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‘15 years on, has the legal Pandora’s Box yet to be sealed? A critical analysis of the majority in the *Heavy Metal* case and determination of the correct interpretation of the concept of ‘control’ as it relates to associated ship arrests.’

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ABSTRACT

In respect of company law, there are two main principles that govern it. The first principle is that a company is a juristic person, having a separate legal identity and thus existing separately from the individuals who stand behind the corporate veil and enjoy the benefits of the company. The second principle is that of limited liability. Collectively, these two principles aim to promote capital investment whilst limiting the liability of potential investors. In the maritime industry however, these two principles serve an entirely different purpose. Ship-owners form 'one-ship' companies where each vessel within the same fleet is registered under the name of a different shipping company. Hence due to the separate legal identity of companies, claimants could only proceed against the guilty ship.

In 1983 South Africa enacted its reform legislation by introducing the Admiralty Jurisdiction Regulation Act with the aim to provide consistency and certainty within the legal sphere of the maritime industry. In doing so, the legislature saw the opportunity to remedy the mischief created by 'one-ship' companies by introducing the associated ship provisions which based the central enquiry in such arrests on 'common-control' rather than 'common ownership'. Thus, the purpose of the provision was to provide claimants with a mechanism to penetrate complex corporate structures so as to locate and hold the true debtor in a maritime dispute liable. The general understanding therefore in associated ship cases was that the provisions concerned themselves with the ultimate or actual control of a shipping company. The leading case in interpreting the term 'control' is the *Heavy Metal* wherein the SCA adopted a restrictive and narrow understanding of 'control' which centralised the enquiry on the registered shareholder of a ship-owing company and in doing so, allowed for the existence of two repositories of control. It therefore allowed an association to be formed on the basis that the companies in question shared a common majority nominee shareholder without considering the fact that such a person may hold the said shares for two different entities. In this manner, the judiciary opened a 'legal Pandora's box' in the sense that it created confusion and uncertainty in respect of the meaning to be acquainted to the term 'control'.

This dissertation will trace the background and history of the associated ship provisions so as to determine its nature, scope and underlying purpose. It will also conduct an investigation of the provisions and the relevant case law in order to determine what is meant by the term 'control'. Lastly the dissertation will determine the correctness of the *Heavy Metal* case and its legal impact on courts applying its *ratio*.

CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1. Introduction

South Africa is a country with a vast coastline, rich in natural resources which may be used for international trade, and most importantly, is strategically located in the southern hemisphere as a result of the country's suitable position at the tip of Africa. It is such factors that prompted the Dutch to settle at the Cape of Good Hope in the 1600s in order to establish a colonial settlement to supply ships with necessities when passing by. With such an impressive outlook on paper, it seems as though South Africa ought to have been a leading maritime state in respect of being at the forefront in the development and enforcement of maritime law. However, this was not the case as the maritime jurisprudence in South Africa remained dormant for many years until the latter part of the 1960s – A time during which there appeared to be a proliferation of maritime matters reaching South African courts.¹ It is therefore useful to mention that factors such as the growth in international trade in the 20th century as well as the closure of the Suez Canal, resulted in an increase of maritime movement alongside the South African Coastline.² Such factors prompted the legislature to enact reform legislation to cater for these maritime matters. This led to the enactment of the Admiralty Jurisdiction Regulation Act 105 of 1983 (hereafter 'The Act/AJRA').

In respect of the Act, Miller JA held the following in the case of the *Berg*:³

‘I agree that it is proper to approach the Act as one that is ‘new’, not only because of the recency of its commencement, but mainly because there are in it bold departures from the old, the possible impact of which needs to be carefully assessed. The departures with which we are now concerned are in the provisions of ss 3 and 5’.⁴

In a subsequent case, Friedman J further reiterated by noting that ‘the Act, which came into operation on 1 November 1983, contains a number of sections apart from s 5 (3) with novel, unusual and at times far-reaching provisions’.⁵ One of the provisions which Friedman J refers to in the aforementioned paragraph is that of the associated ship arrest provisions as

¹ M Wallis *The Associated Ship & South African Admiralty Jurisdiction* 1 ed Cape Town (2010) 1.

² H, Staniland ‘The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa’ (1985) 3 *LMCLQ* 464.

³ *Euromarine International of Mauren v The Ship ‘Berg’ and Others* 1986 (2) SA 700 (A).

⁴ *The Berg* supra note 3 at 711 E-F.

⁵ *Katagum Wholesale Commodities Co Ltd v The MV Paz* 1983(3) SA 261 (N) at 263B.

contained in section 3⁶ of AJRA as for the first time an action *in rem* proceeding may be pursued by the arrest of an associated ship as opposed to the guilty ship (the ship which gave rise to the cause of action in question).⁷

The true novelty in respect of the associated ship provisions and what makes it unique when compared to any other arrest *in rem* procedures in other maritime jurisdictions is that ‘control’ and not ownership now forms the central enquiry in determining whether or not a ship may be arrested.⁸ This dissertation will therefore aim to provide an understanding of what the term ‘control’ means and the scope of its application whilst also looking at whether or not the leading case in associated ship arrest, the *Heavy Metal*⁹ case, has correctly interpreted this provision. In unpacking this dissertation, chapter one will focus on the background of the of the associated ship provisions in terms of AJRA so as to obtain an understanding of the aims, objectives and overall purpose of the provisions. Chapter two will concentrate on establishing the correct meaning which should be acquainted to the term ‘control’ by comparing the original associated ship provisions with the 1992 amendments whilst simultaneously analysing the case law attached thereto. Chapter two will therefore provide the lens through which the majority decision in the *Heavy Metal* will be critically analysed. Chapter three will determine the correctness of the majority’s decision in the SCA judgement of the *Heavy Metal*. In doing so, it will analyse the findings of the High Court decision as well as all three judgments in the Supreme Court of Appeal. Chapter three will thereafter critically analyse the majority decision in light of the findings of chapter two in

⁶ Section 3 (6) of AJRA provides that:

‘An action *in rem*, other than an action in respect of a maritime claim referred to in paragraph (d) of the definition of ‘maritime claim’, may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose’.

⁷ H Staniland ‘The Arrest of Association Ships in South Africa: Lifting the Corporate Veil too high’ (1996-1997) 9 *U.S.F. Mar.L.J* 417-418. Staniland further notes that the reason why the associated ship provisions may be regarded as novel is that they merely brush aside the corporate veil as opposed to merely lifting it at 418.

⁸ Section 3(7)(a) provides:

‘(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’.

Section 3 (7) (b) (ii) states that a ‘person shall be deemed to control a company if he has power, directly or indirectly, to control the company’.

⁹ *MV Heavy Metal: Belfry Marine v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA).

terms of the interpretation which should be bestowed on the term ‘control’. Lastly, chapter four will look at cases subsequent to the *Heavy Metal* which have strictly applied its *ratio*. This chapter will thus aim to provide insight as to the practical difficulties faced by courts in strictly applying the reasoning of the majority in the *Heavy Metal*.

For the purposes of this introductory chapter, it is essential before discussing the provisions itself, to make note of the historical background and developments so as to provide a contextual and purposive understanding of the provisions. Such an approach is necessary in understanding what mischief a true associated ship arrest sought to remedy. In doing so, the following introduction will look briefly at the previous legal regime (i.e. the position of South African Admiralty law prior to the enactment of the AJRA). It will then consider the reform process during the enactment of AJRA and the policy considerations which were considered when the associated ship provisions were enacted. In respect of the latter, this chapter will focus on the 1952 International Convention for the Unification of Rules relating to the Arrest of Sea-going ships (hereafter ‘Arrest Convention’), the difficulties associated with the upsurge of ‘one-ship’ companies and its uncanny relationship with the corporate law principle which notes that a company acts as a separate legal entity apart from its directors or shareholders. This will provide an understanding of the policy considerations and the purpose of the provisions which in turn form part of the enquiry in determining the correct interpretation of the associated ship provisions.¹⁰

1.2. The Previous Regime

South Africa is a country which was occupied by both the English and the Dutch. The effect of this dual colonial infiltration is that it gave rise to two systems of law of which either one could have been applicable in a maritime dispute.¹¹ From the English admiralty law, South Africa inherited the action *in rem* proceeding whilst on the other hand; South Africa received the Roman-Dutch law principle of attachment *ad fundandam et confirmandam jurisdictionem*.¹² It is these two separate legal regimes which could be approached by a maritime claimant in order to seek redress. In this respect, any discussion as to the nature of associated ship arrests, would be incomplete without brief mention of these two avenues available to a maritime claimant prior to 1983 i.e. before the enactment of AJRA, as it is the

¹⁰ *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603F-C.

¹¹ A Rycroft ‘Changes in South African admiralty jurisdiction’ (1984) *LMCLQ* 417.

¹² Wallis (note 1 above; 6-7).

differences between these two systems and the difficulty of having a dual system that prompted the legislature to enact reform legislation in the form of AJRA.¹³

1.2.1. Attachment *ad fundandam et confirmandam jurisdictionem*:

In terms of Roman-Dutch Law, jurisdiction was based on the principle *actor sequitur forum rei*, which required the plaintiff in the respective suit to sue the defendant at their place of domicile.¹⁴ The courts of Holland identified two forms of attachment 1) attachment *in securitatem debiti* arising *ex necessitate* and 2) attachment *ad fundandam jurisdictionem* arising *ex utilitate*. The former, was granted against both citizens and non-resident strangers whilst the latter was granted only in respect of a *peregrinus*.¹⁵

Consequently, a distinction was drawn between an *incola* (persons who live permanently in a location) and a *peregrines*, which referred to a person who did not reside permanently within a location but occupied it on a provisional basis.¹⁶ An *incola* possessed the same rights as a citizen of that particular state and was initially allowed to arrest a *peregrinus* debtor for the purpose of instituting a court's jurisdiction, although further developments allowed for the property of such a debtor to be arrested to establish such jurisdiction. This was seen as an alternative to arresting the said debtor.¹⁷ The attachment of property allowed the *incola* claimant to avoid the needless complications and costs of having to pursue the *peregrinus* at their place of domicile and also allowed for the submission to the court's jurisdiction.¹⁸ On this detail, the South African approach has been described by Pollak as follows:

‘That an *incola* of the area to which the courts belongs can secure the attachment of property of a *peregrinus* to found jurisdiction even though the cause of action arose outside such area’.¹⁹

In essence, the court exercising ordinary civil jurisdiction (applying Roman-Dutch Law) prior to the enactment of AJRA, could exercise maritime jurisdiction over matters where the claimant, is an *incola* of the court and the defendant a *peregrinus* of the country. In a

¹³ Wallis (note 1 above; 6-7).

¹⁴ *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 305 C-D.

¹⁵ *Thermo Radiant Oven Sales* supra note 14 at 306E.

¹⁶ Wallis (note 1 above; 7). In modern terms a true *peregrinus* may refer to a person who is merely passing by i.e. does not reside in the state concerned nor does such a person intend to reside within the state indeterminately. In other words such a person is not domiciled within the particular area concerned. see Pete ... et al *Civil Procedure: A Practical Guide* 2 ed (2011) 82.

¹⁷ Wallis (note 1 above; 7-8).

¹⁸ *Thermo Radiant Oven Sales* supra note 14 at 306F-G.

¹⁹ As referred to in Wallis (note 1 above;10).

situation where both parties are an *incola* of South Africa, but the debtor is a *peregrinus* of the court which is approached to hear the matter, jurisdiction of the court could only be invoked if; the respective contract which gave rise to the dispute was undertaken or performance of which was to be rendered or the cause of action arose within the court's jurisdiction.²⁰

1.2.2. The Action *in rem*:

At the outset, it is useful to mention that the origin of the action *in rem* itself has been the subject of much academic debate and is nevertheless beyond the scope of this dissertation.²¹ Nevertheless, no writing on associated ship arrest may be complete without the mention of the action *in rem*, therefore for the purposes of completion, this dissertation will briefly discuss the key elements of the nature of the action *in rem* and the manner in which it was passed on into South African law. Briefly stated, the object of this arrest proceeding was to require the defendant to provide security or bail for a said claim.²²

In terms of the early English admiralty law, the ship was personified, the effect of which resulted in the action *in rem* being in a claim against the ship itself.²³ In this respect, the proceeding was against the ship i.e. the *res* and there was no need for the claimant to proceed against the ship-owner themselves.²⁴ The result of this was that the ship was arrested or security was furnished in order to secure bail for the satisfaction of the judgment. Where the owner of the vessel did not enter an appearance to defend the action, the owner incurred no personal liability and the value of the ship provided the limit of liability.²⁵ The demobilization of the Doctors commons in 1860 and the subsequent appointment of common-law judges to the admiralty court seem to have encouraged what is known as the 'procedural theory' (where the action *in rem* is seen as a procedural method intended to bring the ship-owner before the court to defend the matter).²⁶ The procedural theory received reinforcement in the judgment of *The Dictator*²⁷, where the court held that following a notice of appearance to defend by the owner of the vessel, the claim proceeded as both an *in rem*

²⁰ Wallis (note 1 above; 13).

²¹ Wallis (note 1 above; 14 and 20).

²² G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012) 96.

²³ Gilmore and CL Black *The law of Admiralty* 2nd ed (1975) 589.

