

148/94

Case No 726/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NATIONAL IRANIAN TANKER COMPANY

Appellant

and

M V "PERICLES GC"

Respondent

CORAM: CORBETT CJ, VAN HEERDEN, NIENABER,
HOWIE JJA, *et* NICHOLAS AJA.

DATE OF HEARING: 2 September 1994

DATE OF JUDGMENT: 30 September 1994

J U D G M E N T

/CORBETT CJ:

CORBETT CJ:

The Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Act") came into operation on 1 November 1983. It repealed the Colonial Courts of Admiralty Act, 1890 of the United Kingdom in so far as it applied in relation to the Republic of South Africa. It also introduced into our Admiralty law a novel concept, the "associated ship".

Sec 3(5) of the Act prescribed that an action *in rem* to enforce a maritime claim should be instituted by the arrest, within the area of jurisdiction of the Court concerned, of property against or in respect of which the claim arose. Included among the categories of property which could be so arrested was -

"The ship, with or without its equipment, furniture, stores or bunkers".

This ship, i e the ship against or in respect of which the claim lay, may conveniently be referred to as "the guilty ship".

Sec 3(6) introduced another category of property which, save in certain exceptional instances not presently relevant, might be arrested, instead of the guilty ship, in the process of instituting an action *in rem*, viz the associated ship. Such a ship was defined in sec 3(7), the relevant portion of which read:

"(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."

(I shall call this "the original definition".)

In 1992 the Act was amended by, *inter alia*, the Admiralty Jurisdiction Regulation Amendment Act 87 of 1992, which came into effect on 1 July 1992. I shall refer to this Act as "the amending Act". In terms of the amending Act the above-quoted definition of associated ship was altered to read:

"(a) For the purpose of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose -

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

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

- (i) ships shall be deemed to be owned by the same

persons if the majority in number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons;

- (ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company;
- (iii) a company includes any other juristic person and any body of persons, irrespective of whether or not any interest therein consists of shares."

(I shall call this "the new definition".)

It will be seen that the original definition described two distinct situations in which a ship, other than the guilty ship (the guilty ship is referred to in the Act as "the ship concerned"), could be an associated ship, viz -

- (i) where a person (say "X") was the owner of both the associated ship and the guilty ship at the time when the maritime claim arose; and
- (ii) where, at the time when the maritime claim arose, X owned or controlled the shares in a company (A Coy) which owned the associated ship and at the same time X owned or controlled the

shares in a company (B Coy) which owned the guilty ship.

Thus situation (i) dealt with the case of direct ownership of both the guilty ship and the associated ship by the person concerned (X); whereas situation (ii) dealt with a form of indirect, or beneficial, ownership achieved through companies the shares in which were owned or controlled by X.

A comparison of the original definition with the new definition shows that three main changes have come about as a result of the amending Act. These are:

- (a) A new situation, not specifically provided for by the Act, was introduced, viz the case where X owns the associated ship directly and also "owns" the guilty ship indirectly through a company.
- (b) The time when X or the company, as the case may be, is required to own the associated ship is the time when the action is commenced, instead of, as it was under the original definition,

the time when the maritime claim arose.

- (c) Where there is the interposition of a company between the person concerned (X), and either the associated ship or the guilty ship, X is required to control the company, in contrast to controlling or owning the shares in the company, as was the position under the original definition.

Another innovation introduced by the Act was the so-called security arrest. This was originally provided for by sec 5(3) of the Act. Under the amending Act a new subsection 5(3) has been substituted. The original sec 5(3) read as follows:

"(a) A court may in the exercise of its admiralty jurisdiction order the arrest of any property if -

- (i) the person seeking the arrest has a claim enforceable by an action *in rem* against the property concerned or which would be so enforceable but for an arbitration or proceedings contemplated in subparagraph (ii);
- (ii) the claim is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding either in the Republic or elsewhere and whether or not it is subject to the law of the Republic.

(b) Unless the court orders otherwise any property so arrested shall be deemed to be property arrested in an action in terms of this Act.

