship in relation to The Chios Clipper. In paras and 15 and 16 he set out the various shareholdings in and the ultimate identity of the controlling shareholders of Boothia Maritime and Saful Navigation: and these were depicted diagrammatically in Annexure "SP3" (the figures express percentages):

ANNEXURE "SP3" - Diagram depicting shareholdings of the companies

SEE ORIGINAL JUDGEMENT TABLE

In Dole Fresh Fruit's answering affidavit, Bertram Robert Greenhalgh did not dispute the contents of paragraphs 15 and 16 and Annexure "SP3", but he did not admit that the persons or companies listed as shareholders in the respective companies in fact controlled the shares which they held. He admitted that the information set out in paras 15 and 16 indicated that the vessels were not associated in terms of s 3(7)(a)(i) of the Act ("inasmuch as the vessels were not owned by the same person when the maritime claim arose") but he submitted that the vessels were in fact associated in terms of s 3(7)(a)(ii) read with s 3(7)(b)(ii).

In the result, the issue was a narrow one: Did Dole Fresh Fruit establish, on a balance of probabilities (see the Bocimar NV case

(supra) at 581 C) that, with due regard to the deeming provision contained in s 3(7)(b)(ii), all the shares in Boothia Maritime were controlled by a person or persons who controlled the shares in Saful Navigation?

Ordinarily, it is the registered holder of shares who controls those shares. But some other person may control them, as in the case of the beneficial owner of shares held by a nominee (see Standard Bank of SA Ltd v Ocean Commodities Inc 1983(1)SA 276(A) at 288H-289C) or in a case where there exists a share-voting agreement.

Goldberg's original submission was that Palios and/or Margaronis and/or Diana Shipping Agencies SA controlled the shares in the respective companies in that they had the power directly or indirectly,

to control the companies. That is a non sequitur: a person may control a company even though he does not control the shares in the company.

Greenhalgh submitted that the shares in Boothia Maritime were controlled by Palios either directly or indirectly. He did not give any direct evidence in support of that submission. He referred to facts which, he said, indicated that the vessels which included The Chios Clipper and The Kapetan Leonidas were part of a fleet which in turn was indicative of common ownership or control. He said that the probabilities were overwhelming that the power to control the shares in both ship-owning companies vested in Palios.

In para 36 of his heads of argument counsel for Dole Fresh Fruit said that the question for decision was whether or not there existed

as at February 1991 a fleet of vessels under common beneficial ownership of which The Kapetan Leonidas and The Chios Clipper were members. And in paragraph 38 it was submitted that there was sufficient circumstantial evidence from which an inference as to the requisite ownership could be drawn, namely,

> "(a) Boothia Maritime Inc (the owner of the m.v. "Kapetan Leonidas") and Saful Navigation Inc (the owner of the m.v. "Chios Clipper") have two common directors, Palios and Colakis; and
>
> 10. Palios is the President of both companies and in relation to Saful has very wide powers; and this notwithstanding that he is not a share-holder in the company;
>
> 11. Palios acted as "attorney in fact" for Saful Navigation Inc in various instances;
>
> 12. the vessels were each managed by a company with a similar name and which shared the same address, telephone number and cable address and in respect of

> which Palios was the President; (e) there are instances of "cross-mortgaging" of various vessels."

Palios dealt in his affidavit with the control of the management of the two companies. He said that the affairs of Boothia Maritime which owns The Kapetan Leonidas are controlled by himself as the principal shareholder of the holding company (Corozal Compania Navieras SA.) The affairs of Saful Navigation, which owns The Chios Clipper, are controlled by Christoforos Sarantis as its principal shareholder. The respective management companies (Diana Shipping Agencies SA which manages The Chios Clipper and Diana Shipping Services SA which manages The Kapetan Leonidas) have a business association, but this does not mean that the control of the two shipping

companies is vested in the same people. It is a common feature for ships controlled by different people to be managed by a single management company or closely associated management companies.

The formulation in para 36 of the heads of argument is not a correct formulation of the question to be decided. Ultimately it was not the case of Dole Fresh Fruit that the two vessels were beneficially owned by the same person. Its case was whether the shares in Saful Navigation, which owned The Chios Clipper were controlled by persons who controlled the shares in Boothia Maritime, which owned The Kapetan Leonidas.

Even if it be assumed, contrary to the direct evidence of Palios, that the same persons were in control of the two companies, that

would not establish the factum probandum.

In my opinion therefore, on the facts contained in its affidavits read with the facts contained in Palios's affidavit which were admitted, Dole Fresh Fruit failed to establish that The Kapetan Leonidas was an associated ship of The Chios Clipper. Consequently the order granted by Thirion J was correct.

It was submitted in the alternative that the present is an appropriate case for a reference to oral evidence in terms of Rule 6(5)(g) of the Uniform Rules of Court. I do not agree. A reference may be made under that rule "where an application cannot properly be decided on affidavit". The present is not such a case. Cross-Appeal

Counsel for The Kapetan Leonidas and Boothia Maritime did not persist in the cross-appeal.

I make the following orders:

1. The appeal is dismissed with costs including the costs of two counsel.

2. The cross-appeal is dismissed with costs.

H C NICHOLAS ACTING JUDGE OF APPEAL
CORBETT CJ) EM GROSSKOPF JA) CONCUR SMALBERGER JA)
VAN DEN HEEVER AJA)