²⁴ Hofmeyr (note 22 above; 98).

²⁵ Hofmeyr (note 22 above; 98) also J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009).

²⁶ Hofmeyr (note 22 above; 98).

²⁷ [1892] P 304 ([1981-4] All ER Rep 360. The position in the Dictator received a further boost in the case of *Republic of India and Another v Indian Steamship Co Ltd (The Indian Grace)* (No2) [1998] 1 Lloyd's Rep 1 (HL) which held that an action *in rem* is one against the owner from the time the admiralty court in question has jurisdiction.

proceeding and action *in personam*. The effect of this judgment was that the owner became personally liable for the action which resulted in the owner's assets, including the ship, being liable to an execution in order to satisfy the debt.²⁸

Section 35 of the Admiralty Court Act 1861 in England allowed the jurisdiction of the high Court of Admiralty to be invoked either through the action *in rem* proceeding or the *action in personam*.²⁹ In this respect, the *in rem* proceeding will commence by the arrest of the vessel or other goods and the proceedings in *personam* would be initiated by the arrest of the debtor. Naturally, the *in rem* proceeding would be the most advantageous option as it provided claimant's with security. This was the proceeding and procedure which South Africa inherited through the colonisation by the English and which existed until the AJRA.³⁰

In this respect, claimants were afforded with two legal procedures of which either one could be used in a maritime dispute. Such claimants could either use the Attachment *ad fundandam et confirmandam jurisdictionem* in terms of Roman Dutch Law or the *in rem* procedure provided by English Admiralty law. The main problem with this dual system of law, which will be discussed in the succeeding section, is that it creates inconsistency in the law as cases of similar facts may give rise to completely different conclusions depending entirely on the choice of law of the claimant

1.3. The Issues Associated with the Dual System of Courts and the Need for Reform Legislation

South Africa, being a British colony, originally had the Vice-Admiralty Courts which administered English Admiralty law.³¹ These courts, however, ceased to exist following the enactment of The Colonial Courts of Admiralty of 1890 by the British Parliament, which replaced the Vice- Admiralty courts with what was referred to as the Colonial Courts of Admiralty.³² In this way, there existed two ways in which a claimant could enforce their

²⁸ Hofmeyr (note 22 above; 99).

²⁹ Wallis (note 1 above; 28).

³⁰ Wallis (note 1 above ; 28).

³¹ G Glover 'Sister Ship Arrest and the Application of the Doctrine of Attachment in Australia: a Jurisdictional Comparative Analysis in the wake of the 1952 Arrest Convention' (2008) 22 *Austl. & N.Z. Mar. L.J.* 107 also Rycroft (note 11 above; 417)

³² Section 2 (1) of the Act provided:

'Every Court of law in a British possession, which is for the time being declared in pursuance of this Act to be a court of Admiralty, or which, if no such declaration is in force in the possession. has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such Court in reference to the jurisdiction conferred by

claim, namely; the Colonial Courts of Admiralty which applied English admiralty law, and the ordinary courts of the Supreme Court which exercised Roman-Dutch Law.³³ This clearly created an undesirable system as the court may administer one system of law in one case and a completely different system of laws in another case - the result of which allowed a same set of facts to yield two different results as the South African Law Commission stated:

‘The position, therefore is that not only may the rights of the parties themselves depend upon whether action is instituted in the admiralty court or in the ordinary courts, but rights of persons who are not parties to the action at all may depend upon which court decides the action’.³⁴

During this period, few admiralty decisions were heard in the courts.³⁵ However, following the closing of the Suez Canal, an increase of maritime traffic flowed at South African ports.³⁶ Wallis also notes other factors which may have contributed to this increase in traffic in South African waters which may include *inter alia*; the increase in commercial trade following the end of World War 2, where entrepreneurs took advantage of trade conditions which existed at the time as well as the influx of flags of convenience which referred to the situation where non-citizens of a country were allowed to register their ship in that particular country as opposed to orthodox approach where ship companies were registered in the same country in which the owners resided.³⁷ The reasoning behind ship-owners opting to register their companies in such states is to obtain benefits which those states provided such as lower taxes and the less stringent requirements in relation to the incorporation and registration of such

this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole judicial authority, the expression 'Court of law' for the purposes of this section includes such Governor’.

In this respect it is important to note that the Colonial Court of Admiralty Act continued to be in force in the country even after the formation of the republic in 1910 see *Crooks & Co v Agricultural Co- Operative Union Ltd* 1922 AD 423, *Tharros Shipping Corporation SA v Owner of the Ship 'Golden Ocean'* 1972 (4) SA 316 at 317E-F and *Trivett & Co (Pty) Ltd v Vm Brandt's Sons & Co. Ltd* 1975 (3) SA 423(A) at 432E-F and 436E-G.

³³ Glover (note 31 above; 108) and also H Staniland ‘The Arrest of Associated Ships in South Africa: Lifting the Corporate Veil too high?’ (1996-1997) *9.U.S.F.Mar.L.J* 407-409. In essence there were two avenues in which a claimant could pursue a claim whilst in form there was only one court. see The South African Law Commission Report on the Review of the Law of Admiralty titled ‘Project 32’ 15 September 1982 page 7. The same case may therefore result in two different conclusions. see also D B Friedman, ‘Maritime Law in the Courts after 1 November 1983’ 1986 *SALJ* 678.

³⁴ The South African Law Commission Report on the Review of the Law of Admiralty titled ‘Project 32’ 15 September 1982 page 9.

³⁵ Rycroft (note 11 above; 418).

³⁶ Glover (note 31 above; 108) Friedman also notes the increase in the South-African ship repair industry at the Cape as well as the opening of the Richard’s bay harbour which prompted the exportation of iron ore and coal as factors which increased the volume of shipping in the South Africa see D B Friedman ‘Maritime Law in Practice and in the Courts’ 1985 *SALJ* 46-47.

³⁷ Wallis (note 1 above ; 41).

shipping companies. In this regard, South Africa's admiralty law experienced two major problems. Firstly, the dual court system which had the effect of allowing claimants to choose the forum which would be most favourable to them, and secondly, the courts sitting as Colonial Courts of Admiralty failed to take into account the international developments in maritime law over the past 75 years as jurisprudence was fixed as at 1890.³⁸ Furthermore, the relevant legal material of Roman Dutch writers which were found in the Groot Placaat Boek, were not readily accessible. Additionally, this material was written in either Latin or High Dutch, where most of the material was not translated into English or Afrikaans so as to make it available to practitioners.³⁹ It was such difficulties that prompted the South African Law Commission to enact reform legislation in the form of AJRA.

1.4. The legislative Reform Process

The increase in traffic along the South African coastline, the difficulties associated with the dual court system, as well as the failure of admiralty law in South Africa (prior to 1983) to cater and address the issues facing the maritime industry at the time, illuminated the need for reform legislation. In 1977, the South African law reform commission was instructed to review the admiralty law in the country and for this purpose the late Mr D J Shaw QC was appointed as an *ad hoc* member of the commission due to his vast experience and expertise in the field.⁴⁰ This may very well be said to be the birth point of AJRA. For the purposes of this dissertation, it is relevant to discuss the 1952 International Convention for the Unification of Rules relating to the Arrest of Sea-going ships (hereafter 'Arrest Convention'), as well as the advent of the 'one-ship' companies in order to obtain an understanding as to what mischief the associated ship provisions sought to remedy.

1.4.1. The Arrest Convention:

The Arrest Convention may be said to be in a development period of 20 years⁴¹ and began with the intention to provide an international standard of rules and regulations surrounding the right to arrest ships for the purpose of providing security for claims against a defendant

³⁸ Wallis (note 1 above ; 46) and also G Bradfield 'Guilt by Association in South African Admiralty law' (2005) *LMCLQ* 237 where Bradfield submits that in the exercise of admiralty jurisdiction, South African courts were locked in a 'time warp' .

³⁹ Wallis (note 1 above; 46-47).

⁴⁰ Friedman (note 36 above; 53) ,Wallis (note 1 above; 47).

⁴¹ In preparation for the CMI conference in 1930, the Bureau Permanent of the CMI welcomed the national associations to suggest new subject matter of study which the CMI could investigate. Three associations namely; France, Germany and Italy proposed the idea of the arrest of ships as a subject topic see F Berlingieri *Arrests of Ships A Commentary on the 1952 and 1999 Arrest Conventions* 5 ed (2011) 1.

ship-owner.⁴² In essence it began as a general enquiry into the arrest of ships and revolved around four main questions which were:

- 1) 'Who is entitled to arrest a ship?
- 2) Which ships may be arrested?
- 3) Where can the arrest be made?
- 4) How can a ship be released from the arrest'?.⁴³

Essentially, the Arrest Convention allowed for the arrest of 'sister ships'. Put simply, this referred to ships which were owned by the same person.⁴⁴ Wallis submits that in the reform process, there is no evidence which suggests that South Africa contemplated conceding to the Arrest Convention; however during this process of reform, local practitioners were to ensure that the new legislative provisions would reflect the provisions of the 1952 Arrest Convention.⁴⁵ The Arrest Convention would therefore be something which the legislature would have considered in the development of AJRA. The South African Law Commission report described the Associated Ship provisions as an 'extension' of the 'sister-ship' arrest in terms of the 1952 Arrest Convention. However, Wallis submits that this is misleading, as an extension would involve broadening the provisions of the convention 'without introducing a new and entirely different basis of liability on the part of a different person'.⁴⁶ One of the reasons as to why the associated ship provisions has been described as such, is that the essential enquiry is based on common 'control' as opposed to ownership and in this way the provision allows for a 'statutory mode of piercing the corporate veil'.⁴⁷

1.4.2. The Separate legal Identity of a Company and its relationship with 'one-ship' companies:

In respect of company law, there are two main principles which govern it. The first principle is that a company is a juristic person that has a separate legal entity and thus exists separately from the individuals who stand behind the corporate veil and enjoy the benefits of the

⁴² H Staniland H JS McLennan J.S 'The Arrest of an Associated ship' (1985) 102 *S.African L.J* 148.

⁴³ Berlingieri (note 41 above; 1).

⁴⁴ Article 3.1 of The Arrest Convention states:

'A claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship in respect of which the claim arose...'

Article 3.2 provides that ships are deemed to be owned by the same person or persons where all the shares in the respective ships are owned by the same person or persons.

⁴⁵ Wallis (note 1 above; 60).

⁴⁶ Wallis (note 1 above; 63).

⁴⁷ Bradfield (note 38 above;238).

company.⁴⁸ The second principle, is that of limited liability.⁴⁹ This position has been expressed by lord Macnaghten in the *locus classicus* of *Salomon v Salomon*⁵⁰ where the respected judge stated:

‘the company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them’.⁵¹

Similarly in *Dadoo*⁵², Innes CJ stated that:

‘a registered company is a legal persona distinct from the members who compose it...nor is the position affected by the circumstance that a controlling interest in the concern may be held by a single member...this conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested in the company is not, and cannot be, regarded as vested in all or any of its members...’.⁵³

These two principles effectively allowed individuals who participated in commercial activity to detach themselves from the company in so far as the company’s debts are concerned by limiting their liability.⁵⁴

In order to circumvent ‘sister ship’ arrests, ship-owning companies developed ‘single ship’ companies (i.e. each ship in a fleet was registered under a different company).⁵⁵ Due to the

⁴⁸ In this respect Cassim et al notes that even though a legal person is a mere concept and exists irrespective of physical form, it enjoys the ability to acquire rights and incur legal obligations separate from those of the directors and shareholders see FHI Cassim... et al *Contemporary Company Law* 2 ed (2012) at 28. The position has been confirmed in the Company’s Act of 2008 in terms of section 19 (1) (b) which states that from the date and time that the company is incorporated; the company has all the legal powers and capacities as a person to the extent that a juristic person is capable of obtaining such rights.

⁴⁹ Cassim et al further note that limited liability refers to ‘the liability of shareholders for the company’s debts is limited to the amount they have paid to the company for its shares’ see FHI Cassim... et al *Contemporary Company Law* 2 ed (2012) at 31 . Lord Macnaghten further held in the *Salomon* case that the main reasons for the formation of such companies is to avoid the risk of bankruptcy and to increase the creditworthiness of the company insofar as it relates to obtaining an increase of capital. *Salomon v Salomon* [1897] AC 22 (HL) at 52.

⁵⁰ [1897] AC 22 (HL).

⁵¹ *Salomon* supra note 49 at 51.

⁵² *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 see further *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HL) and *Lee v Lee Air Farming Co* [1961] AC 12.

⁵³ *Dadoo* supra note 52 above at 550-551.

⁵⁴ Wallis (note 1 above;62).