(c) A court may order that any security for, or the proceeds of, any such property shall be held as security for any such claim or pending the outcome of the arbitration or proceedings."

This subsection was the subject of extensive interpretation by this Court in the case of **Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v M V Dimitris** 1989 (3) SA 820 (A), at 829 *et seq.* At 830 A-C Botha JA, who delivered the judgment of the Court, stated:

"It is clear, in our view, that subparas (i) and (ii) of s 5(3)(a) should be read conjunctively, as if they had been conjoined by the addition of the word 'and' between them (cf the **Euromarine** case *supra* at 708 E). The intention of the Legislature was to make it possible for a claimant to apply to a Court for, *inter alia* (confining myself to what is relevant in the context of the present case), an order for the arrest of a ship with the object of obtaining

security in respect of a claim which is the subject of proceedings contemplated in a foreign court (subpara (ii)). A prerequisite for the grant of such an order is that the claimant must have a claim enforceable by an action *in rem* (subpara (i)). In terms of subpara (i) the action *in rem* must be against the ship which it is sought to arrest, but when the subparagraph is read together with the provisions of s 3(6) of the Act, it is clear that an order of arrest is also available against an associated ship of the ship against which the relevant maritime claim arose, as defined in s 3(7)."

Thus in order to provide security for a claim, such as that described in the subsection, which is or may be the subject of arbitration or other proceedings the court may on the application of the claimant order the arrest of an associated ship. It is not necessary to refer to sec 5(3) under the amending Act in any detail. The main change which it brought about was the inclusion of a claim enforceable by an action *in personam* against the owner of the property concerned.

With that introduction I now turn to the facts. Appellant

is the National Iranian Tanker Company, a company incorporated and having its principal place of business in Iran. During the period October 1990 to January 1991 the appellant chartered two vessels, the "Trade Honor", owned at the time by Trade Gulf Navigation Co Ltd ("Trade Gulf") of Nicosia, Cyprus, and the "Trade Independence", owned at the time by Morella Shipping Co Ltd ("Morella"), also of Nicosia. Appellant alleges that under the relevant charterparties it has claims *in rem* against those two vessels, the details of which need not be stated. It appears that arbitration proceedings in respect of these claims have been initiated in London. Since the "Trade Honor" was the sole major asset of Trade Gulf and the "Trade Independence" the sole major asset of Morella and since both vessels have been sold and the two companies have no substantial assets, appellant now needs security for its claims.

At the end of September 1992 the appellant filed an urgent application to the Durban and Court Local Division for the

arrest, in terms of sec 5(3) of the Act, of a vessel known as MV "Pericles GC", in order to provide security for its claims *in rem* against the "Trade Honor" and the "Trade Independence". It was alleged in the founding papers that what I shall call the "Pericles" was either awaiting a berth outside Durban harbour or was actually berthed in the harbour and that it was an associated ship. It is clear that from the start appellant based its case on the relevant portions of the Act as amended, and more particularly on the new definition. It further alleged -

- (1) that the maritime claims arose, in respect of the "Trade Honor", on 8 February 1992 and, in respect of the "Trade Independence", on 31 October 1991;
- (2) that the "Pericles" was at all material times owned by Trade Banner Line Ltd ("Trade Banner") of Nicosia, Cyprus;
- (3) that at the relevant times a certain Mr Gregory Callimanopoulos controlled the companies which owned the "Trade Honor", the

"Trade Independence" and the "Pericles";

(4) that accordingly the "Pericles" was an associated ship; and

(5) that appellant had a genuine and reasonable need for security.

Appellant sought to establish Mr Callimanopoulos's control, direct or indirect, over the companies in question by reference to various documents and fragments of evidence from which, so it was contended, such control should be inferred.

The matter came *ex parte* before Shearer J and on 2 October 1992 he granted an order for the arrest of the "Pericles". This was implemented the same day. Shortly thereafter the owners of the "Pericles", Trade Banner, filed an urgent application for the setting aside of the arrest. In the affidavit filed in support of the application the deponent stated the following:

"4 This is an application to set aside the arrest on the grounds that the application papers on the basis of which the application was made did not make a

case for the granting of the arrest, more particularly in that:

4.1 This application proceeds on the basis that the relevant provisions are the provisions of Act 105 of 1983 as amended by Act No 87 of 1992. The said owners submit that this is incorrect.

