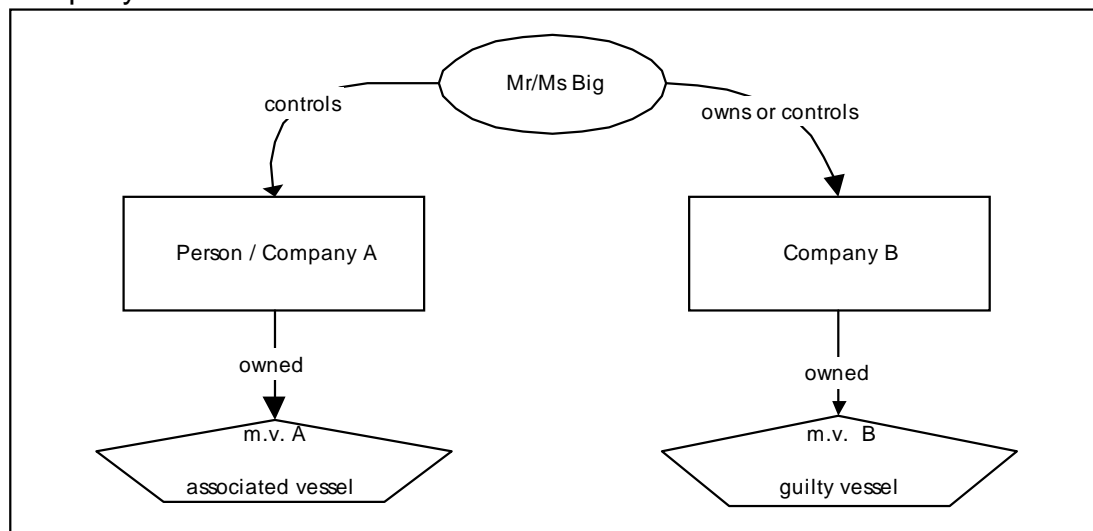


## THE HEAVY METAL MADE EASY

**The Cape Town High Court** ruled on the security arrest of the m.v. 'Heavy Metal' for a claim against the m.v. 'Sea Sonnet.' The arrestors alleged that the 'Heavy Metal' was associated in terms of section 3(6) and section 3(7) of the Admiralty Jurisdiction Regulation Act ("The Act") to the 'Sea Sonnet' (the 'guilty ship') and that the arrestors had a genuine and reasonable need for security in proposed arbitration proceedings.

An association is needed to found *in rem* proceedings necessary for a security arrest in terms of section 5(3) of the Act. An associated ship is a vessel, which is owned by the person or by the company controlled by the person (Mr/Ms 'Big') who owns the 'guilty ship' or controls its owning company.



The evidence placed before the court was that the companies of the respective vessels had their registered offices at the same address in Cyprus, that each company had the same sole director as well as the same secretary. Moreover, the majority of the shares of both companies were registered in the name of the sole director, one Emilios Lemonaris, a Cypriot advocate.

**The applicant**, in short, argued that Lemonaris controlled the two companies that owned the associated and guilty ships because he was the nominee shareholder of the shares in both companies.

**The respondents** refuted this by stating that only the beneficial owner and not the nominee shareholder can be said to control a company. They went on to state that the two beneficial owners of the companies owning the two vessels were unrelated persons and that as nominee of the beneficial shareholders, Lemonaris exercised no control over the companies and had no discretion to represent the companies without the instructions from the beneficial shareholders. They went on to explain that it is normal practice that many Greek beneficially owned 'fleets' are registered under the Cypriot flag in the name of Cypriot companies which require the appointment of local (nominee) shareholders, usually acting as mere 'post boxes' and having to abide strictly to instructions from beneficial owners given through

intermediaries. If these nominee shareholders are members of the legal profession, they are not permitted to divulge information given by their clients in confidence.

**Thring J** found that the majority registered shareholder of a company controls the company. The advocate, as nominee shareholder, owned the majority of the shares in both companies. Thring J deemed **direct control** to vest in the advocate as majority shareholder due to the fact that as registered shareholder, he has the power directly to control these companies by voting their majority of shares in their shareholder's meetings and that in so doing, he can exercise control over their assets and destinies. It is on this basis that the court found that Lemonaris had the power to control the companies, which owned the vessels and upheld the associated security arrest. Whether he in fact had the power or not and whether or not others exercised that power through him was found, by the court, to be of little consequence. The Respondents, unsatisfied with the judgment, took the matter on appeal.

