THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 684/2019

MT 'PRETTY SCENE'

In the matter between:

GALSWORTHY LIMITED **APPELLANT**

and

PRETTY SCENE SHIPPING S.A. **FIRST RESPONDENT**

MT 'PRETTY SCENE' **SECOND RESPONDENT**

Neutral citation: *MT Pretty Scene: Galsworthy Ltd v Pretty Scene Shipping S.A. and Another* (Case No 684/19) [2021] ZASCA 38 (12 April 2021)

Coram: WALLIS, ZONDI, MOCUMIE and SCHIPPERS JJA and GOOSEN AJA

Heard: 19 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 12 April 2021.

Summary: Arrest of an associated ship in terms of ss 3(6) and (7) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the AJRA) – defect in summons not justifying the setting aside of a warrant of arrest –

procedural requirements of Admiralty Rule 4 – requirements for a summons in terms of Admiralty Rule 2(1) – Practice Directive 27 of the KwaZulu-Natal Division of the High Court – summons only required to set out a clear and concise statement of the claim – does not require same detail as a pleading.

Association – provisions of s 3(7)(*c*) of the AJRA – charterer deemed to be the owner of the ship concerned when the claim in issue arose – immaterial whether charterer no longer the charterer at that time.

When does a claim arise – in case of a claim on an arbitration award claim inextricably linked to underlying maritime claim – claim arises when the underlying claim arose.

Second arrest in anticipation of first arrest being set aside – such an arrest permissible – not barred by s 3(8) of AJRA – proper interpretation of that section.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Mbatha J, Madondo DJP and Van Zyl J concurring):

1 The appeal is upheld with costs.

2 The order of the full court of the KwaZulu-Natal Division in the appeal in case no A23/2015 is set aside and replaced by the following order:

'(a) The appeal is upheld with costs, such costs to include the costs of two counsel where two counsel were employed.

(b) The order of the high court is set aside and replaced by the following order:

'The application to set aside the arrest of the *Pretty Scene* is dismissed with costs.'

3 The order of the full court of the KwaZulu-Natal Division in the appeal in case no A65/2016 is set aside and replaced by the following order:

'The appeal is dismissed with costs.'

JUDGMENT

Wallis JA (Zondi, Mocumie and Schippers JJA and Goosen AJA concurring)

[1] On 18 June 2007 and by way of the exchange of recapitulation messages dated 17 and 18 June 2007, the appellant, Galsworthy Ltd (Galsworthy), let and Parakou Shipping PTE Ltd (Parakou Shipping) hired the MV *Canton Trader* (to be renamed *Jin Kang*) on a time charter party for a minimum of 60 and maximum 63 months with delivery due to take place at Singapore between March and April 2009. Parakou Shipping did not intend to trade the *Jin Kang*, but concluded a back-to-back five year charter party with an entity called Ocean Glory at a slightly higher charter rate. However, with the collapse in the charter market as a result of the world financial crisis in 2008, Ocean Glory went into liquidation. Thereafter the shareholders and directors of Parakou Shipping sought unsuccessfully to extricate it from the charter with Galsworthy. Ultimately Parakou Shipping refused to take delivery of the vessel when tendered.

[2] Arbitration in London followed in which Galsworthy sought damages from Parakou Shipping for its repudiation of the charter party. In a First Final Arbitration Award dated 31 August 2010 the appointed arbitrators declared:

'… that the parties entered into a legally binding charter party as a result of the ratification by the Charterers of the terms set out in the recapitulation messages of 17 and 18 June … and that the Charterers are accordingly in repudiatory breach of charter.'

Flowing from that conclusion the arbitrators made an award in favour of Galsworthy in an amount of US$2 673 279.15. Parakou Shipping had conceded during the course of the hearing that if they were found to be in breach of charter they were liable for damages in that sum. The balance of Galsworthy's claim for additional damages and costs was reserved for further adjudication. On 13 May 2011 the arbitrators made a Second Final Arbitration Award in favour of Galsworthy for payment of damages in the sum of US$38 579 000, together with interest and costs.

[3] The present appeal arises from Galsworthy's attempts to enforce payment of those awards by way of an action *in rem* against the MT *Pretty Scene* as an associated ship in relation to the *Jin Kang*. It initially arrested the *Pretty Scene* on 18 June 2016. The first respondent, Pretty Scene Shipping SA (PSS), the owner of the *Pretty Scene*, applied to set the arrest aside. The application came before Vahed J and the arrest was set aside on 31 October 2016. Vahed J refused leave to appeal, but this court granted leave to appeal to the full court of the KwaZulu-Natal Division. In anticipation of an unfavourable judgment from Vahed J, Galsworthy effected a second arrest of the *Pretty Scene* on 28 October 2016. An application by PSS to set aside that arrest, and a counter-application for security for a claim for wrongful arrest under s 5(4) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the AJRA), were dismissed by Henriques J on 10 August 2017. Reasons were provided on 22 September 2017. Like Vahed J, Henriques J refused leave to appeal, but this court again granted leave to appeal to the full court.

[4] The two appeals were heard in a consolidated hearing on 1 August 2018 and judgment was delivered (Mbatha J, with Madondo DJP and Van Zyl J concurring) on 4 March 2019. The appeal against

Vahed J's order was dismissed and that against Henriques J's judgment upheld. In the result both arrests were set aside and the counter-application for security for costs was granted. The order of the full court does not specify the terms on which security was ordered, merely recording that:

'The applicant's counter-application be and is hereby upheld with costs, costs to include costs of two counsel where applicable.'

It must be accepted therefore that the order was in the terms prayed and meant that security was to be provided in an amount in excess of US$6.6 million, plus interest and costs. The appeals are before us by virtue of the grant of special leave by this court.

Mootness

[5] PSS contended that the appeals had become moot, because after its arrest the *Pretty Scene* was sold and the proceeds distributed under ss 9 and 11 of the AJRA. It is common cause that Galsworthy received nothing in consequence of that sale and distribution. On that basis it was submitted that success in the appeals would have no practical effect or result and therefore that they should be dismissed in terms of s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013.

[6] There is no merit in this contention. In the first instance there remains a live issue in that the full court's order that Galsworthy provide security for PSS's claim for damages for wrongful arrest remains in existence, albeit that security has not yet been furnished. In any event the jurisdiction of the South African courts to deal with such a claim has been established.[1] Furthermore, the case raises matters of importance in regard

[1] *Mediterranean Shipping Co v Speedwell Shipping Co Ltd and Another* 1986 (4) SA 329 (D).

to admiralty procedure and it is desirable that these be resolved in the wider interests of clarifying the law and practice in admiralty cases.[2]

THE FIRST ARREST

The procedural objection to the first arrest

[7] Galsworthy applied ex parte to judges in KwaZulu-Natal,[3] the Eastern Cape and the Western Cape, for orders directing the registrars of those courts to issue warrants of arrest and accompanying writs of summons in respect of eight vessels. The eight vessels were product tankers alleged to be associated ships in relation to the *Jin Kang*. Galsworthy brought the applications before judges because it wanted confidentiality orders in respect of the applications and the warrants of arrest, with a view to ensuring that Parakou Shipping would not learn of them and divert the vessels elsewhere to avoid arrest. This could occur via an inspection of the register of admiralty actions at the courts. It is not uncommon for confidentiality orders to be sought and granted in admiralty proceedings, both *in rem* and *in personam*.

[8] The application was brought in the conventional form on notice of motion supported by an affidavit detailing the claim; the basis for association; and the reasons for seeking confidentiality. The order was granted in all three divisions. The warrants and writs of summons in the KwaZulu-Natal Division were subsequently extended for two years by way of a further order granted on 29 March 2016.

[9] An application to set aside the arrest of the *Pretty Scene* was launched on 1 July 2016, two weeks after its arrest. When the arrest was

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[2] *Merak S, The: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA).
[3] The application came before Mnguni J under Case No A20/2015.

made only the warrant of arrest and writ of summons were served, but a copy of the application papers was furnished to PSS's attorneys by Galsworthy's attorneys before the application to set aside the arrest was launched. The application raised a number of issues, principal among which was a procedural objection that the summons did not comply with the requirements of the judgment in *The Galaecia*[4] and Practice Directive 27 ('the Directive') issued by the KwaZulu-Natal Division of the High Court. This objection was upheld by Vahed J and the arrest set aside. He did not address any of the other grounds on which the arrest was challenged. His decision was upheld by the full court for essentially the same reasons as his.

[10] With respect, this conclusion was erroneous for the following reasons:

(a) PSS's procedural objection was misconceived, as a warrant of arrest cannot be set aside because of deficiencies in the writ of summons;

(b) the decision in *The Galaecia* was misconstrued;

(c) the approach to the Directive misconstrued Admiralty Rule 2(1)(*b*) and imposed requirements on the contents of a summons that are inconsistent with the general structure of the Admiralty Rules, unnecessary and unduly burdensome;

(d) the summons in any event complied with the requirements of the Directive in the only respect in which it was challenged.

Each of these will be dealt with in turn.

The misconceived challenge to the warrant

[4] *The Galaecia: Vidal Armadores SA v Thalass Export Co Ltd* SCOSA D 252 (D). SCOSA is an acronym for Shipping Cases of South Africa a private publication of maritime judgments. The judgment is on the Maritime Law Association of South Africa's website http://www.mlasa.co.za/wp-content/uploads/downloads/2010/02/Durban%20Division/2006/MFV%20Galaecia%20part%201.pdf.