4.2 In any event, the application papers do not make allegations sufficient to establish the relevant control of the companies or shares in question."

He went on to say that the only questions involved at this stage were the questions of law reflected in para 4 and that it was appropriate that they be dealt with *in limine*.

The application to set aside the arrest was heard by Shearer J on 14 October 1992. He then granted the order as prayed and furnished his reasons for doing so on 30 October 1992. With leave of the Judge *a quo* the matter is now before us on appeal.

It is conceded by appellant's counsel (rightly in my view)

that inasmuch as the maritime claims in question arose on 31 October 1991 and 8 February 1992 and the amending Act took effect only on 1 July 1992, the application for the arrest of the "Pericles" could be founded on the provisions of the amending Act only if it were to be construed as having retrospective effect, i.e. as applying to matters which existed or occurred prior to its coming into operation. It was also conceded by appellant's counsel in oral argument before us that if the application for arrest had to be adjudged in the light of the Act, and particularly sec 3(7), before amendment, the papers did not establish that the Pericles was an associated ship. It is thus of cardinal importance to appellant's case whether the amending Act of 1992 was retrospective in its effect or not.

In a somewhat similar case, **Euromarine International of Mauren v The Ship Berg and Others** 1986 (2) SA 700 (A), this Court considered the question as to whether the provisions of secs 3(6) and 5(3) in the Act were to be given retrospective effect, in the sense

of applying to maritime claims which arose before the Act came into operation on 1 November 1983. The Court decided against retrospectivity.

In delivering the judgment of the Court Miller JA referred extensively to the authorities. The principles to be extracted from this judgment and the authorities quoted may, I think, be summed up as follows.

There is at common law a *prima facie* rule of construction that a statute (including a particular provision in a statute) should not be interpreted as having retrospective effect unless there is an express provision to that effect or that result is unavoidable on the language used. A statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past. (This definition appears to merge two canons of interpretation: the presumption against retrospectivity and the

presumption against interference with vested rights. This, however, is not of great moment, as both canons lead in the same direction: see **Cape Town Municipality v F Robb & Co Ltd** 1966 (4) SA 345 (C), at 350 F - 351 D.)

There is an exception to this rule in the case of a statute which is purely procedural and operates prospectively on all matters coming before the Court after the passing of the statute, though even here it is the intention of the legislature which is paramount. Moreover, a provision which is procedural in form may in essence affect the substantive rights of persons.

In the case of **The Ship Berg**, *supra*, the argument revolved around the newly-introduced provisions whereby an associated ship could be arrested in the process of instituting an action *in rem* or in order to provide security in proceedings to enforce a maritime claim. In dealing with the question as to whether the Act applied to claims which arose prior to its commencement Miller JA

said (at 712 B-E and 713 D-E):

"The contention on behalf of the appellant was, however, that the new provision enabling a claimant to bring an action *in rem* by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose should be taken to have retrospective effect, because it is in essence a provision relating to procedure rather than to substantive or vested rights. Such provision, it was said, in effect provided the legal machinery by which a claim could be enforced. It is true that s 3(6) read with s 5(3) describes a method for recovery of money due to one who has suffered injury or loss for which he has a maritime claim, but it does much more than that; it gives to the claimant a right which he never had before, namely to recover what is due to him from a party who was not responsible for the damage suffered by him. It provides the claimant not only with a method for recovery but with an additional or alternative defendant. And by that token, it is creative of new liabilities or obligations in owners of ships, or the potential thereof, of which such owners, if the claims arose prior to the commencement of the Act, would have been

wholly unaware and unsuspecting.

.....

The applicability of the Act to claims which arose prior to its commencement would not only result in the owners of ships being deprived of the opportunity of taking precautionary measures to avoid, if possible, the arrest of an associated ship, but the sudden, unsuspected confrontation with the fact of arrest of such ship would carry its own potential of prejudice."