⁵⁵ Staniland (note 2 above; 46) also refers to such a companies as ‘brass-plate’ or ‘asset-poor’ companies. Furthermore, each ship in the fleet was registered under the name of a different company, the effect of which rendered the requirement that the ‘sister ship’ had to be owned by the same person at the commencement of the action by the same party was gravely emasculated to the extent that it would never be satisfied see Bradfield (note 38 above; 238)

separate legal identity of companies, claimants could only proceed against the guilty ship.⁵⁶ In such cases, these companies were not developed to obtain the benefits of a separate legal entity or limited liability, but rather to limit the assets available to which the creditor may pursue against.⁵⁷ Another problem with such companies was that they were, as Staniland describes, ‘notoriously elusive’ as the ship which is the sole asset of the company may never call at a given port, can swiftly depart on a moment’s notice and if the vessel was arrested, the claim often surpassed the value of the ship.⁵⁸ Hare also notes two factors that could have prompted shipping companies to refinance their ships into ‘one-ship’ companies, the first of which referred to the potentially enormous oil pollution liabilities in respect of oil pollution at sea which was brought alight following the example of the MT *Torrey Canyon* incident which took place in the 1950s, whilst the second referred to the influx of registries/flags of convenience.⁵⁹ These flags of convenience refer to the registration of a ship in a country other than the country in respect of which the ship is ‘beneficially owned, managed and controlled’.⁶⁰ The main reasons as to why ship-owners may opt to register their company in such a state may be *inter alia* to avoid high taxes of the domestic state, to avoid onerous requirements and regulations for the building or construction of vessels and to evade labour law regulations.⁶¹

To curb the advent of ‘one-ship’ companies, AJRA included the arrest of associated ships in order to assist plaintiffs seeking to obtain judgment against defendants which thus has the effect of allowing such claimants to surmount the jurisdictional limits of the arrest convention.⁶² The purpose of the provisions, briefly stated, is ‘to make the loss fall where it

⁵⁶ It is important to note however that the use of wholly owned subsidiary companies through the use of common directors and partners is nevertheless a lawful manner in which a person may opt to conduct their business activities Staniland (note 7 above; 418-419).

⁵⁷ Wallis (note 1 above; 79) where he notes that the intention behind the development of ‘one-ship’ companies was not to obtain the broad benefits attached to the general nature of companies i.e. Limited liability and the separate legal personality associated with it nor were they formed to obtain capital investment. Instead, such ‘asset partitioning’ is associated with the limiting of assets against which a claimant may proceed against to satisfy the debt. Hofmeyr substantiates further as he submits that the creation of ‘one-ship’ companies enable fleet owners to limit their risk of exposure which in turn inhibit the creditor in procuring satisfaction of the debt G Hofmeyr (note 22 above; 133).

⁵⁸ H Staniland, J.S McLennan (note 42 above; 148). In this respect, Hare also submits that Prior to the enactment of AJRA, asserting a maritime claim against a debtor might have been a highly problematic task e.g. the ship may never call in the respective port again, there may be other creditors which also have claims against the said vessel which may rank ahead of the arresting creditor, the guilty vessel might have sunk or been sold to a *bona fide* purchaser who has no knowledge of the prior history of the ship. see Hare (note 25 above; 103).

⁵⁹ Hare (note 25 above; 104).

⁶⁰ Hare (note 25 above; 104).

⁶¹ Hare (note 25 above; 202-203).

⁶² Glover (note 31 above; 110). In this respect, the Minister of Justice has stated that the position can be summarised as follows ‘although the principle of the sanctity of a separate corporate personality of a company

belonged by reason of ownership or control'.⁶³The purpose, therefore, of a true associated ship arrest, is to amputate the corporate veil protecting debtors in order to determine the identities of the real beneficiaries of the company.⁶⁴ It is however submitted that the purpose of an associated ship is not to grant a maritime claimant *carte blanche* to arrest any vessel which is owned by persons who have an insignificant remote link to the actual maritime debtor concerned. Bradfield therefore refers to the associated ship provisions as a 'statutory mode of piercing the corporate veil'.⁶⁵ In this sense, a true associated ship arrest can be expressed as a means of disregarding the corporate veil altogether as opposed to piercing the corporate veil.⁶⁶Therefore, once the 'true debtor' has been identified, any ship owned or controlled by them besides the guilty ship may be subject to an arrest as an associated ship.⁶⁷ It is however submitted that in light this chapter, there appears no support for the notion that the associated ship provisions allow for the arrest of property belonging to an innocent third party. Such a position does not support the underlying purpose of the provisions.

1.5. Conclusion

Following the enactment of AJRA, South Africa has been seen as a sanctuary for arrestors who seek to bring action *in rem* proceedings against debtors.⁶⁸The associated ship provisions may be regarded as being novel, in the sense that although ownership was recognised for the formation of an association, the broader concept of control now forms the prime focus of associated ship jurisdiction.⁶⁹ In this respect, it is useful to note that the Australian Law

distinct from its members was enshrined in *Salomon v Salomon and company* [1897] AC 22 (HL), our courts should brush aside the veil of corporate identity time and time again where fraudulent use is made of the fiction of legal personality' (*Lategan & Another NNO v Boyes & Another* 1980 (4) SA 191 (T) as referred to in H Staniland, J.S McLennan (note 42 above; 148).

⁶³*Euromarine International of Mauren v The Ship Berg and Others* 1986 (2) SA 700 (A) at 712A-B. in this respect, it is important to note that this case was decided prior to the 1992 amendment's and therefore as suggested by Hofmeyr, it must be read in light of the subsequent amendments which focused on control of a company as opposed to control of the shares. Hofmeyr (note 22 above; 134) .Wallis brings up an important point as he notes that 'it needs to be emphasised that it is not the purpose of the true associated ship jurisdiction to render liable for claims those who have absolutely no connection with the incurring of the relevant debt. Its purpose is to go behind the corporate curtain and to identify those who are the real beneficiaries of the company that owns the vessel in respect of which the claim arises and the commercial operations of that vessel' see Wallis (note 1 above; 85).

⁶⁴ Wallis (note 1 above; 85).

⁶⁵ Bradfield (note 38 above; 236). Bradfield further notes that the courts will usually pierce the corporate veil in exceptional circumstances such as cases of dishonesty, fraud or irregular use of the corporate form Bradfield (note 36 above; 240).

⁶⁶ Wallis(note 1 above; 85).

⁶⁷ Bradfield (note 38 above; 236-237).

⁶⁸ Bradfield submits that it is the provisions of AJRA which establish an association on the basis of common control which have no corresponding provision elsewhere in the world that have resulted in South Africa's reputation as an arrest friendly jurisdiction. (note 38 above; 234-236).

⁶⁹ Wallis (note 1 above;185) Bradfield (note 38 above; 236).

Reform Commission considered the associated ship provisions but opted not to enact such a provision, and instead elected to enact ‘surrogate ship’ arrests as it decided to leave the issue of whether the corporate veil of a ship-owning company should be disregarded to be dealt with under the principles of its local corporation and insolvency law.⁷⁰

In light of the background provided in this introductory chapter, it is submitted that even at this early stage, the purpose of the associated ship provisions is abundantly clear. The provisions allow a creditor to locate the true debtor of which their claim is based and hold this person liable for the said debts. By shifting the focal point from ‘ownership’ to ‘control’ a maritime claimant is no longer ‘road-blocked’ when attempting to locate the maritime debtor. Furthermore, by using ‘control’ as the core enquiry, ship-owners are no longer shielded by their witty use of corporate structures in an attempt to present a distorted image to the outside world. The leading case in the interpretation of common control is the *Heavy Metal*⁷¹ case which has been the subject of much debate and criticism, due to the manner in which the majority in the Supreme Court of Appeal has interpreted the term ‘control’. Section 3 (7) (b) (ii) of AJRA states that ‘a person shall be deemed to control a company if he has power, directly or indirectly, to control a company’. The majority held that for the purposes of AJRA, either ‘direct’ or ‘indirect’ power to control a company would be sufficient. The majority associated ‘direct’ power with ‘*de jure*’ authority over the company which is exercised by the person whom, according to the register of the company, is entitled to control the destiny of the company. ‘Indirect’ power was equated to ‘*de facto*’ authority over the company which is exercised by the person who has influence over the person who has *de jure* authority. The majority then reasoned that if the person, who has *de jure* authority, controls the respective companies at the relevant time, the statutory requirement of a link between the companies would be met.⁷² Therefore, in this case, Mr Lemonaris who was the majority shareholder of the companies concerned was said to have had *de jure* control despite the fact that he was only a nominee shareholder.

Hofmeyr submits that the interpretation afforded to the associated ship provision by the majority is ‘far-reaching’⁷³ and in this respect the author substantiates by noting that the view of the majority has the effect of allowing an association to be formed on the basis that two companies share a common nominee majority shareholder even though that nominee

⁷⁰ Bradfield (note 38 above;239).

⁷¹ The *Heavy Metal* SCA supra note 9.

⁷² The *Heavy Metal* SCA supra note 9 at 1106 [9]-[11].

⁷³ Hofmeyr (note 22 above; 143).

shareholder may receive instructions in relation to those shares from two different people.⁷⁴ The majority nominee shareholder in such a case would have direct control or *de jure* control according to the majority judgment. The overall effect of such an interpretation is that an innocent ship-owner's vessel may be arrested in a case where that ship is not associated with the guilty ship concerned. The majority decision has been criticized by many academics on the basis that it has failed to correctly interpret the associated ship provisions. Even in the minority decision, Marais J was aware of the difficulties presented by the interpretation afforded by the majority as he held that such an approach would be 'tantamount to naked confiscation without compensation' of which such an approach is usually one which courts avoid ascribing to the legislature.⁷⁵

The *Heavy Metal* case was decided nearly fifteen years ago, and as such it creates an undesirable situation on the basis that there is uncertainty as to the meaning of the term 'control'. The fact however, is that only the SCA or the Constitutional Court on appeal can alter the decision of the *Heavy Metal* case.⁷⁶ It seems as though the position as it stands, is that the lower courts are bound by the decision of the *Heavy Metal*.⁷⁷ It is therefore useful to determine the correct manner in which the respective provisions should be interpreted.

This introductory chapter provided an understanding of the background of the associated ship provisions so as to determine the aims, objectives and purpose of the provisions as well as the mischief that it sought to resolve. Chapter two will now discuss the associated ship provisions in order to ascertain the correct interpretation of the term 'control' which will in turn form the benchmark through which the majority decision in the *Heavy Metal* will be analysed.

⁷⁴ Hofmeyr (note 22 above; 143).

⁷⁵ The *Heavy Metal* SCA supra note 9 at 1111C-G.

⁷⁶ Wallis (note 1 above; 220-221).

⁷⁷ Wallis (note 1 above; 221).

CHAPTER 2: THE CONCEPT OF ‘CONTROL’

2.1. Introduction

During the reform process, the legislature opted to include novel provisions which were not found elsewhere in the world of which, the most significant being the associated ship provisions. In this respect there was no previous regime of which South Africa could follow, and as a result, although the said provisions may have appeared sound on paper, the legislature did not foresee possible discrepancies and difficulties which the associated ship provisions and the Act itself would experience in practice. Therefore in 1992, the legislature opted to amend the Act and the associated ship provisions, in order to iron out any inconsistencies and elucidate its intention.

Chapter one of this dissertation focused on the background of the associated ship provisions so as to provide a broader understanding of its aims and objectives. In light of this background, chapter two will now aim to decipher the term ‘control’ in order to determine what is the correct meaning which should be afforded to it. The findings of this chapter will therefore serve as a yardstick against which the majority finding in the Supreme Court of Appeal decision of the *Heavy Metal* case will be critically analysed.

This chapter will firstly look at the burden of proof which a potential arrestor must overcome to obtain and sustain an arrest against an associated ship, after which the chapter will analyse the original and amended associated ship provisions so as to determine what subsequent changes were made and the reasons for such amendments. The comparison between the provisions and the early decisions is useful as it provides an understanding as to what the legislature meant by the term ‘control’. As a result of the frequency of which the concept of ‘beneficial ownership’ has appeared in associated ship cases, it is necessary to shed light on what this phrase means and how it relates to ‘control’. Lastly this chapter will analyse the possible meanings which can be attached to ‘control’ in order determine which meaning is the most appropriate in associated ship cases

2.2. The Burden of Proof

The terms ‘burden of proof’ / ‘onus of proof’/ ‘overall onus’ are often substitutable, and all refer to the obligation or onus upon a litigant to produce sufficient evidence to persuade the

court that they should succeed.¹ The terms were noted in the case of *Pillay v Krishna*² which held that the person who claims that they are entitled to something, bears the onus to satisfy the court that they are entitled to such relief.³ In civil cases, this onus is discharged on a balance of probability which requires that ‘on preponderance, it is probable that the particular state of affairs existed’.⁴ Where the applicant attempts to arrest and maintain the arrest of an associated ship, such an applicant needs to prove the association (i.e. the ships are associated by virtue of control or ownership on the ordinary standard of a balance of probabilities).⁵ It is therefore submitted that a failure to prove an association on a balance of probabilities, will result in the arrest being null and void.

It is important to note that proving such control is by no means a tranquil task. The main issue experienced by practitioners is that such ships are owned by companies which are registered in countries which prohibit the founding documents from being publically disclosed. These ‘closed registries’ make identifying the beneficial owners of the company, virtually impossible.⁶ In addition to this, shipping lawyers may also be confronted with other difficulties such as that of bearer shares which are, as described by Wallis, ‘self-serving but incomplete set of documents designed to suggest the absence of common control, with elements such as cross-mortgages being explained on the basis of family membership or

¹ P J Schwikkard & S E Van Der Merwe *Principles of Evidence* 3 ed (2012) 571.

² 1946 AD 946.

³ *Pillay* supra note 2 at 951-952.

⁴ Schwikkard (note 1 above; 580).