[11] For the purposes of considering this point I will assume that PSS was correct in saying that the writ of summons was defective. However, its aim was to set aside the arrest of the *Pretty Scene*. Accordingly, it needed to show that the order directing the registrar to issue the warrant of arrest was invalid. For the procedural objection to have effect, the defect in the summons had to invalidate both the order that the warrant of arrest be issued and the warrant itself.

[12] The parties appeared to accept that the invalidity of the summons would lead inexorably to the invalidity of the warrant of arrest. The assumption was that the two are mutually interdependent, that is, the one cannot exist without the other. That is not the case. This is apparent from Admiralty Rule 4(3), which provides that the registrar may only issue a warrant of arrest if summons has been issued, but makes an exception in the case where the arrest is ordered by the court. The court may order an arrest without a summons being issued, as may well occur in circumstances of extreme urgency. If a vessel is about to depart from the jurisdiction an arrest may be ordered on affidavits, or oral evidence, placed before a judge at home in the middle of the night. While this is fortunately relatively unusual, it does occur and the rule accommodates it. What it demonstrates is that there is no link between the arrest and the summons. A deficiency in the latter does not affect the validity of the former.

[13] Even were the summons and the warrant of arrest linked I fail to see on what basis, a defect in the summons would invalidate the arrest. A summons that is defective for non-compliance with Admiralty Rule 2(1)(*b*), which was the complaint here, is nonetheless a summons. It is not a nullity, merely because the claim is insufficiently specified. A

defective summons may serve to interrupt the running of prescription[5] and may be amended.[6] Although counsel for PSS devoted a substantial portion of the heads of argument to the procedural objection, he did not suggest that the summons was either invalid or a nullity. Nor did he explain why the defect in the summons should invalidate the arrest.

[14] A warrant issued by the registrar under Admiralty Rule 4(3) might possibly be invalid if no summons had been issued, but that is not the situation here. There was a summons, but it was alleged to be defective. Nonetheless, the judge ordered the registrar to issue it and to issue the warrant of arrest. He did so on the basis of the information contained in an affidavit that dealt in detail with the basis for the alleged association. On the facts contained in the affidavit he was correct to order the registrar to issue the summons and warrant of arrest.

[15] That brings me to the last point under this head. Where an *in rem* arrest is challenged, the onus is on the arresting party to justify the arrest. It is well established that in doing so they may rely on grounds not advanced at the time of the arrest. On this basis it has been held that an entirely new case may be advanced to sustain the arrest.[7] In the *Andrico Unity* the claimants said they had supplied bunkers to the owner of the vessel. When it transpired that the vessel was subject to a demise charter, this case was abandoned in favour of an allegation that the supply of bunkers created a maritime lien enforceable against the owners, even though they were not personally liable. The court held this change in

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[5] *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15J-16D.
[6] Uniform Rule 28. See the discussion on this rule in Van Loggerenberg et al *Erasmus Superior Court Practice.*
[7] *Transol Bunker BV v MV Andrico Unity and Others; Grecian-Mar SRL v MV Andrico Unity and Others* 1987 (3) SA 794 (C) at 798D-800E, confirmed on appeal in *Transol Bunker BV v MV Andrico Unity and Others; Grecian-Mar SRL v MV Andrico Unity and Others* 1989 (4) SA 325 (A).

stance to be permissible because it was open to the arresting party to justify the arrest on any lawful basis available to it. That is precisely what Galsworthy did in response to the application to set aside the arrest. It relied on the affidavit before the judge who granted the initial order to show that notwithstanding any deficiencies in the summons there was a sufficient case that the *Pretty Scene* was an associated ship in relation to the *Jin Kang*.[8] If one is entitled to alter the entire basis of one's case in order to sustain an arrest, I can see no reason why one cannot, when the arrest is challenged, supplement a deficient summons in the same way.

The Galaecia and Practice Directive 27

Background

[16] Ordinarily, a party seeking to arrest a vessel *in rem* for the purpose of an admiralty action against the vessel applies to the registrar of the high court for the issue of a warrant of arrest.[9] This is a procedure that has been part of our admiralty procedure since 1799 in the Cape and 1856 in KwaZulu-Natal. Before the enactment of the AJRA it was the procedure followed in our courts sitting as courts of admiralty under the Colonial Courts of Admiralty Act of 1890.[10] It also reflects in large measure the procedure in actions *in rem* in many other jurisdictions around the world. In view of the consequences for the shipowner whose ship is wrongly arrested,[11] courts in practice generally accept (and are correct to do so)

[8] The full court mistakenly thought that this affidavit may not have been before Mnguni J because it bore a different case number to the summons. It overlooked that it bore the case number of the application that served before Mnguni J.
[9] Admiralty Rule 4(2)*(a)*.
[10] Colonial Courts of Admiralty Act of 1890 (53 & 54 Vic. C27).
[11] See the oft-quoted remarks of Didcott J in *Katagum Wholesalers Commodities Co Ltd v The MV Paz* 1984 (3) SA 261 (D) at 269H-270A in regard to the serious consequences of arresting a ship. It must be borne in mind that this was a minority judgment and its strictures in regard to procedures and the strength of the case that an applicant has to make were not shared by the majority and have not been endorsed in later decisions.

that an application to set aside an arrest is a matter that should be dealt with urgently and given priority.

[17] The registrar may refer the question whether the warrant should be issued to a judge.[12] In determining whether to do so the registrar does not rely on any personal knowledge of maritime law, but is concerned with whether the requirements for such an arrest as set out in the rules and the AJRA are satisfied. On occasion the legal representatives for the applicant indicates that this is desirable, because the facts were not straightforward. However, most arrests are relatively straightforward.

[18] In order to assist the registrar, the rule provides that a warrant of arrest will only be issued if the summons in the action has been issued and a certificate from the arresting party has been submitted to the registrar:

(a) stating that the claim is a maritime claim and is one in respect of which the court has jurisdiction, or will have jurisdiction once the arrest is effected;

(b) stating that the property sought to be arrested is the property in respect of which the claim lies, or an associated ship that may be arrested in terms of s 3(6) of the AJRA;

(c) saying whether any security has been given to prevent the arrest or procure the release of the vessel from arrest and, if so, providing details of such security;

(d) certifying that the contents of the certificate are true and correct to the best of the knowledge, information and belief of the signatory and the source of such knowledge and information.[13]

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[12] Admiralty Rule 4(2)*(b)*.
[13] Admiralty Rule 4(3).

[19] In practice the certificate will almost invariably be furnished by the applicant's attorney, who owes duties to the court as one of its officers. These duties are particularly onerous where the proceedings are ex parte as is almost always the case with both an arrest and an attachment *ad fundandam et confirmandam jurisdictionem.* The potentially contentious legal issues in relation to the contents of the certificate are whether the claim is a maritime claim; whether the court has jurisdiction or will acquire jurisdiction as a result of an arrest; and, in the case of an associated ship arrest, whether the target of the arrest is an associated ship in relation to the ship concerned. One would expect that, if the facts showed that any of these were potentially controversial, this would be drawn to the attention of the registrar and the latter would refer the matter to a judge. Otherwise, the matters set out in the certificate are largely of a formal nature and not such as to put the registrar on enquiry or require consideration by a judge.

The decision in The Galaecia

[20] The process outlined above, together with the brevity of the summons in the case before him, occasioned Combrinck J some concern in *The Galaecia*.[14] He criticised the summons in that case for its lack of particularity and perceived non-compliance with the provisions of Admiralty Rule 2(1)*(b)*. He said that the certificate under Admiralty Rule 4(3), the requirements for which were summarised in the previous paragraph, did little to ensure that the arresting party's claim was not frivolous or spurious, especially as the signatory might have no personal knowledge of the contents. In regard to the procedure generally he thought it debatable whether it would pass constitutional muster and

[14] Op cit, fn 4.

expressed concern at the time it took to resolve issues concerning the validity of arrests.

[21] Combrinck J concluded, by saying:

'In future practitioners would be well advised to ensure that a summons complies with the provisions of Rule 2(1)*(b)*. In addition, I see no reason why the Certificate in terms of Rule 4(3) should not be made by a representative of the arresting party who has knowledge of the matter and that a facsimile of such Certificate accompany the arrest warrant. With respect to the registrars of this and other Courts, I doubt whether they have any knowledge whatsoever of Admiralty law. Yet they must decide whether sufficient facts and contentions are made in the summons for the defendant to know on what basis for instance, it is said that the defendant vessel is an associated ship of the ship in respect of which the claim is made. In terms of Rule 4(2)*(b)*, the Registrar may refer to a Judge the question whether a warrant should be issued. Without of course wishing to fetter the Registrar's discretion it would appear to me a salutary precaution for the Registrar in the majority of cases to refer these matters to a judge for decision. As a matter of practice this should henceforth be done. I have discussed this matter with a number of senior judges in this Division and they are in agreement that a practice rule to the above effect should be introduced.'

[22] This judgment led to the introduction of the Directive. It reads:

'**27 Admiralty Arrest Warrants in terms of Rule 4(3)**

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.

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.

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)*.'

[23] The Directive diverged in significant respects from the judgment in *The Galaecia*, in part no doubt because of the representations made by the Maritime Law Association referred to in a note in the South African Law Journal that criticised the departure from established practice occasioned by the practice directive.[15] The two principal suggestions in the judgment, namely that the certificate under Admiralty Rule 4(3) be made by a representative of the arresting party and that the registrar should in the majority of cases refer the matter to a judge, were not included. Like the judgment the Directive emphasised the need for the

[15] Darryl Cooke 'The *Galaecia*' (2007) 124 *SALJ* 247 at 251. The representatives of the MLA were D J Shaw QC and M J D Wallis SC. We were informed from the Bar by Mr Wragge SC, who appeared for Galsworthy, that there is no equivalent practice directive in either the Western Cape or Eastern Cape divisions of the high court. Cooke's criticism was described as 'well-directed' in Gys Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* (2d, 2012) at 157, fn 291.

summons to comply with Admiralty Rule 2(1)*(b)*. This merely emphasised the existing position.