Applying these principles to the present case, it seems to me that if the amending Act of 1992 were to be applied to the maritime claims which appellant seeks to enforce it would operate in a manner which prejudiced shipowners by creating burdens or obligations that did not exist before. This can best be illustrated by two examples, one concentrating on the change introduced by the new definition as to the nature of the relationship between the person concerned and the company owning the ship; and the other relating to the time when the person concerned is required to hold his interest in the associated ship.

Example 1:

X (the person concerned) owns all the shares in company A which in turn owns ship no 1. Ship no 2 is owned by company B, in which X has a minor (as to number of shares), but controlling, shareholding. Prior to the coming into effect of the amending Act in 1992 (but after the coming into effect of the Act on 1 November 1983) an event occurs giving rise to a maritime claim in respect of ship no 1, thus causing it to become the guilty ship. After the amending Act has come into effect the claimant applies to arrest ship no 2 as an associated ship. If the Act and the original definition apply, ship no 2 cannot be arrested because at the time when the claim arose X did not own or control the shares in B company. If, on the other hand, the amending Act and the new definition were to apply, ship no 2 could be arrested because at the time the action commenced X controlled B company.

As was pointed out in *Zygos Corporation v Salen*

Rederierna AB 1985 (2) SA 486 (C), at 489 B-C, it is possible for a person to control a company without necessarily controlling the shares in that company. This example accordingly illustrates how a new burden could be placed upon a shipowner and how his vested rights could be adversely affected were the amending Act to be given retrospective effect. The inequity of such a result is intensified if one postulates that X deliberately arranged his affairs and his relationship with company B in order to avoid the possibility of ship no 2 being arrested as an associated ship.

Example 2:

X owns ship no 1 directly. Prior to the coming into effect of the amending Act an event occurs giving rise to a maritime claim in respect of ship no 1. Thereafter, but still prior to the coming into effect of the amending Act, X acquires ship no 2. After the amending Act has come into effect the claimant commences an action

in rem by seeking the arrest of ship no 2 as an associated ship. If the Act and the original definition apply, ship no 2 cannot be arrested because X did not own it at the time when the maritime claim arose. If, however, the amending Act and the new definition apply, ship no 2 can be arrested because X owned ship no 2 at the time the action was commenced. Retrospective effect would thus operate to X's detriment by creating a new burden.

These examples were put to appellant's counsel during the course of argument and he conceded the correctness of the legal conclusions arrived at on the facts postulated.

Furthermore, the rights of innocent third parties could be adversely affected by giving the amending Act retrospective operation. Take the facts of example 1, but postulate that X acquired his minority, but controlling, shareholding from Y, then the sole beneficial shareholder, after the maritime claim arose, but before the amending Act came into operation; and that proceedings to arrest ship no 2 are

taken after the amending Act has come into operation. One of the consequences of giving the amending Act retrospective operation would be that Y's shareholding would be adversely affected by the arrest of ship no 2.

In my view, therefore, to give the amending Act retrospective operation would interfere with existing rights and create new burdens. There is nothing in the amending Act itself to indicate any intention that it, or at any rate the provisions in it now relevant, should operate retrospectively. Moreover, it is clear, on the authority of **The Ship Berg**, that the provisions in question cannot be regarded as purely procedural. It follows that the relevant provisions of the amending Act do not have retrospective effect and that appellant's case must be adjudged on the basis of the Act before amendment. So adjudged, the application failed to establish that the "Pericles" was an associated ship. Accordingly, my conclusion is that Shearer J correctly set aside the arrest of the "Pericles" and that the appeal must

fail. This conclusion renders superfluous any consideration of the further question debated by counsel, viz whether, even on the basis of the amending Act and the new definition, the appellant made out a *prima facie* case.

The appeal is dismissed with costs.

M M CORBETT

VAN HEERDEN	JA)	
NIENABER	JA)	CONCUR
HOWIE	JA)	
NICHOLAS	JA)	