⁵ *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 581 B-F where Corbett CJ held:

‘It is clear that an applicant who seeks to arrest an associated ship in terms of s 3(4), read with ss 3(6) and 3(7), is required to establish that the vessel in question is an associated ship on a balance of probabilities C (see *Transgroup Shipping SA (Pty) Ltd v Owners of MV Kyoju Maru* 1984 (4) SA 210 (D) at 214I; *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C) at 497A-B). The same rule as to standard of proof would apply to an application to arrest an associated ship to provide security in terms of s 5(3). Similarly it has been held that in applications for the attachment of property to found or confirm jurisdiction, either under the D common law or in terms of s 3(2)(b) of the Act, the *onus* is upon the applicant to prove on a balance of probabilities that the property to be attached belongs to the respondent (*Lendlease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others* 1976 (4) SA 464 (A) at 489B-C; *Sunnyface Marine Ltd v Hitoroy Ltd (Trans Orient Steel Ltd and Another Intervening)*; *Sunnyface Marine Ltd v Great River Shipping Inc* 1992 (2) SA 653 (C) E ; *Rosenberg and Another v Mbanga and Others (Azaminle Liquor (Pty) Ltd Intervening)* 1992 (4) SA 331 (E) at 335E-336D). The same rule would apply to applications to arrest in terms of ss 3(4), (5) and (6) and 5(3) of the Act’.

See also: *The Leros Strength Roza v MV Progress, MV Progress v Stone Engineering Ltd* SCOSA C20, *Ipanema Navigation Corporation v The Silver Constellation* SCOSA C141, *The Sandokan Owners of the Sandokan v Liverpool and London Steamship Protection and Indemnity Association Ltd* SCOSA C73, *Ya Mawlaya (NO 1) Delray Shipping Corporation v Eridiana Spa* SCOSA C30.

⁶ M Wallis *The Associated Ship & South African Admiralty Jurisdiction* 1 ed (2010) 113 .For the meaning of the term ‘beneficial owner’ see the heading titled ‘beneficial ownership’ below.

long-standing friendship'.⁷ It is these corporate tools that form the very shackles in associated ship arrests, especially when regard is given to the fact that such arrests are usually considered on papers in motion proceedings, and not at trials where parties will have the opportunity to cross examine witnesses as well as the advantage of extra time so as to gather and produce sufficient evidence to establish an association.⁸ This lack of intimate knowledge of the inner structures of the ship-owning company, accompanied with the onus to establish the requisite control or ownership on a balance of probabilities, places the arrestor in a difficult position. Although shipping documents such as the Lloyds Confidential Index and the ICC International Maritime Bureau may assist an arrestor in determining the identity of the registered shareholder, such documents may however be of little assistance where such holders are mere nominee shareholders.⁹ Proving an association is therefore a question of fact and where the identity of the true controller of a ship-owning company is cocooned by complex corporate structures, the arrestor may need to go beyond the company register and identify the true seat of control.¹⁰

At first glance, this might be seen as overburdening a potential arrestor. However, upon further investigation it becomes clear that the establishment of such a burden is necessary. As noted in chapter one, South Africa took a unique approach when adopting the associated ship provisions; an approach which is yet to be followed by any other maritime nation in the world. Where the arrest of ships is usually based on common ownership, South Africa elected the use of 'control' as the core enquiry in such arrests. In doing so, South Africa inadvertently expanded the scope of arresting ships in the country. As stated already, ship-owning companies usually cloak themselves in corporate structures so as to conceal the identity of the beneficial owners of the company shares, thus there is a high probability that an arrestor may make a *bona fide* error and arrest a ship which has no actual relationship with the guilty vessel. By using the balance of probability standard, as opposed to a *prima facie* standard of

⁷ Wallis (note 6 above;113).

⁸ Wallis (note 6 above;126). In the *Galaecia* unreported judgment of DCLD Case No. A19/2006 delivered on 23 March 2006 per Combrinck J, Combrinck J noted that summonses must contain sufficient facts so as to enable a defendant to have satisfactory clarity in respect of the case which they must meet.

⁹ *The Baconau Transportes Del Mar SA v Jade Shipping Co Ltd* SCOSA C42.

¹⁰ H Staniland 'The Arrest of Association Ships in South Africa: Lifting the Corporate Veil too high?' (1996-1997) 9 *U.S.F. Mar.L.J* 415.

proof, it is submitted that this not only maintains consistency in civil courts but also aims to prevent the arbitrary deprivation of property.¹¹

2.3. The Associated Ship Provisions

Now that the dissertation has discussed the overall purpose of the associated ship provisions as well as the onus encumbered on a potential claimant seeking to establish an associated ship arrest, focus will now shift to determining what the term ‘control’ means in so far as such arrests are concerned. The starting point in respect of the latter enquiry will be the associated ship provisions itself.

2.3.1. The Original Associated Ship Provisions:

‘3 (6) Subject to the provisions of ss (9) an action *in rem*, other than such an action in respect of a maritime claim contemplated in para (a), (b) or (c) of the definition of 'maritime claim', may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.

(7) (a) For the purposes of ss (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose –

(i) Owned by the person who was the owner of the ship concerned at the time when the maritime claim arose; or

(ii) Owned by a company in which the shares, when the maritime claim arose, were controlled or owned by a person who then controlled or owned the shares in the company which owned the ship concerned

(b) For the purposes (a) -

(i) Ships shall be deemed to be owned by the same persons if all the shares in the ships are owned by the same persons;

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

(c) If a charterer or subcharterer of a ship by demise, and not the owner thereof, is alleged to be liable in respect of a maritime claim, the charterer or subcharterer, as the case may be, shall for the purposes of ss (6) and this subsection be deemed to be the owner.’

The original associated ship provisions were unfortunate in the sense that it created confusion as to whether ‘control’ should be interpreted in a narrow, restrictive sense as section 3 (7) (a)

¹¹ The arbitrary deprivation of property as it relates to the *Heavy Metal* case will be discussed in more detail in chapter three and the postscript of this dissertation.

(ii) made mention of the control or ownership of the shares of a shipping company, as opposed to the control of the company itself.

In the case of *Dole Fresh Fruit International*¹², Nicholas AJA held that the plain meaning of the phrase ‘the shares in the company’ as contained in section 3 (7) (a) (ii) refer to ‘all the shares in a company’. In this respect, the court stated the following:

‘The plain meaning of the words ‘the shares in the company’ in ss (7)(a)(ii) is ‘all the shares in the company’. Some of the shares in a company, even if they be the majority, are not ‘the shares in the company’. That interpretation accords with the policy of the Act regarding associated ships’.¹³

In this regard, the provision can be easily circumvented by vesting the said shares in a party other than the person who actually exercises control over the company.¹⁴ The court did however take notice of the fact that there is a difference between control of a company and control of the shares of a company as the court held further:

‘A person may control a company without controlling all the shares in the company. And control over a company can be exercised even without a majority shareholding’.¹⁵

It is therefore submitted that even before the 1992 amendments, courts acknowledged that control of a company is not dependent on the control or ownership of the shares of a company.

This provision i.e. section 3 (7) (a) (ii) was particularly difficult to reconcile with subsection 3 (7) (b) (ii) which deemed a person to have control over a company if such a person has the power ‘directly or indirectly’ to control it.¹⁶ The latter provision therefore provided a much broader scope as to what might constitute as ‘control’. Furthermore, in the definitions section of the Act, no terminology was provided for the phrase ‘directly or indirectly’. By strictly focusing on the ownership or control of the shares of a shipping company, it is submitted that the provisions failed to take into consideration the difficulties presented by bearer shares,

¹² *Dole Fresh Fruit International Ltd v MV Kapetan Leonadis and Another* 1995 (3) SA 112 (A).

¹³ *Dole Fresh Fruit International Ltd* supra note 12 at 119B.

¹⁴ Wallis (note 6 above; 145).

¹⁵ *Dole Fresh Fruit International Ltd* supra note 12 at 119F, see further *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C) at 489B-D and *National Iranian Tanker Co v MV Pericles GC* 1995 (1) SA 475 (A) at 485B-C.

¹⁶ Staniland and McLennan writing prior to the 1992 amendments acknowledged this difficulty as they noted that subsection 3 (7) (b)(ii) is in the wrong place as paragraph (b) was meant to amplify paragraph (a) yet paragraph (a) makes no mention of control of a company. H Staniland and J.S McLennan ‘The Arrest of an Associated ship’ (1985) 102 *S.African L.J* 150.

majority shareholdings, the beneficial owner of the shares and also, as submitted by Wallis, it failed to cater for companies which did not have any shares, such as with a company limited by guarantee.¹⁷

Following the problems illustrated above, it has been submitted that the issues could have been solved, albeit with difficulty, through proper interpretation of the provisions as opposed to an amendment of the Act.¹⁸ However, following certain discrepancies presented in section 9 of the Act in relation to the arrest of associated ships and its subsequent sale in execution, the legislature opted to amend the Act, and in doing so, saw an opportunity to clarify any inconsistencies in the associated ship provisions.¹⁹

2.3.2. The Associated Ship Provisions as Amended:

The amended associated ship provisions are as follows:

‘Section 3 (6) An action *in rem*, other than an action in respect of a maritime claim referred to in paragraph (d) of the definition of 'maritime claim', may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.

Section 3 (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.

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

(i) ships shall be deemed to be owned by the same persons if the majority in number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons;

¹⁷ Wallis (note 6 above; 123).

¹⁸ Wallis (note 6 above; 135).

¹⁹ Wallis (note 6 above; 135-136).

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

One of the first perceptible differences in respect of the amended provisions is that the original provisions excluded maritime claims in paragraphs (a), (b) or (c) of the Act from being pursued against the associated ship. These claims referred to

- (a) The ownership of a ship or a share in a ship;
- (b) The possession, delivery, employment or earnings of a ship;
- (c) Any agreement for the sale of a ship or a share in a ship, or any agreement with regard to the ownership, possession, delivery, employment or earnings of a ship;’.²⁰

The amended provisions are less restrictive in that they only exclude paragraph (d) of the list of maritime claims in AJRA which refers to mortgage, hypothecation, right of retention, pledge or other charge, on or of a ship, and any bottomry or *respondentia* bond claims. In this respect, it is submitted that the reasoning behind such exclusions is that such claims are more intimately related to the ship with which the claim arose (the guilty vessel). Therefore the said claims would be best pursued against that particular vessel.²¹

A more noteworthy modification in respect of the amended associated ship provisions, is illustrated in the manner in which the legislature has dealt with the issue of control. As stated above, the problem with the original provisions was that they referred to the control or ownership of all the shares of a company as opposed to the actual control of the company concerned. The amended version adequately deals with this issue as it states ‘controlled the company’.²²

²⁰ Section 1 of the Act.

²¹ Wallis (note 6 above; 143).

²² This difference has been noted in the case of *National Iranian Tanker Co v mv Pericles Gc* 1995 (1) SA 475 (A) where Corbett CJ provided the following example:

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

It is therefore submitted that this centralises the enquiry to the relevant person who actually controls the company, and the control of the shares of company serves a more evidentiary purpose in the sense that it may be one of the factors which shows an association but is no longer a defining characteristic.

Another noteworthy section in the provision, is section 3 (7) (b) (iii) which broadens the concept of a company to include any juristic person or a body of persons, whether or not any shares exist therein. It therefore respectfully submitted that by broadening the scope of what may be regarded as a company, the legislature was aware of the difficulties which corporate structures present insofar as it relates to the arrestor identifying the true source of control. It is further submitted that this section provides an all-encompassing provision to cater for an array of different corporate structures so as to avoid cases in which a ship, may for all purposes, be regarded as an associated ship, save for the fact that the structure of the ship-owning company concerned, is plagued by unidentifiable shareholders, or its structure does not conform to the general structure associated with a company. Section 3 (7) (b) (ii) and (iii) therefore assists an arrestor in the sense that it may penetrate the corporate shields so as to locate the true seat of control irrespective of the internal structures of the company concerned.

Another factor which must be considered in determining control, is the relevant time period when such control must exist in relation to the ships concerned. In terms of the guilty vessel, the relevant time period when such control must exist is ‘when the maritime claim arose’. Thus a subsequent sale of the guilty ship is immaterial in relation to the establishment of control.²³ The relevant time period for the alleged associated ship is ‘when the action is commenced’.²⁴

ship No 2 could be arrested because at the time the action commenced X controlled B company.’ at 484I-485B.

²³ J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) 108. In the case of *MV Cape Courage Bulkship Union SA v Qannas Shipping Co Ltd and Another* 2010 (1) SA 53 (SCA) the court held that a claim may be said to have been ‘originated’ when there are sufficient factors present to indicate that the owner/controller of the ship concerned has ‘offended’. The court further held that the damage which result from the offending owners conduct need not yet be materialise but it is sufficient for the purposes of the Act that the damage will be suffered in due course. Paragraph [23]. The decision has been subject to much criticism and debate see G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012)136 .

²⁴ See section 3(7) above.

2.4. Beneficial Ownership

The term ‘beneficial ownership’ originates from English law, the relevant provision of which lies in section 3 (4) of the English Administration of Justice Act. Although the term stems from English doctrine, it has been mentioned in numerous South African shipping cases which dealt with associated ship arrests.²⁵ It is therefore necessary to determine what is meant by the term ‘beneficial ownership’ so as to provide insight as to how this term relates to the concept of ‘control’. This segment will briefly look at the relevant English provision and how the English cases have interpreted the term ‘beneficial owner’ after which it will look toward the relevant South African law.