[24] *The Galaecia* did not lay down any new rule or provide any authority relevant to this or any other case. The owner had not sought to set aside the arrest on procedural grounds.[16] It was set aside because the claim was not a maritime claim.[17] The judgment drew attention to the provisions of Admiralty Rule 2(1)(*b*) and suggested that three allegations in the summons were conclusions of law.[18] Without elaboration it was said that the failure to comply with the rule gave rise to practical problems for the owner seeking to set aside the arrest and procedural difficulties.[19] It criticised the certificate furnished by the attorney because he had no personal knowledge of the facts being certified as true and correct. However, the Directive performed a *volte face* by requiring the certificate to be given by an attorney practising in the jurisdiction of the KwaZulu Natal Division. It rejected the automatic referral of applications to a judge.

[25] The argument for PSS, and the judgments in the high court at first instance and the full court, attached far greater significance to *The Galaecia* than was warranted. Given that no procedural issue was addressed in argument and the application was determined on the basis that the claim was not a maritime claim advanced, the judgment was no

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[16] The owner was represented by senior counsel experienced in maritime matters.
[17] The full court erred in thinking otherwise.
[18] This was a mistake as at most the summons contained only two allegations that might be characterised as conclusions of law. It seems that the judge had in mind the certificate by the attorney under Admiralty Rule 4(3), which referred to three separate provisions of the AJRA.
[19] The court referred to *SY Sandokan: Owner of the SY Sandokan v Liverpool and London Steamship Protection and Indemnity Association Ltd* 2001 (3) SA 824 (D) at 827D-828J, and the explanation for admitting a fourth set of affidavits, to enable the arresting party to respond to the allegations by the owner of the arrested vessel. It did not suggest that this was problematic. It is by no means unusual for this to be done in applications to set aside arrests and attachments.

more than an extended *obiter dictum* concerning procedural issues. It had no binding effect and was not adopted in terms in the Directive. It stressed the importance of Admiralty Rule 2(1)(*b*) without any analysis of its requirements. It has not been reported and its relative anonymity should be preserved.

The Practice Directive

[26] The Directive is of greater importance, because it involves a matter of practice that the high court is entitled to regulate in the exercise of its inherent powers.[20] It does not have the same standing as a rule promulgated under statutory authority, but it may supplement any rule, provided that it does not subvert it or the overall scheme of the rules governing a particular area of practice. Three of the Directive's explicit requirements are uncontroversial. They are that it is desirable that the person giving the certificate under Admiralty Rule 2(3) be an attorney practising in the KwaZulu-Natal Division; that the signatory should specify the source of their knowledge; and that the signatory should state that they know of no circumstance making it desirable that the matter be placed before a judge, failing which the registrar will refer it to a judge.

[27] The only potentially controversial provision was the requirement that the summons should contain the facts upon which the claim was based and the facts on which it was stated that a ship was an associated ship. I say potentially controversial because it is not clear what facts were being referred to. The two courts below erred in relation to what constitutes facts for the purposes of a summons and the extent of the facts required to be embodied in the summons. They demanded more than was contemplated in the Directive and, in the result, approached the summons

[20] Section 173 of the Constitution.

on the stringent basis demanded of a pleading, which is inapplicable to a summons.

[28] The application to set aside the first arrest focussed entirely on the adequacy of the writ of summons. It quoted the following allegation from para 17:

'Parakou Shipping is deemed to be the owner of the 'Jin Kang' in terms of Section 3(7)*(c)* of the Admiralty Jurisdiction Regulation Act 105 of 1983, as amended.'

The deponent said that 'such a statement is a conclusion of law and not a statement of fact' and submitted that it did not comply with the practice directive because it did not satisfy the requirement that 'sufficient particulars [must be pleaded] to enable the defendant to identify the facts and contentions upon which the claim is based'. No other part of the summons was attacked.

[29] I will deal at a later stage with three arguments raised on the merits of the arrest and the claim that the *Pretty Scene* was an associated ship in relation to the *Jin Kang*. It suffices for present purposes to say that none raised any dispute in regard to the facts on which Galsworthy relied in alleging an association. These were that the individual who controlled Parakou Shipping, at the time the original claim arose and when the first arbitration award was handed down, was a Mr Por Liu and that he controlled PSS through being the sole shareholder of its parent company Parakou Tankers Inc. These allegations were contained in the founding affidavit in the application for an order that the registrar issue the warrants of arrest. They were therefore before the judge who granted that order.

[30] Although none of this was disputed on the papers before it, the full court decided that Mr Por Liu did not control Parakou Shipping. It did so after reading a Singaporean judgment in proceedings where the court held that, despite all the shares in Parakou Shipping having been transferred by his parents to Mr Por Liu and an associate in December 2008, his father Mr CC Liu continued to control the affairs of Parakou Shipping. That was not an issue before the full court and it was not a finding that the court was entitled to make. Even if factually correct this was not decisive of the issue of control in the light of the judgment in the *Heavy Metal*.[21] While that judgment is controversial, its application was not in issue before either the full court or this court. On the basis of the distinction it drew between *de facto* and *de iure* control of a company, even if Mr CC Liu retained *de facto* control of Parakou Shipping, his son acquired *de iure* control, which sufficed for the purposes of the association.

The judgments

[31] Vahed J held that the absence of any factual support for the allegations in para 17 of the summons rendered it defective in accordance with the practice directive and the principles espoused in *The Galaecia*. He correctly identified that this was the cause for complaint and then quoted in full the judgment in *The Galaecia*. After citing two decisions dealing with pleadings,[22] not the contents of a summons, he rejected the contention that the summons only required the cause of action to be set out 'in concise terms' and also the submission that the writ of summons had been authorised by a judge on the basis of an affidavit setting out the facts in considerable detail. His conclusion was that had the judge's

[21] *The Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* [1999] ZASCA 44; 1999 (3) SA 1083 (SCA).
[22] *Trope and others v South African Reserve Bank* 1993 (3) SA 264 (A)(*Trope*) at 273A-B and *Buchner and Another v Johannesburg Consolidated Investment Co Ltd* (*Buchner*) 1995 (1) SA 215 (T) at 216G-H.

attention been drawn to *The Galaecia* and the practice directive he would not have authorised the issue of the writ of summons and the warrant of arrest. This led him to set aside the arrest without addressing the other grounds advanced by PSS.

[32] Turning to the full court's decision it is difficult to distil the precise ground upon which it upheld the high court's judgment. I trust I do it no injustice in saying that the principal points appear to be the following. The requirements of Admiralty Rule 2(1)*(b)* are peremptory. *The Galaecia* was the progenitor of the practice directive and was a binding judgment of the court. In *The Galaecia* the arrest of the vessel was set aside on the basis of procedural defects in the summons. The court rejected the contention that defects in the summons did not matter as the facts were before the judge at the time he granted the order for the issue of the summonses and warrants of arrest.[23] It held that in any event the high court had exercised its discretion judiciously in setting aside the arrest. In this it erred because there was no indication in Vahed J's judgment that he thought that he was exercising a discretion.

[33] Bar the last item, these were the same reasons that motivated the high court in reaching its conclusion. There was also a separate section of its judgment, in which the full court held that the high court was correct to conclude that association had not been proved on a balance of probabilities. However, this section did not deal with whether association was proved on a balance of probabilities, nor did it address any of the grounds raised by PSS and mentioned in para 29 as reasons why

[23] For some reason it went on to express doubts as to whether that was factually the case, on the basis that the case number of the summons differed from that on the affidavit placed before the judge in the initial application. This was incorrect as the full court overlooked the fact that this application bore the case number that it said gave rise to a doubt.

association had not been established. Instead, it relied on the deficiencies in the summons and certificate by Galsworthy's attorney that had already been considered. This led it to the conclusion that the summons was defective and had properly been set aside.

[34] For the sake of completeness, I should mention that the full court referred to the decisions in *Windrush Intercontinental*[24] and the *Cape Courage.*[25] However, neither case was concerned with an alleged deficiency in the summons. Both were opposed applications seeking to set aside the arrest of the vessels concerned on a full set of affidavits supported by documents and expert evidence. The question in *Windrush* was whether the applicant had established that the claims enjoyed a maritime lien. In the *Cape Courage* it was whether, where the ownership of the ship concerned changed on delivery of the vessel under a sale agreement, the association had been established. The argument was a technical one about when the maritime claim arose. Neither case bore upon the present situation.

The proper approach to Admiralty Rule 2(1)(b)

[35] Given that the decision in relation to the first arrest was based on *The Galaecia* and the Directive and their approach to a conventional application to the registrar for the issue of a warrant of arrest it is best to start there. The process in such an application was outlined earlier in paras 16 to 18 of this judgment. Ordinarily the summons will be issued at the same time as the warrant of arrest. The requirements in respect of a

[24] *Windrush Intercontinental SA and Another v UACC Bergshav Tankers AS* [2016] ZASCA 199; 2017 (30 SA 1 (SCA).
[25] *MV Cape Courage: Bulkship Union SA v Quannas Shipping Co Ltd and Another* [2009] ZASCA 74; 2010 (10 SA 53 (SCA).

summons are contained in Admiralty Rule 2, the relevant portions of which read as follows:

(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.

(2) Subject to the provisions of subrule (3), the summons shall set forth the matters referred to in rule 17(4) of the Uniform Rules.'

