

DURBAN AND COAST LOCAL DIVISION
Name of ship: MV "Als Express"

Unreported
Case No. A55/2001

Kherson Shipyard --- Plaintiff
vs
MV "Als Express" --- Defendant

Judge: P. C Combrink J
Date delivered: 11 July 2002

Headnote:

Allegedly associated vessel arrested for the purposes of enforcing an action in rem for the remainder of an unpaid purchase price. Issue whether, at the time of the commencement of the action, the arrested vessel and the vessel against whom the claim lay were owned by a company which was owned or controlled by the same entity in terms of section 3(7)(a)(ii) of the Admiralty Jurisdiction Regulation Act 105 of 1983. Held that onus not discharged by plaintiff but no costs awarded to due to court finding defendant's behaviour not to have been satisfactory.

The matter concerned the arrest of the mv "Als Express" on 19 March 2001, for the enforcement of a claim for the unpaid purchase price of the construction of the mv "Iver Pride" against Emerald International, Navigation Inc ("Emerald"), a Liberian registered subsidiary company of Vroon International BV ("Vroon"). The claim was enforced against the "Als Express" ("the targeted vessel") on the basis that she was allegedly a vessel associated [as defined in sections 3(6) & 3(7) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Act")] to the vessel "the Iver Pride" from which the claim arose. The defendant had instituted arbitration proceedings in Hamburg against eh Plaintiff for malperformance of the shipbuilding contract and the plaintiff had counter-claimed for the balance of the purchase price. The arbitration award awarded both parties their respective claims.

In order to succeed the plaintiff had to establish on a balance of probabilities that:

1. it had a maritime claim
2. its claim would, when it arose, have been enforceable in rem against eh "Iver Pride" in terms of section 3(4)(b) of the Act, which is to say that the "Iver Price" was owned by Emerald when the claim arose; and
3. when the action was commenced, the defendant was owned by a company which was controlled by an entity which controlled Emerald when the maritime claim arose.

Re 1: The fact that the plaintiff had a maritime claim [section 1(1)(c) of the Act] was not disputed but the defendant pleaded that:

Re2: the plaintiff's claim against the Emerald arose only on completion of the vessel and that at the time the vessel was not owned by Emerald;

Re3: at the time of the commencement of the action, 50 shares in Emerald were owned by Vroon, the remaining 250 shares having been transferred to René Yves Rostant.

The court was satisfied that Emerald owned the "Als Express" on the basis that the claim came into existence even when it was not yet due (ie before the completion of the vessel) [mv "Golden North" 1999 (1) SA 144; the mv "Forum Victory" 2001 (3) SA 529 (SCA)]. The case thus turned on who controlled or owned Emerald.

Mr Mullins for the plaintiff claimed that the “*so-called joint venture agreement between Vroon and Rostant was a sham and a fraud and never took place*” but was designed to frustrate the plaintiff’s reliance on the ‘associated ship’ provisions of the Act. He furthermore said that the “Iver Pride” had been transferred out of Emerald into another company in the Vroon Group for the express purpose of avoiding liability for payment of the balance of the purchase price, which had been concealed from the arbitrator. Mr Mullins then set about highlighting a number of improbabilities in the defendant’s evidence.

The court held that although Mr Mullins’ criticisms were valid, it was unable to conclude that the defendants had perjured evidence and manufactured the documents relied upon. The court found that the plaintiff had not discarded the onus of proving that the Emerald was owned or controlled by Vroon at the commencement of the action.

Combrink J however went on to stress that he had reservations about certain aspects of the defendant’s version, which left him with a “*lingering suspicion that [he had] not heard the full truth*” (at p. 20) He furthermore remarked that he had not been impressed by the conduct of Vroon International BV, especially its manner of avoiding paying the arbitration award and costs which were legally due to the plaintiff and to which there was no defence. Under the circumstances the court ordered absolution from the instance and made no order as to costs against the plaintiff.

Rapporteur: Arabella Bennett