Section 3 (4) of the English Administration of Justice Act 1956 states:

‘In the case of any ... claim...being a claim in connection with a ship, where the person who would be liable on the claim in an action in personam was when the cause of action arose the owner or charterer of or in possession or in control of the ship the Admiralty jurisdiction of the High Court may... be invoked by an action in rem against (a) that ship if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person...’

The aforementioned provision therefore allows the claimant to look beyond the corporate form of the company in order to locate the real source of ownership or control, which will generally be accompanied with an investigation of the relevant trusteeship/nominee holdings, and ultimately the beneficial ownership.²⁶

In the case of the *Aventicum*,²⁷ a case which dealt with a claim for damages in relation to the damages to cargo on board the vessel the *Aventicum*, the court stated the following in terms of the concept of ‘beneficial ownership’:

²⁵ See *Owners of the Cargo Lately Laden on Board The mv Katina P v mv Afthoros* SCOSA C1, *The Eleftherotria (NO 2) Crusader Shipping Co Ltd v Canadian Forest Navigation Ltd* SCOSA C5, *Ya Mawlaya (NO 1) Delray Shipping Corporation v Eridiana Spa* SCOSA C30, *The Baconau Transportes Del Mar SA v Jade Shipping Co Ltd* SCOSA C42, *The Sandokan Owners of the Sandokan v Liverpool and London Steamship Protection and Indemnity Association Ltd* SCOSA C73, *The Amer Whitney Shippers d' Singapore Pte Ltd v Amer Whitney* SCOSA C86, *The Asian Hope Shipping Ltd v Ocean Trade S.A C115*, *Sino West Shipping Co Ltd v NYK-Hinode Line Limited* C203, *National Iranian Tanker Co v mv Pericles Gc* 1995 (1) SA 475 (A).

²⁶C Cunningham *The Arrest of an Associated Ship in terms of Section5 (3) of the Admiralty Jurisdiction Regulation Act, No. 105 of 1983 (As Amended) The Burden of Proof* (unpublished LLM Thesis, University of Cape Town, 1999) 15.

²⁷The *Aventicum* [1978] 1 Lloyd's Rep 184.

‘where damages are claimed by cargo-owners and there is a dispute as to the beneficial ownership of the ship, the court in all cases can and in some cases should look behind the registered owner to determine the true beneficial owner... but of course it is plain that s 3(4) of the Act intends that the court shall not be limited to a consideration of who is the registered owner or who is the person having legal ownership of the shares of the ship; the directions are to look at the beneficial ownership. Certainly in a case where there is a suggestion of a trusteeship or a nominee holding, there is no doubt that the Court can investigate it’.²⁸

Ultimately the court held that in this case, the persons who beneficially owned the shares in the *Aventicum*, were not the same persons who were the owners at the time when the cause of action arose, thus the arrest was set aside.²⁹ Similarly in the *Andrea Ursula*,³⁰ Justice Brandon stated the following in attempt to give meaning to the term ‘beneficial owner’:

‘a ship would be beneficially owned by a person who, whether he was the legal or equitable owner or not, lawfully had full possession and control of her, and , by virtue of such control, had all the benefit and use of her which a legal or equitable owner would ordinarily have’.³¹

It is respectfully submitted that what can be drawn from the above mentioned case law, is that the term ‘beneficial owner’ refers to the true holder of the benefits of the shares and extends beyond mere nominee holders or registered holders who act as agents of the beneficial owner and upon the latter’s directives. The aim, therefore, of Section 3 (4) of the English Administration of Justice Act is to locate and proceed against the true controller of the vessel in question and permeate the various corporate structures concealing the beneficial owner’s identity. The associated ship provisions differ from s 3 (4) of the English Administration Justice Act, therefore the interpretation assigned to that provision by the English courts, provides little assistance to the interpretation of section 3 (6) and (7) of AJRA, except to the extent that in determining where control lies, South African courts would follow the English courts and look beyond the corporate veil.³²

In respect of South African corporate law, the terms ‘beneficial interest’ has been mentioned in the Companies Act.³³ In terms of section 56 (1), the Act states:

²⁸ The *Aventicum* supra note 27 at 187.

²⁹ The *Aventicum* supra note 27 at 190.

³⁰ *Medway Drydock & Engineering Co Ltd v MV The Andrea Ursula* [1971]1 Lloyd’s Rep 145.

³¹ The *Andrea Ursula* supra note 30 at 147.

³² *Zygos Corporation v Salen Rederierna AB* 1985 2 SA 486 (C) at 488I.

³³ 71 of 2008.

‘Except to the extent that a company's Memorandum of Incorporation provides otherwise, the company's issued securities may be held by, and registered in the name of, one person for the beneficial interest of another person’.³⁴

Although the term ‘beneficial owner’ is not specifically stated, it is clear that there is a relationship between the term ‘beneficial interest’ and ‘beneficial owner’ and in this respect, South African law recognises this concept as ‘right to be on the register is independent of the ownership of the shares’.³⁵ Cassim provides insight in this regard as he states:

‘the beneficial shareholder is entitled to the rights attached to the share while the registered shareholder is the person in whose name the share happens to be registered. Such a person is also known as a nominee, defined as ‘a person that acts as the registered holder of securities or an interest in securities on behalf of other persons’’.³⁶

There are numerous reasons as to why a shareholder may opt to cloak their identity by not registering the shares in their own name such as *inter alia*; they simply wish to keep their investment anonymous, where the directors of a company would have refused the transfer of shares or registration of such shares in another person. Therefore to bypass this, the seller may remain as the registered shareholder while the buyer would be regarded as a beneficial owner on his behalf, and also, cases where an investor opts to register the shares in their name on behalf of numerous investors in respect of dissimilar shares.³⁷ A detailed analysis of

³⁴ Section 1 of the Companies Act further states:

‘beneficial interest’, when used in relation to a company's securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to-

- (a) receive or participate in any distribution in respect of the company's securities;
- (b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or
- (c) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities,

but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002’.

³⁵ FHI Cassim et al *Contemporary Company Law* 2 ed (2012) 331.

³⁶ Cassim et al (note 35 above; 331) .see also *Oakland nominees (Pty) Ltd v Gelria Mining & investment Co (Pty) Ltd* 1976 (1) SA 441 (A) AT 453 where the court discussed the position of a nominee shareholder and noted that such a person; is an agent with limited authority ,holds the shares in the name of and may only act on behalf of the principal, from whom he takes instructions, the principal who is described as ‘beneficial owner ‘is not wholly accurate but is a convenient and well understood label.

³⁷ Cassim et al (note 35 above; 331-332) Cassim further notes that one of the difficulties in respect of beneficial owners is that internal trading becomes difficult to determine, minority shareholders cannot determine the identity of the majority shareholder and furthermore directors cannot prevent a hostile takeover. Cassim et al (note 35 above; 331-332). In respect of public companies section 56 (3) states that if a security of a public company is registered in the name of a person who is not the holder of the beneficial interest in all of the securities in the same company held by that person, that registered holder of security must disclose-

- (a) the identity of the person on whose behalf that security is held; and

the term ‘beneficial interest’ as contained in the Companies Act is beyond the mandate of this dissertation. The brief mention of it however, serves two main purposes, firstly it provides insight as to the position in South Africa in relation to shares not owned by the true owner and secondly it provides perspective as to how this concepts relates to corporate structures and the manner in which a person may register their shares, so as to conceal their identity.

As stated above, the term ‘beneficial owner’ often appears in associated ship cases as well as other cases relating to shareholdings. It is therefore essential to determine what the relevant authorities have stated. In the *Afthoros*,³⁸ Majid J held that ‘the phrase ‘ultimate sole beneficial owner’, has a well-recognised meaning in commercial circles when used in relation to a group consisting of a holding and several subsidiary companies’.³⁹ Whilst in the *Baconau*⁴⁰ the court held that ‘In our company law and that, for instance of the United Kingdom we understand that the beneficial owner is the true owner of the share and entitled to the dividends and any other benefits which flow from its ownership’.⁴¹

In *Standard Bank of South Africa Ltd & another v Ocean Commodities Inc*:⁴²

‘Normally the person in whom the shares vest is the registered shareholder in the books of the company and has issued to him a share certificate specifying the share, or shares, held by him. Indeed, such a share certificate, duly issued, affords prima face evidence of his title to the shares specified therein...in some instances, however, the registered shareholder may hold the shares as the nominee, i.e. agent, of another, generally described as the ‘owner’ or ‘beneficial owner’ of the shares. This fact does not appear on the company’s register, as it is the policy of the law that a company should concern itself only with the registered owner of shares... the term ‘beneficial owner’ is, juristically speaking, not wholly accurate, but it is a convenient and well-use label to denote the person in whom, as between himself and the registered shareholder, the benefit of the bundle of rights constituting the share vests’.⁴³

In the *Elefthoratoria*⁴⁴ the court held that the term ‘nominee’ refers to someone whose name is used in lieu of another and refers to the position where a registered shareholder or

(b) the identity of each person with a beneficial interest in the securities so held, the number and class of securities held for each such person with a beneficial interest, and the extent of each such beneficial interest.’

³⁸ The *Afthoros* supra note 25.

³⁹ The *Afthoros* supra note 25 at C3-D.

⁴⁰ The *Baconau* supra note 25.

⁴¹ The *Baconau* supra note 25 at C57-G.

⁴² 1983 (1) SA 276 (A).

⁴³ *Standard Bank of South Africa Ltd & another v Ocean Commodities Inc* supra note 42 at 288H-289B.

⁴⁴ The *Elefthoratoria* supra note 25.

appointed director holds the shares or exercises their functions subject to the directive/ commands or orders of the actual or the beneficial owner of the shares or the person on whose behalf they act as director.⁴⁵ The court ultimately found that in this case, the ‘beneficial owner’ in question shielded his identity in order to conceal his involvement in the shipping company in question from Greek officials, and there was nothing to suggest that the nominee directors and shareholders did not act upon his instruction.⁴⁶

It is therefore submitted that the term ‘beneficial owner’ refers to the person who obtains the benefits associated with the relevant shareholdings and at whose discretion the nominee or registered shareholders act. It can therefore be said that for the purposes of associated ship arrests, the requisite control lies with this person who is the source of ultimate control. Therefore although the relevant English and South African provisions are different, insofar as they refer to ‘beneficial ownership’ they apply the same meaning. It is further submitted that not all cases of associated ship arrests will involve beneficial ownership as in some cases shareholders may hold their shares in their own name subject to no will but their own. In such cases control for the purposes of associated ship arrest may be said to lie with that person. However where the beneficial owner opts to register their shares in the name of another, claimants would need to go beyond the registered shareholdings so as to determine the true seat of control.

2.5. The Type of ‘control’ Required to Establish Associated Ship Jurisdiction

The Act does not provide any insight as to the meaning to be amalgamated with the term ‘control’ except that it may be executed ‘directly or indirectly’.⁴⁷ It therefore becomes necessary to look toward the relevant case law to determine how the term is to be interpreted. This portion of the dissertation will briefly look at the language of the statutory provisions itself, after which it will look at the various meanings which may be associated with the term ‘control’ and which term best suits the overall purpose of the provision.

The starting point with all statutory provisions is that of the provision itself. Section 3 (7) makes reference to control three times and in doing so refers to the word ‘person’ in the singular and not in its plural form.⁴⁸ It therefore appears that what is meant by this is that

⁴⁵The *Elefthoratoria* supra note 25 at C9D-G.

⁴⁶ The *Elefthoratoria* supra note 25 at C10-C11.

⁴⁷ Section 3 (7) (b)(ii) .

⁴⁸ Section(7) (a) (ii) states:

‘control’ for the purpose of associated ship arrest must rest with a single entity and not two or more. Simply put, the requisite control must rest with a single person.⁴⁹ There is no suggestion in the provisions, that for the purposes of the provision there may be more than one repository of control. It is submitted that if this was intended by the legislature, it is likely that the legislature would have provided distinguishing factors and characteristics of different forms of control in order to determine which configuration of control has more authority, or is superior to others.⁵⁰

The next question which need be interrogated, is what is actually meant by the term ‘control’? . Wallis submits that there are several possibilities in which the provision may be interpreted, the first of which being the narrow and formalistic interpretation i.e. based on the law of the country concerned in which the company was incorporated, whereby the person who is legally authorised to control the undertakings of the company concerned, is identified as the person who has control. This approach will basically restrict the enquiry to the determination of the registered shareholder of the shares of a company. Secondly, it may refer to the authority to oversee the operation of the vessel in question, which refers to the day-to-day management of the company and lastly, it may refer to the ‘actual or ultimate’ control of a company.⁵¹

With regard to the narrow interpretation i.e. the actual legal control of the company concerned, one usually looks at the registered shareholder of the company. It is only the registered shareholders that may exercise a vote in respect of the said shares and in this sense, undertake the affairs of the company. If such a person has the majority shares of the company, they may be said to legally control the company.⁵² Such an approach is restrictive in its nature and as such, does not cater for situations where control may be exercised without a majority holding, where voting rights are not proportionate with the shareholding of a

‘owned, at the time when the action is commenced, by a *person* who controlled the company which owned the ship concerned when the maritime claim arose; or

(iii) Owned, at the time when the action is commenced, by a company which is controlled by a *person* who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.