[36] Some background to this rule is helpful. Until the AJRA came into force, our admiralty law and procedure were contained in the Colonial Courts of Admiralty Act (the CCA) and the Rules promulgated under the CCA (the CCA Rules). The action *in rem* was derived from the CCA and was deliberately preserved in the AJRA. Under CCA Rule 3(1) every action was commenced by a writ of summons indorsed with the nature of the claim, the relief or remedy required and the amount claimed, if any. Forms of indorsement of claims were provided in Appendix 7 to the CCA Rules. The first example read:

'(1) *Damage by collision*

The Plaintiffs as owners of the Ship "Mary" [her cargo and freight *&c, or as the case may be*] claim the sum of £ _____ against the Ship "Jane" for damage occasioned by a collision which took place [*state where*] on the _____ day of _____ 18__; and for costs.'

Similar forms of indorsement in respect of salvage, pilotage, towage, master's wages and disbursements and seamen's wages followed. All were characterised by the same brevity.

[37] CCA Rule 29 provided that a warrant for the arrest of property in an action *in rem* might be issued by the registrar at the time of, or at any time after, the issue of the summons. The warrant was to be issued on the filing of an affidavit to lead warrant filed with the court. The affidavit was required to state the nature of the claim and that the aid of the court was required. The form of an affidavit to lead warrant was set out in Appendix 11. It was terse requiring only a statement that the claimant had a claim against the named vessel and stating the nature of the claim. This would normally follow the indorsement to the summons. CCA Rule 30 added some simple requirements in respect of three claims. For example, in an action for wages the national character of the ship had to be specified and the indorsement had to show that notice had been given to the consular officer of the state to which the ship belonged, if there was one residing in the particular colony where the CCA was being invoked. These did not affect the overall requirement in relation to the nature of the claim.

[38] The procedure incorporated into the AJRA was simple and uncomplicated. This was reflected in the original rules. Admiralty Rule 2(1), which remains in its original form, follows the language of CCA Rule 3(1). Form 1 to the Admiralty Rules, requiring the concise terms of the cause of action to be set out in the summons, clearly intended an endorsement along the lines of those contained in Appendix 7. Insofar as an arrest was concerned, the requirement of an affidavit to lead warrant was abolished and replaced by the certificate required under Admiralty Rule 4(3), which rule has been unaltered since inception. The certificate

is generally to much the same effect as the previous affidavit to lead warrant.[26]

[39] The amendment to Admiralty Rule 2(1) by the introduction of Rule 2(1)(*b*) merely clarified what was required from a claimant in providing a clear and concise statement of the nature of the claim. Sufficient particulars had to be furnished to enable the defendant to identify the facts and contentions on which the claim was based, but no more than that. The amendment was not directed at expanding the scope of Rule 2(1)(*a*).

[40] In England the requirements in regard to a summons and the issue of a warrant of arrest are not significantly different. The claim form in an admiralty claim *in rem*[27] requires only 'brief details of the claim'. Particulars of claim may be annexed or must follow within 75 days. The latter is what usually happens.[28] A claim for damages for breach of contract on behalf of eighteen unidentified parties situated at eighteen different addresses in regard to unspecified goods carried on board a ship in 1982 was rightly said to be insufficient to give brief details of the claim as required.[29] In another case it was said that the writ should give sufficient information to enable the recipient to identify the occasion on which the breach of contract occurred, by identifying the voyage on which on which the ship was engaged when the cargo was damaged and the approximate date of the voyage.[30] Neither judgment suggested any greater detail. Nor is the declaration[31] in support of an application for the

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[26] Shaw, *Admiralty Jurisdiction and Practice in South Africa* 107.
[27] Practice Direction 61.3.1 requiring the claim to be in Form ADM 1.
[28] Nigel Meeson and John A Kimbell *Admiralty Jurisdiction and Practice* (4d, 2011) para 4.7, p 144.
[29] *The "Tuyuti"* [1984] 2 Lloyd's Rep 51.
[30] *The "Jangmi"* [1988] 2 Lloyd's Rep 462.
[31] Practice Direction 61.5.1 (2) and Form ADM 5.

issue of a warrant of arrest any more stringent. It requires only that the nature of the claim be stated.

[41] Unlike Rule 17(2) of the Uniform Rules of Court, which distinguishes between a combined summons and a simple summons, the latter being used when the claim is for a debt or liquidated demand, Form 1 to the Admiralty Rules applies to all claims, whether liquid or unliquidated. Its terms are the same as Form 9 in the First Schedule to the Uniform Rules. It requires plaintiffs to set out in 'concise terms' their cause of action. I do not think that the requirement in Admiralty Rule 2(1)(*a*) that the claim be clear materially adds to this. Clarity and conciseness are not mutually exclusive. I share Cooke's view[32] that:

'It is difficult to think of a situation where a plaintiff sets out the concise terms of the cause of action, but in doing so does not provide a clear statement of the nature of the claim in the summons.'

[42] Admiralty Rule 2(2) should not be overlooked. It requires a summons in admiralty to set forth the matters in Uniform Rule 17(4). Those are the identification of the defendant – name, address, occupation and if being sued in a representative capacity, that capacity – and the full names, gender (if a natural person), residence and, if suing in a representative capacity, that capacity of the plaintiff. Bearing in mind that Admiralty Rule 2(3) permitted the plaintiff to be cited as the owner or insurer of a named ship or cargo, or the owner, master and crew of a particular ship and Rule 2(4) permitted the property being sued *in rem* to be named as the defendant, these are not onerous requirements.

[32] Op cit, fn 15, at 252.

[43] A comparison of the Admiralty Rules with the Uniform Rules is helpful. Long-standing authority holds that a simple summons requires no more of the plaintiff than a label for the claim, giving a general indication of the claim the defendant has to meet.[33] It does not require the particularity or precision of particulars of claim. The similarity between the language of Admiralty Rule 2(1)(a) and Form 1, and their counterparts in the Uniform Rules, suggests that little more should be required in Admiralty. Under the Uniform Rules an unliquidated claim requires a summons to which are attached particulars of claim. In admiralty no distinction is drawn between a liquidated and unliquidated claim and no pleadings are required unless the action is opposed.[34] This is consistent with the earlier admiralty practice where pleadings were only required if ordered by the court.[35] Provided the nature of the claim – not necessarily a complete cause of action – appears from the summons that appears to suffice.

[44] Did the introduction of Admiralty Rule 2(1)(*b*) alter this in the manner suggested in *The Galaecia*? The rule's wording is unfortunate, in that it borrowed from Uniform Rule 18(4), which deals with the requirements of pleading in a set of particulars of claim or a declaration accompanying a combined summons. This led the high court in this case to cite the two judgments dealing with the requirements of pleadings referred to earlier.[36] However, neither addressed the problem before it,

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[33] See the general discussion in *Globe Engineering Works Ltd v Ornelas Fishing Co (Pty) Ltd* 1983 (2) SA 95 (C).
[34] Admiralty Rule 9(1).
[35] *Incorporated General Insurance Ltd v Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (AD) was conducted under the AJRA without pleadings under the rules applicable before the Admiralty Rules were promulgated.
[36] Op cit, fn 29 and 30.

not least because they dealt with pleadings, not the contents of a summons, and a summons is not a pleading.[37]

[45] The first judgment, *Trope*, is authority for the proposition that one pleads facts and not conclusions of law, unless they flow from those facts. But, in a summons, the plaintiff is not required to plead its case. The rule requires it to set out sufficient particulars to enable the defendant to identify the facts and contentions upon which the claim is based. Neither the facts nor the contentions need be set out in the summons provided the defendant has sufficient particulars to identify them. To hold otherwise would require the summons to assume the form of particulars of claim, which are not required unless the action is defended. That seems, however, to have been the consequence of *The Galaecia* and the Directive, if this case is any guide. The summons runs over six pages and twenty paragraphs, with two annexures adding another sixteen pages. That is hardly consistent with a concise statement of the nature of the claim.

[46] *Buchner* is a very confusing judgment. A summons in the format prescribed in form 9 stated that the defendant owed the plaintiff the amount claimed 'pursuant to an agreement' concluded on a specified date. The court held that it could not provide a proper foundation for a claim for summary judgment, because an affidavit confirming the validity of the claim was ineffective unless the terms of the agreement giving rise to the defendant's liability had been set out. In concluding that the 'label' was insufficient the court relied upon the provisions of rule 18(4). This was incorrect as the stage of pleadings had not been reached, so that rule

[37] *Icebreakers No 83 (Pty) Ltd v Medicross Health Care Group (Pty) Ltd* 2011 (5) SA 130 (D), followed in the cases cited in *ABSA Bank Ltd v Janse van Rensburg and another* 2013 (5) SA 173 (WCC) para 5.

was inapplicable. Whether the result was correct, because the label was insufficient to support a claim for summary judgment, is neither here nor there. It had no relevance to the issue in this case.

[47] To sum up, Admiralty Rule 2(1)(*a*) requires only a clear and concise statement of 'the nature of the claim'. A clear and concise statement of the material facts on which the claim is based, with sufficient particulars to enable the other party to reply thereto, is only required when it becomes necessary to file particulars of claim.[38] By way of example therefore, a statement that the claim is for damage to cargo under a bill of lading; or for hire due under a charterparty; or for salvage of a named vessel or cargo; or for collision damage to a named vessel; satisfies that requirement. Sub-rule (*b*) requires that sufficient particulars of the claim are given to enable the defendant to identify the facts and contentions on which the claim is based. In the examples given, that can be achieved by identifying the bill of lading; identifying the charterparty; identifying the vessels involved in the collision and saying when and where it took place; or saying what was salvaged and whether this was in terms of a salvage agreement. This is slightly more detailed than is necessary to satisfy the 'label' requirement of a simple summons under the Uniform Rules, but not much. Beyond the few pertinent facts needed to satisfy this requirement, the rule does not require the facts upon which the claim is based to be furnished.