**The Appellate Division's** three-judge-bench re-examined what is meant in section 3(7)(b)(ii) of the Act by "power, directly or indirectly; to control the company." The court was split 2 to 1, with Smalberger AJ and Marais AJ delivering judgments on behalf of the majority of the court and Farlam AJ delivering the dissenting judgement. The majority held that the arrest could not be set aside and dismissed the appeal with costs.

**Smalberger AJ** held that the Act differentiated between 'direct' and 'indirect' power. He stated that it was the intention of the drafters of the legislation not to restrict the meaning of 'power' in terms of the section and that either 'direct' or 'indirect' power would be satisfactory to affect an associated ship arrest. The court went on to define that 'direct power' is equivalent to *de jure* power meaning that in legal terms and in the eyes of the public, the majority shareholder, as registered in the share register, controls the shares of the company and therefore determines the fate of the company. By contrast, 'indirect power' is said to be *de facto* control. The person who exercises authority or influence over the person who has *de jure* control, is said to be in indirect control of a company. This could, as in this case, be the beneficial owner who is neither a majority shareholder, nor a director of the company concerned. Smalberger AJ emphasised that

*"[t]his extension of de jure power to de factor power is in line with the objective of the section: to prevent the true 'owner', by presenting a false picture to the outside world, from concealing his assets from attachment and execution by his creditors".(para 10).*

Smalberger's argument is based on the reasoning that the section was not designed to cater for the situation where *de jure* control over both vessels/companies vests in one person but the owner of the targeted (associated) ship is able to show that the *de jure* controller is merely a puppet dancing at the string of two different masters (as averred by the appellants). He explains that if this had been the intention of the legislature, the drafters would merely have had to refer to "power to control" and that the distinction of "direct and indirect control" would then not have fulfilled any purpose.

**Marais AJ**, although in agreement with the finding of Smalberger AJ, came to his conclusion through different reasoning. He stated that the purpose of the section is to make it possible for claimants to

*“penetrate protective facades such as nominee shareholdings and demonstrate that real power to control the company lies in other hands, were such is in fact the case.”*

He stated that the true seat of power to control needs to be established and to this end a claimant may ‘pierce the veil’ of apparent power to get to the person who actually controls the company. The claimant thus does not have an election between the *de jure* and *de facto* controllers of the company, depending of which is more suitable. He held that on the facts, weighed on a preponderance of probabilities, the beneficial owner had the power to control the nominee shareholder and that therefore the appeal should be dismissed.

**Farlam AJ** in his dissenting judgment stated that the Act intended that the registered shareholder of a company, without anyone having indirect control over him, is the true controller of the company. There can only be one person who ultimately controls a company and thus in a situation where a nominee shareholder is acting purely as a proxy or ‘post box’ for the beneficial owner, he cannot be said to be the true controller, even if the majority of the shares are registered in his name. In this case, Farlam AJ argued, the advocate was merely in ‘apparent’ and not actual control of the companies and that the companies owning the associated and guilty vessels could be in the hands of two different persons. He held that it had not been established that the same person, ultimately controlled the two companies owning the vessels.

### **Critique**

The majority decision of the Appellate division has been criticised in that it can result in the bizarre situation were an unrelated third party may have its vessel arrested purely because it has appointed the same person (also appointed as nominee shareholder/proxy or post box for the *de facto* controllers of the guilty ship) to hold all the shares of the ship-owning company in his/her company or firm. Smalberger AJ was however aware of the potentially adverse consequences of his decision and reasoned:

*“If [this] conclusion results in the bizarre position referred to in para 57 of my colleague’s judgment, that is the direct and foreseeable consequence of a shipowner choosing to operate behind a cloak of secrecy....The result is not as unfair as it may at first blush seem, for it lies within the power of the shipowner to arrange his affairs and his relationship with the company in question so as to avoid any prejudicial consequences to himself.”*

Will the future nominee shareholder run the risk of having negative inferences drawn from his/her silence or will the application of this judgment force the ultimate beneficial owner and controller of the guilty vessel to come crawling out of the woodwork?

***By Arabella Bennett***