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

(ii) a *person* shall be deemed to control a company if he has power, directly or indirectly, to control the company;’ (my emphasis included.)

⁴⁹ Wallis (note 6 above; 187).

⁵⁰ Wallis (note 6 above; 187).

⁵¹ Wallis (note 5 above; 187).

⁵² Wallis (note 5 above; 188).

company or cases of pyramid schemes.⁵³ In the case of *Zygos Corporation v Salen Rederierna AB*⁵⁴, a case decided prior to the 1992 amendments, Friedman J provides further support in this regard as the respected judge states:

‘It is possible for a person to control a company without necessarily controlling the shares in that company. For example, control over a company can be exercised without a majority shareholding where voting rights are not commensurate with shareholding, or where ‘pyramiding’ takes place. . . . It is in each case a factual question whether the necessary ownership or control is present in order to bring the two ships within the terms of s 3(6) read with s 3(7) of the Act.’⁵⁵

In this respect Hare also notes that to look only to the person who, at the relevant time, has the bearer shares⁵⁶ is to ‘oversimplify the inquiry to an extent that it is likely to emasculate it’, and in this sense it is important to note that the 1992 Amendment of the Act emphasises the control of the company, rather than merely controlling its shareholding.⁵⁷ It is further submitted that if this restrictive interpretation was to be regarded as the correct meaning, it seems illogical for the legislature to use the catch-all phrase ‘directly or indirectly’ and would have rather expressly stated that control is to be determined by identifying the majority shareholder. Evidence of common ownership of shares, still carries probative value in the sense that they may indicate a common control between the companies.⁵⁸ It is therefore submitted that the probative value of common ownership of shares will however depend on other factors which point toward common control.

The second type of control i.e. managerial control, also presents further challenges. Such persons may be employees of the company and may perform key functions within the company. However, their mandate is limited and subject to the will of the shareholders. Before looking at the case law, it is useful to look at the nature and functions of directors generally. In this aspect, it is however difficult to make a comparison with the corporate

⁵³Staniland (note 10 above; 414). In *Dole Fresh Fruit International Ltd* supra note 12 at 119F the court held ‘A person may control a company without controlling all the shares in the company. And control over a company can be exercised even without a majority shareholding’.

⁵⁴ 1985 (2) SA 486 (C).

⁵⁵*Zygos Corporation* supra note 12 at 488I-489C:

⁵⁶ In this respect the person who is in possession may be regarded as the person who has the requisite control. The difficulty however is that it is easily transferable from one person to another.

⁵⁷ Hare (note 22 above; 109).

⁵⁸Staniland (note 10 above; 414). Hare also notes that the determination of control may involve a multi-faceted enquiry into the shareholding of a company, the board of directors, the CEO or managing director of the ship-owning company as well as relevant legislation which may imply control such as that the company being under the power and authority of a judicial manager. Hare (note 23 above; 109).

provisions across the world, and such a discussion is beyond the mandate of this dissertation. The discussion will therefore focus on the position of directors in South African law. A company is a juristic person and as such, can only act through its duly appointed agents and representatives.⁵⁹ The day-to-day business affairs of the company are therefore managed by the directors who have the authority to implement all the powers and perform all the functions of the company insofar as the memorandum of incorporation and the Companies Act allow.⁶⁰ The board of directors therefore have the legal power to manage the business affairs and make vital decisions relating to the everyday running of the company.⁶¹ Directors are elected by the shareholders and as such, they may be removed by ordinary resolution by the shareholders.⁶² The directors are therefore subject to the command of the shareholders. Therefore, their control extends no further than the everyday operations of the company and important decisions which relate to the direction of the company, such as an election to liquidate the company, will be decided by the shareholders. Hence, although being able to provide insight and input in respect of decisions to be made, such persons lack the ability to have the final say in such matters.⁶³

In terms of determining whether managers may be regarded as having the requisite control for the purposes of associated ship arrests, it is useful to look at the decision of *R v Mall*⁶⁴ where the court made mention of the legal position of directors and managers. The court stated that managers are employees of the company and are therefore subject to the authority of the directors, and the scope of their mandate is a question of fact. Furthermore, whilst the directors are appointed and may be removed by the shareholders, the managers are employees of the company and are appointed and dismissed at the discretion of the directors.⁶⁵ Therefore, from a South African company law perspective, it seems as though neither directors nor managers of a company have the necessary 'control' for the purposes of associated ship arrests. However it is still necessary to look at what the relevant case law has

⁵⁹Cassim et al (note 35 above;383).

⁶⁰ 66(1) see also P Delpont *The New Companies Act Manual (including Close Corporations and Partnerships) Student Edition* (2011) 90.

⁶¹Cassim et al (note 35 above; 375).

⁶²Section 71 (1) of the Companies Act 2008 states that:

'despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2)'. See also Delpont (note 60 above 80-81).

⁶³Wallis (note 6 above; 189).

⁶⁴1959 (4) SA 607.

⁶⁵ Cassim et al (note 35 above;387).

mentioned in respect of the control held by directors and managers and whether such control is sufficient.

King J, writing before the amendment of the Act, held that control in terms of section 3 7(b) (ii) refers to overall control ‘and not its day-to-day management’.⁶⁶ The respected Judge went on further to state that ‘there must be managing agents in all the major ports of the world who in a sense, control innumerable merchant ships owned by different interests and quite independent of each other. It could never have been the intention of the legislature that such vessels could be arrested as ‘associated ships’’.⁶⁷ In this case the court was not satisfied with the applicant’s assertion that the two vessels were associated on the basis that they had the same agents. The applicant thereafter amplified their papers and averred that each of the companies that own one of the alleged sister-ships has a common director/president. It was further asserted that the president of such companies could sign and act on behalf of the corporation and with their signature, bind the corporation. Another common factor between the companies was that they shared a common director/ secretary. The court ultimately held that a case of association had been made out. It is also important, in this respect, to note the case of *Hasselbacher*⁶⁸. In this case, the applicants applied for, and had been granted an urgent order for the arrest of the motor vessel m.v. *Stavroula* as security for their claim in the English High Court of Justice against Dunnet Bay Shipping (Dunnet Bay) as owner of the m.v. *Manolis L*. On the return day, the owners of the m.v. *Stavroula*, North Sea Maritime, applied for an order that the arrest be set aside on the ground that the applicants had not proved that the two ships were associated. The applicants were aware of the identity of the owner of the shares in Dunnet Bay i.e. Captain Lelakis. However, North Sea was registered in Liberia, and it was therefore not possible to identify the shareholders of the company. The applicants therefore looked at the Greek Ministry of Mercantile Marine which stated in a letter that Universal Glow represented North Sea and managed the vessel m.v. *Stavroula*. The Lloyds confidential list of ship-owners for 1984-1985 stated that Universal Glow is the manager of 23 ships owned by single-ship companies, including vessels *inter alia* the m.v. *Stavroula* and m.v. *Manolis*. The director of Universal Glow was a Mr. Lambros Karakostas who was also one of the trustees which held shares in the Dunnet Bay shipping on behalf of Captain Lelakis. In the Lloyds confidential index March 1985 annexure it had the following entry:

⁶⁶ *E E Sharp & Sons v MV Nefeli* 1984 (3) SA 325 (C) at 326-327.

⁶⁷ *E E Sharp & Sons* supra note 66 326H-327A.

⁶⁸ *Hasselbacher Papier Import and Export (Body Corporate) and Another v MV Stavroula* 1987 (1) SA 75.

‘Universal Glow Inc,... (registered in Liberia) (Antonis Lelakis & Peter G Stamoulis)’⁶⁹. Furthermore, there was evidence of a list of 38 vessels and the companies owning them, all managed by Universal Glow. The applicants have shown that ten of these companies are directly or indirectly controlled by Captain Lelakis. No further information existed in respect of the other vessels. Another factor which the court considered was that Th Skoulas, who acted on behalf of the respondent and placed the m.v. *Stavroula* under the management of Universal Glow and nominated it as its representative, was presumably the same person as Theodorus Skoulas who was the co-holder of shares in Dunnet Bay and the trustee of Captain Lelakis. The court made reference to the dictum in the *E E sharp* case at 327A as mentioned above, but stated that the control referred to by King AJ in that case is a different type of control exercised by Universal Glow in this case. Burger J then stated:

‘it seems to me that its management and control is not confined to management in a port but was so complete in its extent and overall that indicates an association between the ships managed by Universal Glow’.⁷⁰

In this respect, it is therefore important to note that there may be such cases where the nature and extent of the management over a vessel is so complete that it may satisfy section 3 (7) of AJRA but this will depend ultimately on the facts of a particular case and the location of the true seat of control. It is important however, to note that one of the main factors which played a role in the court upholding the arrest, was the refusal by the respondent to deny the allegations with regard to whether Captain Lelakis had control over the respondent.⁷¹

In the *Eleftherotria* (NO 2)⁷², the *Eleftherotria* was arrested by Canadian Shipping Co Ltd on the basis that it was an associated ship of the *Esquire*. Both ships were both managed by the same company i.e. Dileship Marine Corporation. The *Eleftherotria* was owned by Crusader Shipping Co Ltd and the *Esquire* was owned by Serenissima Shipping Co Ltd. The ultimate owners of the two companies were separate persons. However a 1 % shareholder in Crusader was also a nominee shareholder of 1% of the shares in Serenissima. The ultimate owner of shares in Serenissima was a person who held 100% of the bearer shares in a holding company of Serenissima.⁷³ It was found that this person was a business manager and had no previous experience in shipping and entered into the shipping business with unexplained financial

⁶⁹ *Hasselbacher* supra note 68 at 77F-J.

⁷⁰ *Hasselbacher* supra note 68 at 78H.

⁷¹ *Hasselbacher* supra note 68 at 78J-79A.

⁷² *Eleftherotria* (NO 2) supra note 25.

⁷³ *Eleftherotria* (NO 2) supra note 25 at C5F-G.

resources, and in doing so attempted to screen his activities from the Greek Foreign Exchange Authorities. He was a friend of the owners of *Crusader*, and therefore entrusted them to handle the day-to-day management of the *Esquire* in order to obscure his involvement in its operations from the Greek officials.⁷⁴ The court based its enquiry on who was the ultimate controller of the company and found that there was no evidence to suggest that the nominee holders did not act on behalf of the beneficial owner. The importance of this case is that it shows that; common management is insufficient to establish 'control' and that the true enquiry of associated ship arrest is based on the question of who exercises ultimate control over a company, nominee holders are subject to the directives of the beneficial owner of a company, and as such, do not have an independent unfettered discretion as to how they may use such shareholdings, and lastly, that one of the reasons as to why a person may opt to conceal their identity and involvement in a company may be to avoid the relevant authorities of a state.

In the *Kardiga 5* (NO 1)⁷⁵ - JA Chapman arrested the *Kardiga 5* and claimed payment in respect of fleet insurance, of which the *Kardiga* was a part. It was alleged that the owner of the *Kardiga 5* was controlled by the same person/persons with whom JC Chapman had insurance claims against. The allegations were faced by denials by the respondents and the matter therefore had to be referred to oral evidence.⁷⁶ However the court did state the following, in respect of common management:

'in order to prove its case, Chapman relies inter alia on a degree of common shareholdings and a degree of common directorships. Suffice it to say that neither the common shareholding nor common majority directorships is sufficient in themselves to establish the requirements of control set out in section 3 (7) (b) (ii)'.⁷⁷

In the case of the *Sandokan*⁷⁸, Liverpool and London Steamship Protection and Indemnity Association Ltd arrested the *Sandokan* on the basis that it was an associated ship of the vessels: *Lina, Alan, Rapan and Shane*. Each of these vessels, except the *Sandokan*, was

⁷⁴*Eleftherotria* (NO 2) supra note 25 at C5G-H.

⁷⁵*The Kardiga Five (No.1): JA Chapman & Co Ltd v Kardiga Denizcilik ve Ticaret AS* SCOSA C12.

⁷⁶*The Kardiga Five (No.1)* supra note 75 at C17-C19.

⁷⁷*The Kardiga Five (No.1)* supra note 75 at C14I-C15. see also *East Cross Sea Transport Inc v Elgin Brown & Hamer (Pty) Ltd* 1992 (1) SA 102 (D) at 107 E-G where the court stated :

'If they had common directors, those directors, acting together, would have controlled the management of the companies' affairs. That is not, however, to say that they controlled the shares in the companies for there is a vast conceptual and factual difference between control of the management of a company's affairs and control of the shares in that company'.

⁷⁸*The Sandokan* supra note 25.

entered into as a fleet entry where each vessel was jointly and severally liable for all claims in respect of the said fleet entry. Super Bulk Ltd., the company which registered the ships as a fleet entry, was also jointly and severally liable. Mini Bulk Ltd., the company owning the *Sandokan* had no interest in the other vessels. The commonality in this case between the two companies, was that they shared a common director. The court held:

‘It was not seriously in contention between the parties that the word ‘control’ as used in this section means ultimate control of the destiny of the ship and not mere day to day control or management thereof. To be a director in the company owning the ship is usually insufficient in itself to prove control, particularly where that director holds no shares in the company’.⁷⁹

The court held further, that the fact that a vessel is entered as part of a fleet entry for the insurance purposes, may indicate an association. However, in this case there is no relationship between the other vessels and the *Sandokan*, save for the fact that the two ships share a common director.