[48] The aim of Admiralty Rule 2(1) is to ensure that the registrar, the defendant, and the court seized of the matter if it is not defended and no pleadings were filed,[39] would know in broad terms what the claim was

[38] Admiralty Rule 9(3)(*a*).
[39] Admiralty Rule 9(1).

about. It was not intended that the summons should be equivalent to a set of particulars of claim, which is what occurred in the present case. That would fly in the face of Admiralty Rules 9(1) and (2), which direct that particulars of claim are only delivered when the action is defended. It accords with the historic approach of admiralty cases that they should be dealt with quickly,[40] inexpensively and relatively informally. This is reinforced by the fact that in admiralty cases there are no requests for particulars and no exceptions on the grounds that a pleading is vague and embarrassing.

[49] The approach in *The Galaecia* and the Directive has occasioned uncertainty in regard to the requirements of Admiralty Rule 2(1)(*b*) and led to precisely the situation that the rules were intended to avoid, namely excessive and unnecessary prolixity in drafting summonses. The Directive has created confusion in regard to the facts needed to be set out in the summons. Equally unclear was the requirement to state the facts on which an associated ship arrest was based. Did this require the same, or possibly more, detail than a set of particulars of claim? No-one knew. And the consequence of this uncertainty was the taking of technical objections to arrests, such as the procedural objection in this case that has now engaged the attention of four courts.

[50] The time has come to end this confusion and to return admiralty practice to the simplicity the Admiralty Rules intended it to have. The Directive acted as a wholesome corrective to some of the views expressed in *The Galaecia* and is in general unimpeachable. Regrettably the one sentence reading:

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[40] Between tide and tide was the historical description.

'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'

has been the source of confusion. A well-meaning attempt to convey to practitioners that achieving what Rule 2(1) required necessitated enough information to enable the defendant to identify in broad terms the facts and contentions on which the claim was based, has been misconstrued. In the present case, a reference to and identification of the two awards without more would have sufficed to indicate the nature of the claim. Instead, the Directive has been taken to require, and been interpreted by two courts as requiring, the kind of detail that should appear in particulars of claim. The only way in which to remedy this is to say that the final sentence in para 2 of the Directive is inconsistent with the requirements of the rule and is no longer to be followed. There is no reason to qualify any of the other requirements of the Directive.

The summons was not defective

[51] The summons contained twelve paragraphs dealing with the two arbitration awards, both of which were annexed. The defendant therefore knew the nature of the claim against it and the facts on which it was based. It was only necessary for Galsworthy to say that it suffered damages as a consequence of the repudiation of a charterparty and these damages had been quantified in the two identified arbitration awards in proceedings between Galsworthy and Parakou Shipping. Everything else was surplusage.

[52] As far as association was concerned, the summons made repeated references to the repudiated charterparty between Galsworthy and Parakou Shipping. The pleaded reliance on s 3(7)(*c*) was unmistakeably

based on this. Even assuming that para 17 of the summons was a conclusion of law, it was one that followed inevitably from the factual allegations concerning the charterparty. The summons said that Parakou Shipping was the charterer of the *Jin Kang* and referred to the statutory provision deeming the charterer to be the owner. The basis for reliance on s 3(7)(*c*) was clear. The defendant was apprised of the facts and contentions on which the claim that it was an associated ship was based. It was not entitled to anything more. Accordingly, the summons was not defective on the basis advanced in the application to set aside the arrest.

[53] No attack was mounted on the following allegation reading:

'The Defendant 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 are accordingly enforceable by an action in rem against the Defendant.'

For the avoidance of doubt, it is desirable to deal with this. I do not regard this as purely a conclusion of law. It is primarily one of fact, because it is necessarily implicit in it that PSS fitted one of the three categories set out in s 3(7)(*a*) of the AJRA.[41] All are concerned with control of the two vessels at the critical times. Either the two vessels have the same owner; or the owner of the one and the person controlling the company owning the other are the same; or the person controlling the two ship-owning companies at the statutorily relevant times are the same.[42] This is not an allegation that is in any way bewildering to the owner of the arrested vessel, who will undoubtedly know whether any of these situations is in fact the case. The allegation did not come as any surprise to PSS, as is apparent from the founding affidavit in the application to set aside the first arrest. Nonetheless it studiously avoided dealing with the

[41] *Owners of the MV Silver Star v Hilane Ltd* [2014] ZASCA 194; 2015 (2) SA 331 (SCA) para 14.
[42] It would be unusual, but there is no reason in principle why in a pleading the three possibilities could not be pleaded in the alternative.

allegations of common control implicit in the summons and explicitly made in the founding affidavit in support of the application for an order that the registrar issue the warrants of arrest. This allegation also satisfied the requirements of Rule 2(1)(*b*).

[54] For those reasons, even on the basis of the requirements of the practice directive and *The Galaecia* as construed in the courts below, the summons was not defective.

Summary on the procedural objection

[55] It follows that for the reasons set out in para 10 and amplified above, the summons was not defective and the warrant of arrest under which the *Pretty Scene* was arrested was valid. Subject to the arguments on the merits, which the judge did not decide, the arrest should not have been set aside at first instance and the full court should not have dismissed the appeal against that order. I turn then to deal with the arguments on the merits.

Association

[56] If its procedural objection was dismissed, PSS contended that the *Pretty Scene* was not in fact an associated ship in relation to the *Jin Kang*. The focus of the objection was the application of s 3(7)(*c*) in relation to the *Jin Kang*. In regard to the underlying claim based on repudiation of the charter party – the conclusion of which was not disputed – it alleged that as Parakou Shipping had refused to take delivery of the vessel it never became the charterer for the purposes of s 3(7)(*c*). As regards the claims under the arbitration awards it contended that at the stage of those awards Parakou Shipping was no longer the charterer of the *Jin Kang*. Lastly it contended that at the time the second arbitration award was

handed down Parakou Shipping had been placed in voluntary liquidation in Singapore and accordingly was no longer controlled by Mr Por Liu but by the liquidators.

[57] Each of these arguments depended upon the proper construction of s 3(7)(*c*) of the AJRA, but in order to appreciate the point it is necessary to examine s 3(7)(*a*) as well. The two sections read as follows:

'(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.

(*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 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.'

[58] Sub-section 3(7)(*a*)(iii) was the provision relevant to Galsworthy's claims. The *Pretty Scene* was owned at the time the action was commenced by a company that was controlled by Parakou Tankers Inc, which was in turn controlled by its sole shareholder, Mr Por Liu. Where the charterer is personally liable for the claim it is deemed in terms of s 3(7)(*c*) to be the owner of the ship concerned for the purposes of an associated ship arrest. In order therefore for the *Pretty Scene* to be an associated ship in relation to the *Jin Kang* it was necessary that Mr Por Liu should have controlled the charterer Parakou Shipping at the time the

claims arose. That is how this court explained the provisions of ss 3(7)(*a)* and (*c*) in the *Silver Star*.[43]

[59] A new submission, advanced for the first time in this court, was based on the judgment in the *Seaspan Grouse*,[44] where it was held that the action commenced on the date of service, rather than the date of issue, of the summons. It was submitted that no evidence had been led to show who controlled PSS at the time of service of the summons. It will be recalled that the shares in PSS were wholly owned by Parakou Tankers Inc and when the order for the arrest was sought it was alleged that Mr Por Liu was the sole shareholder in Parakou Tankers Inc. This was admitted in the application to set aside the arrest. The attorney who deposed to the founding affidavit said that his instructions came *inter alia* from Mr Por Liu, 'the Director and President' of PSS. There was no suggestion that his position in regard to either Parakou Tankers Inc or PSS had altered in the interim. Had that been alleged Galsworthy would have been entitled to respond to it. There was no merit in this point.

The original claim

[60] PSS contended in regard to the original claim based on the repudiation of the charterparty that Parakou Shipping never became the charterer of the *Jin Kang*. It submitted that for this reason the deeming provision could not be invoked against it. The difficulty with this submission was that in the First Final Arbitration Award dated 31 August 2010 the appointed arbitrators declared:

'… that the parties entered into a legally binding charter party as a result of the ratification by the Charterers of the terms set out in the recapitulation messages of 17

[43] Op cit, fn 41, paras 14 and 16.
[44] *The Seaspan Grouse: Seaspan Holdco 1 Ltd v MS Mare Traveller Schiffahrts GmbH* [2019] ZASCA 2; 2019 (4) SA 483 (SCA).

and 18 June … and that the Charterers are accordingly in repudiatory breach of charter.'

The finding that there was a binding charterparty binds PSS. Until the repudiation was accepted that charterparty existed, albeit that Parakou Shipping was in repudiatory breach thereof. While technically its claim for damages would only have arisen at the moment the repudiation was accepted, in the *Cape Courage*,[45] the correctness of which was not challenged, it was said:

'… when a claim has 'originated' and enough factors are present to indicate that the owner or controller of the ship concerned at that time (or those for whose actions or omissions it is liable) has 'offended', … another ship owned or controlled by that person when the claim is enforced may be arrested in respect of the claim. Damage resulting from the offending actions or omissions by the owner or controller (or for which it is liable) may not yet have been suffered but if it is clear that it will in due course be suffered, I think that it is not stretching language to say that the claim has "arisen".'

This broad, one might say practical, approach to when a claim arises suffices to dispose of the objection insofar as it related to the original claim for damages.