In the *Theokeetor*⁸⁰, the *Theokeetor* was arrested as an associated ship of the *Theometor* of which Ssang Yong had a claim against. The agent of the ships affirmed that the ships were only associated to the extent that they were part of the same fleet in which they were both managed. There was no further evidence to suggest that the two ships were controlled or owned by the same persons. The court noted that there were sound commercial reasons as to why ships may be managed by the same persons, which included *inter alia* the fact that such common management facilitates the raising of funds and also the use of cross guarantees which are supplied by investors for mutual benefit.⁸¹ The court held that the two ships were not associated and that in an industry such as shipping, it is unlikely that the shipping companies would be able to operate without such ‘community of interests’.⁸² The court went on further to note that the situation where various ships are managed by the same company, is similar to commercial developments where an estate agent gathers together a congregate of investors to invest in property.⁸³

It is therefore submitted that common management of ship owning vessels cannot, for the purposes of establishing common control, be the primary and sole criterion, but rather one of

⁷⁹ The *Sandokan* supra note 25 at C74 D-E.

⁸⁰ *Ssang Yong Shipping Co Ltd v The MV Theokeetor* SCOSA C 81.

⁸¹ The *Theokeetor* supra note 80 at C83.

⁸² The *Theokeetor* supra note 80 at C84 E-G.

⁸³ The *Theokeetor* supra note 80 at C84 E-G.

the characteristics amongst others that point towards common control.⁸⁴ Put simply, common management forms one of the factors that need to be considered in establishing common control as there may be cases where companies act as professional managers for investors who lack the intimate and practical knowledge of shipping.

Ultimately, neither legal control nor managerial control are sufficient to support the underlying purpose of an associated ship arrest, which is to make the loss fall where it belonged by reason of ownership or control⁸⁵, as these interpretations allow for the associated ship provisions to be circumvented easily through the vesting of shares in others or through pyramid schemes. It therefore makes no sense for the legislature to take such a bold approach in enacting the associated ship provisions if they were to be so easily thwarted. Hence, it is the ultimate or overall control that needs to be looked at. In this respect, Bradfield submits that when regard is given to the mischief at which the associated ship provisions is aimed at; it becomes clear that it is the real control and not apparent control which parliament had in mind.⁸⁶

When determining control of a company, as stated above, it is important to note that the fact that a party may be a majority shareholder in a company, does not necessarily mean that the said party has the necessary ‘control’ for the purposes of associated ship arrests. In such cases the court will have to take into account the relevant terms and conditions of the shareholders agreement as part of the inquiry into the ultimate/actual control of a company. A clear illustration of this is seen in the case of *The Guangzhou*⁸⁷. In this case, China National Chartering Co. Ltd. arrested the *Guangzhou* on the basis that it was an associated ship of the *Global Commander* which it had a claim against for hire and damages. The owner of the *Guangzhou* was the GC Guangzhou Pte Ltd which was wholly owned by GC Tankers Pte Ltd whose shareholders were owned by Centre Securities Ltd (40% shareholding) Hainan American Ltd (10% shareholding) Grand Columbia Shipping Ltd (25% shareholding) and Grand Mississippi Shipping Ltd (25% shareholding). The latter two companies were owned by Mega Bulk Holdings Co Ltd. Mega Bulk and Grand China Shipping were subsidiaries of

⁸⁴ Other factors may include common mortgage bonds of the respective vessels, where two or more vessels guarantee performance under different charter parties, common: addresses facsimile numbers, surety ship and power of attorneys. see Staniland (note 10 above; 416).

⁸⁵ *Euromarine International of Mauren v The Ship Berg and Others 1986 (2) SA 700 (A)* in this respect, it is important to note that this case was decided prior to the 1992 amendment’s and therefore as suggested by Hoffmeyr, it must be read in light of the subsequent amendments which focused on control of a company as opposed to control of the shares. Hofmeyr (note 23 above; 134).

⁸⁶ G Bradfield ‘Guilt By Association in South African Admiralty Law’ (2005) 2 *LMCLQ* 247.

⁸⁷ *China National Chartering Co Ltd v The Guangzhou* SCOSA C197.

Grand China Logistics Holding Co Ltd which formed part of the HNA group of companies. HNA controlled the *Global Commander*. China National also alleged that HNA controlled the *Guangzhou* through the control of the two subsidiary companies which were owned by Mega Bulk Holdings Co Ltd and that it had control of Hainan American. Guangzhou denied that HNA controlled Hainan American and further provided evidence of clause 5.2 of the shareholders agreement, concluded by the shareholders of GC Tankers, which provided that the company could only act with prior resolution of the shareholders and consent of 75% of the voting rights at a general meeting. The applicants' contention in this case was that the HNA group controls Hainan American, which in turn results in HNA controlling 60 % of the shareholding in GC Tankers.⁸⁸ The court held that this was insufficient to establish the requisite control in terms of section 3 (7) as control of 60% of shares was insufficient to establish control of the company, as the shareholders agreement requires control to the extent of 75%. The court also went on to state that 'it is perfectly in order to arrange one's affairs in such a way as to avoid the effect of statutory provisions, provided of course that the arrangements are genuine and not simulated so as to disguise the true position'.⁸⁹ The court therefore looked beyond the majority shareholding and focused on the true seat of control.

The courts investigation as to the ultimate control of a company will often involve an enquiry into the company laws of the state in which the shipping company was registered. In the case of *Baconao*,⁹⁰ Jade Bay Shipping Co Ltd chartered the *Jade Bay* to Empresa Cubana De Fletes (Cuflet Chartering of Havana, Cuba). A dispute arose between the parties, and Jade Bay arrested the *Baconao* in Durban to obtain security for claims which were subject to arbitration proceedings in London. The *Baconao* was owned by Transportes Del Mar SA. To prove the association, Jade Bay submitted documents showing a) that Transportes Del Mar SA was the owner of the *Baconao* which was listed as such under the subheading of a company called 'Empresa Navegacion Mambisa' in the Lloyds confidential index and b) certain documents from the ICC International Marine Bureau which stated that Cuflet was a Cuban state-owned or controlled company which operated vessels owned by Mambisa who was also controlled/owned by the government of Cuba. Transportes Del Mar SA argued that it was the owner of the *Baconao*, that Mambisa and Cuflet were separate entities and that neither the government of Cuba nor Mambisa controlled the *Baconao*. Transportes Del Mar SA further submitted that it was formed as joint venture between Mambisa and another

⁸⁸The *Guangzhou* supra note 87 at C199 F-G.

⁸⁹The *Guangzhou* supra note 87 at C200I-C201A.

⁹⁰ *Transportes Del Mar SA v Jade Bay Shipping Co Ltd* SCOSA C42.

company named Glyfada Marine Co Ltd where Mambisa contributed the *Bacanao* and Glyfada contributed capital. It was further contended that under the revised Cuban legislation, the Cuban government did not control such joint ventures. The court found that the submitted revised Cuban law was more aesthetic than a reality and that it merely showed that various one-ship companies had been established to own the various vessels which were previously owned by Mambisa. It did not however terminate the fact that the state had ultimate control over the vessels, nor did it prove that the ships in question were not associated ships. In this sense, the court noted that ‘there would accordingly be nothing inherently improbable in a state which was a large shipowner and was converting from strict socialism, where doctrine required all its assets to belong to the state, to a more open economy, taking advantage of the schemes evolved by business men, to hide the true ownership of its property whether for business or political reasons’.⁹¹ The court therefore applied a common sense approach and focused on the actual identity of the controller of the companies concerned, rather than merely looking at the picture presented to the outside world. It can therefore be deduced that the court in this case favoured an approach which focused on with whom the ultimate control actually resided as opposed to with whom it merely appeared to reside with.

The courts applied a similar approach in the case of *Le Cong*⁹² where it had to determine whether the respective companies in the case, Guangzhou Ocean Shipping Company and the Shantou Sez were controlled by the same person i.e. the state of China. The court looked at the relevant corporate law provisions, The Constitution of China as well expert witnesses on behalf of the parties, and concluded that Guangzhou was founded and financed by the central government of China as opposed to Shantou Sez which was established and funded at municipal level by the Shantou Municipal Government. The court found that according to the law in China, each level of government is elected by popularly elected bodies. In the case of the central government, it is the National People’s Congress whilst the low tiers of government are elected by the Local People’s Congress. In terms of the budget laws of China, each level of government has its own independent financial status and has exclusive rights in relation to capital funds. Therefore the power to control Shantou Sez vested with the Shantou City Municipal Government. The central government is thus legally precluded from exercising any form of control in respect of the assets of Shantou Sez.⁹³ In this case once

⁹¹The *Baconao* supra note 90 at C56.

⁹²*International Marine Transport SA v The Le Cong* SCOSA 107.

⁹³The *Le Cong* supra note 92 at C110-C111.

again, the court adopted an approach which aimed to locate the true source of control as opposed to merely focusing on the picture presented to the outside world.

2.6. Conclusion

This chapter began by noting that one of the main difficulties faced by potential arrestors is overcoming the evidentiary burden of on a balance of probabilities. This difficulty is further amplified when regard is given to the fact that ships call into ports for a relatively short period of time and as such, shipping practitioners have to, within such time constraints; provide facts which prove common control or ownership. This task becomes even more problematic as many of these shipping companies are one-ship owning companies which consist of complex corporate structures which shield the true source of control through avenues such as bearer or nominee shareholdings. However, although proving such an association may be a burdensome task, it aims to prevent the wrongful arrest of ships.

The chapter also provided a comparison between the original provisions and its subsequent amendments. What can be clearly noted here, is that whereas the original associated ship provisions were difficult to interpret and overall restrictive in its nature, the amendments allowed for a broader interpretation to be associated with ‘control’ as it is the control of the company that is now the central enquiry and not control of all the shares. The effect of this amendment is that it facilitates the arresting party in locating the actual or ultimate source of control of a ship-owning company, irrespective of whether or not the company contains any shareholdings. Thus, factors such as bearer shares, nominee shareholdings and pyramid schemes no longer pose as factors which serve as a bar to establishing associated ship jurisdiction, as it did under the original provisions. To amplify on this discussion, the chapter also looked at the term ‘beneficial ownership’ and what meaning is attached to it when it is referred to in shipping cases. It is submitted that although the relevant English and South African law are distinguishable, they both provide the same understanding of ‘beneficial ownership’ in that it relates to the true holder of the benefits of the shares of a company and at whose directive the nominee holders act. This is important as it is with such a person that ‘control’ can, for the purposes of associated ship arrests, be said to lie.

Lastly this chapter looked at the various forms of ‘control’ which could be used to establish associated ship jurisdiction. What could be concluded from this discussion, according to the case law, is that neither managerial control nor the strict formalistic control is sufficient to

satisfy section 3 (7). Instead, what is required from the Act is to look at the ultimate or actual control of the company concerned. It is this form of control which best fulfils the purpose of the provision, which is to make loss fall where it belonged by virtue of common ownership or control.⁹⁴ Now that it has been established that it is the ultimate or actual control with which the associated ship provisions is concerned, it is this benchmark which will be used when determining the correctness of the majority decision in the *Heavy Metal* case.

⁹⁴The *Berg* supra note 85 at 712A-B.

CHAPTER 3: THE *HEAVY METAL* SAGA

3.1. Introduction

In chapter one of this dissertation, it was noted that the underlying purpose of associated ship arrests is to hold the true debtor in a maritime dispute liable for the debt in question. However, it is important to note that the associated ship arrests do not aim to provide an arrestor with free reign in obtaining such arrests and such a person will bear the onus of proving the association on a balance of probabilities. To achieve this end, chapter two submitted that the interpretation of ‘control’ which best supports and promotes this underlying purpose is the ‘ultimate or actual control’ of a company which in turn will refer to a single repository of control. The main reason for this submission as noted in chapter two is that, the other meanings of ‘control’ such as managerial control or strict legal control allows debtors to easily circumvent the provisions of the Act through the crafty and astute use of corporate structures.

In light of this background, chapter three will aim to use the abovementioned findings as a yardstick with which the findings of the majority in the SCA decision of the *Heavy Metal*¹ case will be critically analysed. In doing so, this chapter will firstly discuss the facts of the case, after which it will look at the findings of the High Court. Subsequent to this, this chapter will look at the three judgments of the Supreme Court of Appeal decision. Following this, the majority decision will be critically analysed by firstly looking at whether the interpretation afforded by the majority supports the underlying purpose of associated ship arrests. Secondly, this chapter will determine whether the majority was correct when it acquainted the phrase ‘directly or indirectly’ to the Latin terms *de jure* and *de facto*. Lastly this chapter will briefly look at the Constitutionality of the decision and whether it has the effect of allowing a ship-owner to be arbitrarily deprived of their property. The latter enquiry will be discussed more fully in the postscript of this dissertation. The findings of this chapter will then be used in chapter four in terms of determining the legal impact of the *Heavy Metal* case in terms of providing insight as to the practical difficulties faced by courts when strictly applying the *ratio* of the majority.