[61] In its heads of argument in this court and before the full court, PSS advanced an alternative argument that the original claim had been extinguished as a matter of English law in consequence of the two arbitration awards. The contention that English law applied relied on the choice of law clause in the charterparty and the provisions of s 6(1) of the AJRA. The proposition that the claim had been extinguished by the award

[45] *MV Cape Courage: Bulkship Union SA v Quannas Shipping Co Ltd and Another* [2009] ZASCA 74; 2010 (1) SA 53 (SCA) para 23.

was based on a passage from the speech of Lord Goff of Chieveley in *The Indian Grace (No 1).*[46]

[62] As to the first of these, the arbitration clause in the charterparty provided that 'English law shall apply.' PSS argued that this clause was effective by virtue of s 6(5) of the AJRA and operated to make s 34 of the English Civil Jurisdiction and Judgments Act 1982 applicable to the awards, thereby resulting in the original claim becoming merged with the arbitration awards. I am not persuaded that this proposition is correct. A choice of law clause in a charterparty serves to identify the legal system that will apply to the dispute between the parties. It does not ordinarily serve to identify the law governing the conduct of the arbitration proceedings or the consequences of an arbitration award. That is determined by the law of the seat of the arbitration, in this case, England, where the Arbitration Act 1996 (1996, c 23) would apply. English law would have applied to the resolution of the charterparty dispute even if the seat of the arbitration had been Singapore or South Africa. But that would not have brought the provisions of either the English Arbitration Act or the Civil Jurisdiction and Judgments Act into play. The argument accordingly stumbles at the first hurdle. But even if it did not, it would fall at the second.

[63] The passage from the speech of Lord Goff was contrasting a discussion on the principles of *res judicata* and issue estoppel in English law, with the doctrine of merger. It reads:

' The principle, which is sometimes called the doctrine of merger in judgment, is that a person—

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[46] *The Indian Endurance: Republic of India and others v India Steamship Co Ltd* [1993] 1 All ER 998 (HL) at 1003-1004. It is known as *The Indian Grace* because that was the name of the ship on which the damaged cargo giving rise to the claim was carried.

"in whose favour an English judicial tribunal of competent jurisdiction has pronounced a final judgment … is precluded from afterwards recovering before any English tribunal a second judgment for the same civil relief on the same cause of action …"

(See *Spencer Bower and Turner on the Doctrine of Res Judicata* (2nd edn, 1969) p 355, para 423.)

The basis of the principle is that the cause of action, having become merged in the judgment, ceases to exist, as is expressed in the Latin maxim transit in rem judicatam'

After explaining that the principle did not apply to a foreign judgment, although it could give rise to both *res judicata* and issue estoppel, Lord Goff went on to say:'

It was to remove this anomaly that s 34 of the Civil Jurisdiction and Judgments Act 1982 was enacted. This provides:

"No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, in Northern Ireland."'

[64] Two points emerge from this passage. The first is that the principle of merger that concerned Lord Goff related to the effect of a judgment by an English court, not an arbitration. The second is that s 34 applies to judgments of foreign courts not arbitration awards. This disposed of the alternative argument.

[65] For the sake of completeness an argument that an English arbitration award had a similar effect to the doctrine of merger in judgment was advanced and rejected in the *Silver Star*.[47] Counsel did not submit that we should depart from that decision and, having reviewed

[47] Op cit, fn 41, paras 21-32.

what I said there, I can see no reason to do so. The argument that the claim for damages for repudiation of the charterparty no longer exists must fail.

The arbitration awards

[66] The *Silver Star*[48] held that the intervention of an arbitration award did not mean that the ship in respect of which the claim had originally arisen was no longer the ship concerned for the purposes of an arrest. Accordingly, the *Jin Kang* is the ship concerned in determining whether the *Pretty Scene* is an associated ship in relation to it. But Parakou Shipping was no longer the charterer of the *Jin Kang* when the two arbitration awards were made. PSS argued that for this reason Parakou Shipping's deemed ownership of the *Jin Kang* had ceased, so that it was not the owner of the ship concerned when the claims arose.

[67] When does the claim on an arbitration award arise? In its heads of argument PSS submitted that the AJRA contemplates that an arbitration award is a 'self-standing' claim not dependent upon the merits of the underlying claim. But that does not mean that the claim on the arbitration award can be detached from the underlying claim. In the *Yu Long Shan*,[49] Marais JA described a claim based on an arbitration award as an entirely derivative cause of action. By that he meant that there must be an underlying claim that is essential to the existence of an award. This is also apparent from sub-sec (*aa*) of the definition of a maritime claim[50] which refers to a claim for, arising out of or relating to:

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[48] Op cit, fn 41, para 32.
[49] *MV Yu Long Shan: Drybulk SA v MV Yu Long Shan* 1998 (1) SA 646 (SCA) at 653F-H. See also *MV Ivory Tirupati: MV Ivory Tirupati v Badan Urusan Logistik (aka Bulog)* 2002 (2) SA 407 (C) at 419 C-D.
[50] AJRA, s 1(1) s v 'maritime claim'.'

'any judgment or arbitration award *relating to a maritime claim*, whether given or made in the Republic or elsewhere'. (Emphasis added.)

An arbitration award alone is not a maritime claim. Only one that has the quality of 'relating to a maritime claim' is a maritime claim. It does not suffice to allege that an arbitration award has been made. It is necessary to plead and prove that it was an award in relation to a maritime claim. The two are inextricably tied together. The arbitration award is the determination of the existence and extent of the pre-existing liability in respect of that maritime claim. It is a distinct claim in the sense that its fate is not dependent on the merits of the underlying maritime claim and proof of such a claim requires proof of different elements to the original claim,[51] but in considering when that claim arises for the purposes of an associated ship arrest it is necessary to have regard to the underlying claim.

[68] The claim on which the award is based must necessarily have arisen before the award was made and the award refers back to the original claim. If one applies the logic of the *Cape Courage* in that situation, then the claim on the award arises at the same time as the original claim on which the award is based. That conclusion disposes of the objections in relation to the awards.

[69] There is, however, an even stronger reason for saying that the objection is unsound. It flows from the language of s 3(7)(*c*) itself and the scope of its deeming provision. The charterer is deemed to be the owner of the ship concerned 'in respect of any relevant maritime claim for which the charterer and not the owner is alleged to be liable'. The ship

[51] *MV Ivory Tirupati: MV Ivory Tirupati v Badan Urusan Logistik (aka Bulog)* 2003 (3) SA 104 (SCA) para 32.

concerned is the *Jin Kang*. The relevant maritime claims are, in the first instance the underlying claim giving rise to the awards, and secondly the claims based on the awards, of which the underlying claim is an essential component. The charterer is the person personally liable for those claims. Section 3(7)*(c)* says that, for the purposes of an associated ship arrest in relation to those claims, the charterer is deemed to be the owner of the ship concerned. PSS submits that this is irrelevant because it was not the charterer when the arbitration awards were made. But the deeming is for the purpose of s 3(7)(*a*), and the sole concern of s 3(7)(*a*) is ownership of the ship concerned at the time the maritime claim arose. It follows that the deeming must be a deeming of ownership when the claim arose, because no other situation is relevant under s 3(7)(*a*). On PSS's argument, the deeming would still exist, but it would be a 'deeming in the air', because of an unexpressed qualification attaching to it. There is no justification for that construction in the language of the section.

[70] The opening words of s 3(7)(*c*), namely, 'if at any time a ship was the subject of a charterparty', reinforce this. PSS's contention would add a qualification to these words, namely: 'If at the time the claim arose a ship was the subject of a charterparty'. Not only is such reading-in not justified on ordinary principles of interpretation, but it would undermine the purpose of introducing the deeming, namely to make a vessel under the control of the erstwhile charterer liable to be arrested as an associated ship in relation to a claim against the charterer.[52] The critical feature for the purposes of the deeming is that the ship concerned was under charter

[52] *Silver Star* op cit, fn 41, para 15.

and the claim is one for which the charterer is liable. It is not concerned with whether the claim arose while the charterparty remained extant.[53]

[71] When the claim lies against the owner of the vessel, the fact that their ownership has terminated subsequently, or even that the vessel no longer exists, is neither here nor there. They were the owner at the time the claim arose and that is an end to the matter. The purpose of the deeming provision is to place the charterer who is liable for the claim in the same position as the owner. The vessel was under charter and the charterer, and not the owner, was liable for certain claims arising in relation to the vessel. Accordingly, for the purpose of identifying an associated ship that may be pursued in respect of that claim they will be deemed to be the owner of the ship when the claim arose. PSS's second argument cannot be sustained.

The liquidation

[72] In regard to the second arbitration award PSS had a further string to its bow. It arose from the fact that before the second arbitration award was handed down Parakou Shipping had been placed in voluntary winding up in terms of the Singapore Companies Act (Cap 50, Revised 2006). It was submitted that the effect of this was that at the time the claim arose Parakou Shipping was no longer controlled by Mr Por Liu, but by the liquidators.

[73] The fallacy in this contention is that it assumes that the claim under the second arbitration award arose when the award was made. This seeks to separate it from the arbitration process that led to the first award. Such

[53] *MV F Elephant: Gulf Sheba Shipping Ltd v MV F Elephant and Others* 2012 (3) SA 633 (WCC) para 23 and 28. I do not agree with the proposition in the latter paragraph that this interpretation does not fit comfortably in the scheme of the AJRA.

separation is impermissible. There was only one arbitration process arising out of one referral under the charterparty. At the end of the initial hearing the first award was made and the question of further damages was reserved for future determination.[54] Accordingly the claim being adjudicated in the second award was the claim that had been the subject of the initial reference and the first award. That claim arose at the same time as the claim in the first award. For the reasons given in relation to the first award this objection too cannot be sustained.

The additional arguments

[74] PSS contended in the application to set aside the first arrest that the original claim for damages for repudiation of the charterparty had prescribed in terms of the English Limitation Act 1980. I do not think it necessary to canvass the merits of this argument. On its own it is not a ground upon which the arrest could be set aside. Prescription, or limitation as it is referred to in some other jurisdictions, usually requires a careful consideration of the facts surrounding the claimant's endeavours to pursue a claim. The original claim related to the repudiation of a charterparty concluded between companies operationally based in Hong Kong and Singapore. Whether the choice of English law to govern the contract imports the English Limitation Act is by no means clear. It is one thing to say that the claim could not be pursued in an English court, but all that the statute appears to do is bar, not extinguish, the claim. We received no argument on why a South African court would be bound by an English statute governing limitation, if our own law would not regard the claim as prescribed. If limitation is viewed as a procedural question, the ordinary principle that the procedural rules of other jurisdictions are

[54] Para D of the First and Final Award reads:
'**WE RESERVE** jurisdiction to deal with all outstanding issues in the arbitration, including all remaining issues as to quantum and all issues as to costs.'

not enforced by our courts would come into play. It seems to me that the point is one that can only be resolved at trial on a full conspectus of the facts. It is a defence on the merits and does not form a basis for setting aside the arrest.

[75] Many of these considerations point to the same conclusion in relation to the further contention that the claim for damages is *res judicata* in consequence of the arbitration awards. In any event, if that is so, it is unclear how it assists PSS or why it should lead to the arrest being set aside. If anything, it would prevent PSS from disputing liability for the claim.

Conclusion on the first arrest

[76] For the reasons set out above the procedural objection that formed the main ground of objection to the first arrest should not have been upheld and the arguments challenging the association on its merits were without merit. The other two points raised in the affidavit in support of the application to set aside the arrest did not, whatever their merits, suffice to justify the setting aside of the arrest.

[77] It follows that on every ground advanced in the papers, whether or not dealt with in the judgment, the arrest of the *Pretty Scene* should not have been set aside. Nor should the judgment have been upheld on appeal by the full court. However, one cannot, without more, conclude that the appeal in that regard must be upheld.

[78] The reason for this slightly surprising statement is that the second arrest occurred because it was correctly anticipated that the first arrest would be set aside. The application brought to set aside that arrest raised

several additional issues that had not been part of the argument in the first case and the full court reached conclusions on them in upholding the appeal against the judgment of Henriques J. Some of these new issues, albeit not raised in the first application, overlap with the issues in that application. In this appeal no clear distinction has been drawn between the first and the second arrest in advancing the arguments and it has been submitted indiscriminately that both appeals should fail on all the grounds argued. It was correctly submitted that PSS was entitled to advance any legal argument open to it on the papers to sustain the judgment of the full court in relation to both appeals.

[79] This gives rise to the curious situation that on the grounds advanced in the application to set aside the arrest and the arguments advanced before Vahed J the arrest should have been sustained. Had that occurred there would have been no call to maintain the second arrest obtained two days before his judgment. The certificate in terms of Admiralty Rule 4(3) stated expressly that Galsworthy would withdraw the second action if the first arrest was sustained and its existing action were held to be valid. In that event, the new arguments that were advanced in the application to set aside the second arrest and canvassed before the full court and this court, would probably never have seen the light of day. However, it is necessary, with as little repetition as possible, to deal with these arguments, and any that arose specifically in relation to the second arrest. This will affect the order we make and possibly also questions of costs. I turn then to deal with the second arrest.

THE SECOND ARREST

[80] Galsworthy applied to the registrar for the issue of a warrant of arrest and this was granted without the matter being referred to a judge.

At the outset of her judgment Henriques J summarised the grounds upon which PSS applied to set aside the arrest. The only grounds not common to the application to set aside the first arrest were:

(a) that the second arrest was an abuse of process and both the issue of the fresh summons and the application for the issue of the warrant of arrest should have been referred to a judge;

(b) Section 299(1) of the Singaporean Companies Act imposed a moratorium on the enforcement of Galsworthy's claims;

(c) In terms of ss 3(6) and (8) of the AJRA it was not permissible for Galsworthy to arrest the *Pretty Scene* for the same debt, while the original arrest was still in place.

Abuse of process

[81] The basis for this contention was set out in the founding affidavit in the application to set aside the second arrest. It claimed that it was prima facie vexatious to issue and serve a second summons for the same relief on the same cause of action while the first action was still pending. This was particularly so given the nature of the action. Furthermore it was deliberately concealed from Vahed J and from PSS so as to constitute a material non-disclosure. Finally, it was said that Galsworthy already had sufficient security for its claims as a result of steps taken by the liquidators of Parakou Shipping in Singapore resulting in security in excess of its claims being provided.

[82] The underlying premise of this was that it was an abuse of process for Galsworthy to take steps to protect its position in the event of the first arrest being set aside. It was not suggested that there was any legal bar to it seeking a second arrest. The permissibility of a second arrest in those

circumstances has been recognised since 1842.[55] The cases where it was held that a duplication of proceedings constituted an abuse of process, were cases in which an issue had been fully litigated before one court and the losing party then sought to relitigate them in other proceedings.[56] That was not the situation here. The second action was instituted in anticipation of the first arrest being set aside. The warrant was only served two days before Vahed J delivered his judgment. There was an undertaking to withdraw the second arrest and summons if the first was held to be valid. None of that is indicative of an abuse. The defence of *lis alibi pendens* was available to PSS if Galsworthy did not fulfil its undertaking. There was no risk of double security having to be furnished. There was no ulterior purpose underlying the arrest.[57] It was being used for its intended purpose of commencing an action *in rem*.

[83] The complaint that Vahed J was not informed of the second arrest was without substance. He was not concerned with what Galsworthy intended to do in anticipation, or in consequence, of his judgment. It could not have affected the judgment. The proceedings before him were complete, save for the issue of the judgment. If anything, approaching him in relation to the second arrest might have been seen as an attempt to influence or interfere with his judgment. There was no need to refer the application for the issue of the summons and warrant to a judge. Had it been referred, the fact that an arrest already existed and that the application was brought in anticipation of that being set aside, would not have provided grounds for refusing to instruct the registrar to issue the

[55] *Roberts v Tucker* (1828-1840) 3 Menzies 130.
[56] See the authorities referred to in *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* [2013] ZASCA 129; 2013 (6) SA 499 (SCA) paras 45 – 48.
[57] *Hudson v Hudson and Another* 1927 AD 259 at 268.

summons – its perceived flaws having been remedied – and the warrant of arrest.

[84] An allegation of abuse of process is not lightly upheld,[58] especially given the constitutionally protected right of access to courts. The only point raised in this regard that might give pause was the allegation that Galsworthy already held sufficient security for its claims. It transpired from its answering affidavit that the allegation was not correct. Arising out of *Mareva* injunctions, security had been given to the liquidators of Parakou Shipping in Singapore in respect of claims against its former directors and associated entities. It was not security available to Galsworthy to execute on the arbitration awards. Any advantage accruing to it was indirect and dependent on the outcome of that litigation and the execution on that security by the liquidators. In its only reference to the abuse of process argument the full court said that this security provided security for the claims of all the creditors including Galsworthy. That was incorrect as was the statement that it sufficed to cover all the claims by Galsworthy. For those reasons the abuse of process argument was correctly rejected by Henriques J.

The moratorium

[85] It is unclear whether the full court upheld this argument. It depended on the application of a moratorium granted to Parakou Shipping under Singaporean law having worldwide effect. Ordinarily statutes have territorial effect only and the statutes of one country do not apply

[58] *MV Alina II (No 2): Transnet Ltd v The Owner of the MV Alina II* [2011] ZASCA 129; 2011 (6) SA 206 (SCA) para 10.

elsewhere in the world.[59] Section 299 has no binding effect in South Africa unless the liquidators in Singapore have sought and been granted recognition in this country on terms that would impose a moratorium not only in respect of direct claims against Parakou Shipping, but also claims against vessels owned by other companies and arrested as associated ships.[60] That is not the case and there is no merit in this point.

Sections 3(6) and (8) of the AJRA.

[86] Section 3(8) of the AJRA 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.'

The wording of the section is adapted from the opening words of Article 3(3) of the Arrest Convention, 1952,[61] which reads:

'A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant: and, if a ship has been arrested in any of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest.'

The context of this provision of the Convention, which was an agreement between States, was the possibility of multiple arrests in multiple different countries arising out of the same maritime claim. In the United Kingdom and jurisdictions applying English maritime law an action *in*

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[59] *Chancellor. Masters and Scholars of the University of Oxford v Commissioner for Inland Revenue* 1996 (10 SA 1196 (A) at 1250F-H; *American Soda Ash Corporation CHC Global (Pty) Ltd v Competition Commission of South Africa and Others* 2003 (5) SA 633 (CAC) para 17.

[60] *Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 179D-J; *CMC v CIPC and Others* [2020] ZASCA 151 para 32.

[61] International Convention Relating to the Arrest of Sea-Going Ships (Brussels, May 10, 1952).

rem could only be pursued against the ship in respect of which the maritime claim arose. In other countries any property could be attached provided it was owned by the person liable on the claim. Article 3(1) was a compromise between these two situations in permitting the arrest not only of the particular ship in respect of which the maritime claim arose, but also any other ship owned by the same person as the owner of the particular ship. Article 3(3) was directed at the possibility of multiple arrests in different countries with security having to be furnished several times in respect of the same claim.[62]

[87] The background to s 3(8) of the AJRA was fundamentally different from that of the Arrest Convention. Prior to the enactment of the AJRA, if a ship was arrested *in rem*, either the ship would stand as security, or any bail furnished to secure its release would stand in its stead, precluding a further arrest.[63] Similarly once a vessel had been attached *ad fundandam et confirmandam jurisdictionem* either it remained under attachment, or security would be furnished for its release. Save in unusual circumstances,[64] a second attachment was impermissible. When the AJRA was enacted s 3(8) stated the general rule in admiralty, but made it subject to the power of the court to order increased security and authorise the arrest of property under s 5(2)(*d*).[65]

[88] Construing s 3(8) as if it were a statutory enactment of Article 3(3) of the Arrest Convention in South Africa is therefore inappropriate. South

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[62] C/f *Inter Maritime Management SA v Companhia Portuguesa de Transportes Maritimos EP* 1990 (4) SA 850 (AD) (the *H Capelo*) where the appellant had attached two different vessels in different jurisdictions in South Africa and two other vessels in Senegal in respect of the same claim. For a more detailed discussion see Wallis *The Associated Ship and South African Admiralty Jurisdiction* 231-235.
[63] *The Christiansborg* (1885) 10 PD 141 (CA) at 152, 154 and 155-6; *The Point Breeze* [1928] P 135; *The Daien Maru No 18* [1986] 1 Lloyd's Rep 387.
[64] See the *H Capelo* op cit, fn 62.
[65] Shaw, op cit, fn 26, p 67.

Africa is not a party to the Convention and the extensive list of maritime claims in the AJRA, as well as the associated ship arrest provisions, would preclude our membership. Section 3(8)'s sole purpose is to govern arrests in South Africa under the AJRA. If proceedings have been brought elsewhere a disaffected defendant may raise the defence of *lis alibi pendens*. If vessels have been arrested, or security furnished, elsewhere, this must be disclosed in the certificate furnished by the attorney for the arresting party in terms of Admiralty Rule 4(3) and may affect the terms of the arrest and the security that may be obtained in that way. It will also be relevant to the exercise by the court of its powers under s 5(2) of the AJRA in regard to the terms of any arrest, and s 7(1) of the AJRA to decline jurisdiction or stay proceedings.

[89] This brief exposition of the purpose and effect of s 3(8) is necessitated by the fact that in argument before Henriques J and the full court reliance was placed upon the decision in the *Fortune 22*[66] in support of PSS's arguments. While this is not the occasion to deal with that court's approach to s 3(6), which was mentioned in the high court, but formed no part of the argument in the full court or before us, it is right to say that in two respects the *Fortune 22* does not correctly reflect the law in relation to s 3(8) and was in consequence wrongly decided. First, it held that English law applied to the application of the section, by virtue of s 6(1) of the AJRA.[67] Second, it held, on the basis of the international nature of maritime disputes, that the section extended to arrests made in jurisdictions other than South Africa.[68] Neither proposition is correct. The interpretation of s 3(8) is not a matter of English law, but one of the

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[66] *MV Fortune 22: Owners of the MV Fortune 22 v Keppel Corporation Ltd* 1999 (1) SA 162 (C)(*Fortune 22*).
[67] Ibid at 165E-H.
[68] Ibid at 165H-166B and 167G-H.

proper construction of a South African statute, by a conventional process of statutory interpretation in terms of South African law.[69] Second, the AJRA is concerned with the jurisdiction and procedure to be applied in admiralty cases in South Africa. It is a piece of domestic legislation and there is nothing to indicate that its purpose in s 3(8) was to extend its application to arrests occurring in other jurisdictions contrary to the general rule that statutes do not have extra-territorial effect.[70]

[90] Henriques J correctly approached s 3(8) on the basis outlined above. She held that the effect of this section is that a second arrest of the same ship in relation to the same claim is only prohibited where security has been given for that claim. The section prohibits the arrest of the same property more than once. It is only when there has been an arrest of specific property and security has been given 'therefor' that the prohibition applies.[71] This accords with the decision in *Great River Shipping*.[72] The only difference between that case and this is that there the second arrest was obtained after the first arrest had been set aside, but in my view that is a difference of no moment.

[91] The section provides that if particular property has been arrested and security given to secure its release, it may not be arrested again in respect of the same maritime claim by the same claimant. If the security is insufficient the remedy is to be found in s 5(2)(*dA*) of the AJRA. But the prohibition in the section is narrow. It does not operate to prevent the

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[69] *Silver Star* op cit, fn 41, para 31.
[70] See the cases cited in fn 59.
[71] A submission that the prohibition extended to the arrest not only of the specific property but to property in general was advanced in *MV Ivory Tirupati: MV Ivory Tirupati v Badan Urusan Logistik (aka Bulog)* 2002 (2) SA 407 (C) at 419I-J. It was incorrect.
[72] *Great River Shipping Inc v Sunnyface Maritime Ltd* 1992 (2) SA 87 (C) at 88E-90A. See also *MV Wisdom C: United Enterprises Corporation v STX Pan Ocean Co Ltd* 2008 (1) SA 665 (C) para 15. The point was not pursued in the subsequent appeal.

arrest of other property in respect of the same maritime claim by the same claimant, even where security has been furnished in relation to the property first arrested. The decision to the contrary in *MV La Pampa*[73] is plainly wrong on this point. Where there is a second arrest the only possible issue is whether that is an abuse of process or vexatious rendering the arrest liable to be set aside on that ground.

Conclusion on the second arrest

[92] For those reasons Henriques J correctly dismissed the application to set aside the second arrest. The primary ground upon which the full court overturned her decision was that the *Pretty Scene* was not an associated ship in relation to the *Jin Kang*. That subject has been fully addressed in dealing with the first arrest and it is unnecessary to explore it further. The full court erred in upholding the appeal against the judgment of Henriques J. That leaves only the question of the counter-application.

The counter-application

[93] The counter-application was based on ss 5(2)(*b*) and (*c*) of the AJRA and security was sought for a claim for wrongful arrest in terms of s 5(4) of the AJRA. Two grounds were advanced for saying that Galsworthy had arrested the *Pretty Scene* without reasonable and probable cause and requiring excessive security. The first was the allegation that Galsworthy was pursuing the arrest as a tactical ploy and not seeking to recover payment through the court process. In other words, it was contended that the arrests were an abuse of the process of the court. The second was that the claim for security was excessive because of the first arrest – which had been set aside – and because of the security allegedly held by Galsworthy in Singapore.

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[73] *MV La Pampa: Louis Dreyfus Armateurs SNC v Tor Shipping* 2006 (3) SA 441 (D) para 42.

[94] These allegations were disputed. Galsworthy maintained that its sole purpose in pursuing the arrests was to obtain a judgment and payment of what was owing to it. As discussed in para 84 it transpired that Galsworthy held no direct security for its claims, but was dependent on the liquidators of Parakou Shipping succeeding in their actions against former directors and being able to realise from the security they held amounts sufficient to pay Galsworthy's claims. A creditor who arrests or attaches property to pursue a claim in terms of the AJRA is entitled to security (possibly restricted to the value of the property) up to the amount of its reasonably arguable best case.[74] That means that Galsworthy was entitled to security for the full amounts owing to it under the arbitration awards, together with interest and costs. There is nothing to sustain the contention that its requirements for security were excessive.

[95] In upholding the counter-application the full court commenced by asking, but not answering, the question: 'When do the multiple arrests give rise to an action against Galsworthy?' After referring to s 3(8) it arrived at the conclusion that:

'Galsworthy has pursued its claim against Parakou Shipping in Singapore and there was no need for it to pursue the same claim in South Africa. … This was a classic case of pursuing the same claims in two different jurisdictions. … 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.'

It seems that the full court confused the *in rem* proceedings by Galsworthy in South Africa, with the proceedings by Parakou Shipping through its liquidators against its previous directors. It was not correct to

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[74] *The Moschanthy'* [1971] Lloyd's Rep 37 at 44 recently endorsed by the Court of Appeal in *Stallion Eight Shipping Co SA v Natwest Markets PLC* [2018] EWCA Civ 2760; [2019] 1 Lloyd's Rep 406 para 82(iv).

say that Galsworthy had brought proceedings against Parakou Shipping in Singapore. There was no question of it having pursued the same claim in different jurisdictions.

[96] Not surprisingly there was no attempt to support these conclusions in PSS's heads of argument. The argument advanced in support of the order for security was the one advanced in the application. For the reasons I have given it should not have succeeded.

Result

[97] In the circumstances, the full court erred in dismissing the appeal against Vahed J's judgment and upholding the appeal against the judgment of Henriques J. The appropriate relief is simply to reverse this situation. The practical implications of that in the light of the sale of the *Pretty Scene* will no doubt be resolved between the parties.

[98] I make the following order:

1 The appeal succeeds with costs.

2 The order of the full court of the KwaZulu-Natal Division in the appeal in case no A23/2015 is set aside and replaced by the following order:

'(a) The appeal is upheld with costs, such costs to include the costs of two counsel where two counsel were employed.

(b) The order of the high court is set aside and replaced by the following order:

'The application to set aside the arrest of the *Pretty Scene* is dismissed with costs.'

3 The order of the full court of the KwaZulu-Natal Division in the appeal in case no A65/2016 is set aside and replaced by the following order:

'The appeal is dismissed with costs.'

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	M Wragge SC
Instructed by:	Shepstone & Wylie, Durban; Matsepes Inc, Bloemfontein
For respondent:	G D Harpur SC
Instructed by:	Norton Rose Fulbright South Africa Inc, Durban; Webbers, Bloemfontein.