¹*MV Heavy Metal: Belfry Marine v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA).

3.2. The Facts

The dispute in this case arose as a result of a breach in the Memorandum of Agreement (MOA) in which Dahlia Maritime sold the m.v. *Sea Sonnet* to Palm Base Maritime. In terms of the MOA, the seller was to deliver the vessel free of recommendations and shall notify the classification society of any matters coming to their knowledge prior to delivery which, upon being reported to the classification society would lead to the withdrawal of the vessels class or to the imposition of a recommendation relating to her class.² According to a report furnished by a consultant marine engineer, numerous problems were uncovered after the delivery of the vessel and these were matters which warranted to be reported to the sellers classification society. Furthermore, the consultant also stated that the seller was in breach of the MOA and that if the matters in question were reported to the classification society, recommendations would have been imposed.³

Palm Base Maritime accepted delivery of the m.v. *Sea Sonnet* and did not elect to cancel the agreement and intended to bring arbitration proceedings in London against Dahlia. In order obtain security for its claim; Palm Base Maritime sought the arrest of the m.v. *Heavy Metal* on the basis that it was an associated ship with the m.v. *Sea Sonnet* in terms of s 3(6) and s 3 (7) of the Act and that it had a genuine and reasonable need for security in the arbitration.⁴ The owners of the m.v. *Heavy Metal* (Belfry Marine) challenged the arrest and denied the association.

To secure the arrest of the m.v. *Heavy Metal*, Palm base Maritime had produced a body of evidence which portrayed the two vessels as having close ties. In its founding affidavit, Palm Base had alleged that Mr Lemonaris, a Cypriot advocate, was the majority shareholder and sole director of Dahlia and Belfry Marine and also that a Mr Nikolaos Vafias exercised ultimate control over an entire group of vessel owning companies and a company called Brave Maritime Corporation Inc. (incorporated in Greece), which managed and operated a fleet of vessels which included the m.v. *Heavy Metal* and the m.v. *Sea Sonnet* when it belonged to Dahlia.⁵ The two companies also had the same registered address, the same secretary and the same company managed the vessels as part of a fleet of vessels regarded as

² The *Heavy Metal SCA* Supra note 1 at 1088J-1089B.

³ The *Heavy Metal SCA* Supra note 1 at 1089C.

⁴ The *Heavy Metal SCA* Supra note 1 at 1089E.

⁵ The *Heavy Metal SCA* Supra note 1 at 1089G-H.

a group, many of which had musical names. Furthermore in a previous incident where a ship in the fleet was arrested, security had been provided.

In response to the aforementioned allegations, Mr Lemonaris, in an opposing affidavit, stated that he held both the shares in both Dahlia and Belfry as a nominee shareholder for non-residents of Cyprus.⁶ He further admitted that the m.v. *Sea Sonnet* was managed by Brave Maritime Corporation Inc. but denied that the vessel was operated by it.⁷ In a subsequent affidavit, Mr Lemonaris stated that during the period from 23 October 1996 (the date of the MOA relating to the sale of the vessel) to 9 December 1996 (the date on which the vessel was delivered to.) , the m.v. *Sea Sonnet* was owned by Dahlia, the shareholding in which during that period, 52% was held by himself as a nominee holder on behalf of a Liberian corporation called Carnation Finance Inc. and the other 48 % by another Liberian company called Wichita Maritime and Trading Inc. He further stated that during the period in question, all the shares in Carnation Finance Inc. were owned by a Mr Nikolaos Tsavlis and that he had been specifically authorised to disclose the identity of Mr Tsavlis as the ultimate beneficial owner of the m.v. *Sea Sonnet* during the relevant time period in question. He further stated that he:

‘acted as a nominee shareholder in respect of the controlling interest in the MV *Heavy Metal*. I am not authorised by the beneficial owner of the MV *Heavy Metal* to disclose to the above honourable Court the true identity of such owner. However, I can state that Mr Nikolaos Tsavlis had no interest, whether as owner or otherwise, in the MV *Heavy Metal* on 1 April 1988 or at any time to date hereof’.⁸

It is important to state that in this case, Mr Lemonaris had no beneficial interest in the shares of the companies concerned and could not make any decision without the instructions from

⁶ The *Heavy Metal* SCA Supra note 1 at 1090A-E where Mr Lemonaris stated:

‘It is normal practice in Cyprus for advocates to be appointed as nominee shareholders and directors. We act on the instructions of beneficial owners, which instructions are often given through intermediaries. We are required by the laws of Cyprus to abide strictly by, and carry out, these instructions and we are more often than not, as in the case of my relationship with [Dahlia] and [the appellant], simply ‘postboxes’ .I am therefore merely a nominee director and shareholder of [Dahlia] and [the appellant] in which I have no interest or ownership. I exercise no control over these companies and, indeed, I have no discretion to represent these companies without having received instructions as I have, for example, for the purpose of dealing with this application. Cypriot advocates are not, in terms of the ethical rules applicable, permitted to disclose information given to them in confidence by their clients. The information contained in the instructions given to me when I attended to the registration of [Dahlia] and [the appellant] was given to me in confidence and I am accordingly not at large to disclose this information. I am, however, able to disclose that Mr Nikolaos Vafias did not own or control [Dahlia] at the time of the delivery and sale of the MV *Sea Sonnet* or at any other material time.’

⁷ The *Heavy Metal* SCA Supra note 1 at 1090F.

⁸ The *Heavy Metal* SCA Supra note 1 at 1091C-D.

his principal. Furthermore, although he disclosed the identity of the beneficial owner of the m.v. *Sea Sonnet*, he did not provide reasons for his non-disclosure in respect of the identity of the beneficial owner of the m.v. *Heavy Metal*. He merely stated that they were owned by different persons.

3.3. The High Court Decision⁹

Thring J found that in this case, the respondents had the following in common: a registered office address, a majority shareholder (Mr Lemonaris), a sole director (Mr Lemonaris) and a secretary (Mrs Theocharidou). The respective judge further submitted that a *prima facie* strong case 'is made out on these facts that both companies are controlled or were, at the relevant times, controlled by the same person, Lemonaris. Alternatively, if they are or were not in fact controlled by him, he has or had power to control them at the relevant times and is accordingly deemed to have controlled them.'¹⁰ In this sense it is difficult to fathom the situation where a person does not factually control the said shares but may nevertheless have control over the company concerned.

With regard to the purpose of the respective provisions, Thring J held that the purpose of the Act is to make the loss fall where it belongs by reason of ownership and in the case of companies this will refer to the ownership or the control of the said shares.¹¹ Thring J thereafter goes on to state the following:

'It is against this background, it seems to me, that the deeming provision of s 3(7) (b) (ii) of the Act must be construed. In my view it was intended to assist a claimant who seeks to rely on the 'associated ships' provisions of the Act in order to recover money due to him from the owner of an associated ship. It is frequently difficult for a claimant in this position to establish and prove who the beneficial owners of the shares in a particular ship-owning company are, because they are concealed from him. Indeed, this is amply demonstrated in this very case. Accordingly, it seems to me, the Legislature came to the aid of such claimants by providing, in effect, in s 3(7)(b)(ii) that the claimant need establish no more than that the person concerned has the power to control the company concerned, directly or indirectly. Whether or not he in fact exercises that power himself or whether it is exercised through him by others is immaterial. He is deemed to control the company, that is to say he is regarded as controlling the company, whether he does so in fact or not. In other words, this is a situation in which the

⁹ *MV Heavy Metal :Palm Base Maritime SDN BHD v Dahlia Maritime Limited and Others* 1998 (4) SA 479 (C).

¹⁰ *The Heavy Metal* High Court supra note 9 at 489 F-G.

¹¹ *The Heavy Metal* High Court supra note 9 at 490 I-J.

Legislature sought to achieve finality as regards the identity of the person or persons who control such companies, even at the expense perhaps of artificiality. Had it not sought this result, it seems to me that the Legislature would not have used the very strong word 'deemed' in the subsection (Afrikaans text: 'geag'): it would have used some less far-reaching expression such as 'presumed until the contrary is proved'.¹²

Thring J thereafter held that the only question which therefore needs to be considered is whether Mr Lemonaris had during the relevant time period, the power to control the companies.¹³ Thring J then held that there is nothing in Mr Lemonaris's affidavit which stated that the laws in respect of the control of companies were different in Cyprus as in South Africa and thereafter notes that in the absence of evidence to the contrary it is presumed that foreign law is the same as the law applied in South Africa.¹⁴ Thring J then looks at section 404 of the Companies Act 61 of 1973 which defined 'control' in the following terms:

' . . . a holding or aggregate holdings of shares or other securities in a company entitling the holder thereof to exercise, or cause to be exercised, the specified percentage or more of the voting rights at meetings of that company, irrespective of whether such holding or holdings confer *de facto* control'.¹⁵

Following this, Thring J then held that in terms of South African company law, the ultimate control of a company is exercised by the members of such a company in a general meeting of who may determine who the directors are of the company and that for those purposes, it is the registered shareholders which are referred to.¹⁶ Thring J in conclusion, held that even if Mr. Lemonaris is a nominee shareholder, he remains the registered shareholder and as such has the power directly to control these companies by voting the majority of the shares in a shareholder meeting. Thus he exercises overall control of the company and can control the destiny and assets of the respective company.¹⁷ Furthermore, Thring J emphasised that Mr Lemonaris is the sole director of the respective companies and, as such, is probably the only person who exercises managerial powers over such companies. The respective Judge also held that it is irrelevant that other persons may be entitled to direct Mr Lemonaris as to the manner in which he exercises his powers, the companies are nevertheless obliged to give

¹² The *Heavy Metal* High Court supra note 9 at 491A-F.

¹³ The *Heavy Metal* High Court supra note 9 at 491J.

¹⁴ The *Heavy Metal* High Court supra note 9 at 492B-C.

¹⁵ The *Heavy Metal* High Court supra note 9 at 492C.

¹⁶ The *Heavy Metal* High Court supra note 9 at 492D-F .

¹⁷ The *Heavy Metal* High Court supra note 9 at 492F-G .

effect to his legitimate wishes as he is the majority shareholder of the company and directly controls it.¹⁸

Following the above reasoning, Thring J therefore concluded that Mr Lemonaris has or had at the relevant time period in question, the power to control both companies and that in terms of section 3 (7) (b) (ii) of the Act, Mr Lemonaris is deemed to control both the companies at the relevant time period. The m.v *Heavy Metal* and the m.v. *Sea Sonnet* were therefore held to be associated ships for the purposes of section 3(6) and 3 (7) of AJRA.¹⁹

In this sense it is submitted that Thring J adopted a rather technical and formalistic approach in respect of interpreting the concept of ‘control’ and failed to look at the substance of the matter. Wallis notes that it is difficult to draw any real inference of common control from the fact that companies may have a common nominee shareholder between them.²⁰ He further notes that in many Mediterranean states, there is an abundance of specialist legal firms which focus on registering ship companies and acting as nominee shareholders for the respective companies so as to mask the identity of the beneficial owner.²¹ Such evidence may only be probative in light of other factors which point toward common control. Evidence which may prove to be probative may include *inter alia*; that the vessels in question are entered as part of a fleet entry with the respective P & I club, that they are managed by the same personnel and that a common manager has put up guarantees in respect of the debts of both vessels.²² It is however submitted that proving an association or ‘control’ is a question of fact and that there is no single defining characteristic which points toward common control. The facts of each case will have to be viewed holistically in light of all evidence put forth.

Wallis has also criticized, and rightly so, of the manner in which the court dealt with the evidence presented and notes:

‘The court took certain pieces of evidence and concluded that they pointed towards a particular conclusion. Only then did it consider the evidence on behalf of Belfry Marine, which was directed at establishing the opposite proposition. It is with respect unhelpful to

¹⁸ The *Heavy Metal* High Court supra note 9 at 492G-H .

¹⁹ The *Heavy Metal* High Court supra note 9 at 492I.

²⁰ M Wallis *The Associated Ship & South African Admiralty Jurisdiction* 1 ed (2010) 198.

²¹ Wallis (note 20 above;198).

²² Wallis (note 20 above ; 198-199).

weigh evidence in this piecemeal fashion. It also creates the risk of fragmenting the onus of proof.²³

Put simply, the court in this case failed to consider the evidence as a whole and opted to form conclusions based on a certain aspects of the judgment as opposed to considering the evidence in its entirety. Ultimately it can be stated for all purposes that Thring J adopted a rather narrow approach in interpreting the relevant provisions relating to control. The respected judge opted to rather interpret the provision in a technical manner by focusing primarily on who held the shares in terms of law i.e. the registered shareholder rather than with who had actual control. The difficulty here is that Thring J acknowledged the fact that Mr Lemonaris may have received instructions from two different persons but nevertheless chose to overlook this factor.

3.4. The Supreme Court of Appeal Decision

3.4.1. Smalberger JA for the Majority:

Smalberger JA begins by stating that in order to properly interpret a statutory provision and to give effect to the enactment ‘regard must be had to the language used, the apparent purpose of the provision, its contextual setting and the object of the Act as a whole’.²⁴ He notes that the object of the provision was to benefit a party applying for an arrest by affording the claimant with a means of recovery against an alternate defendant. The effect of which results in the respective claimant being afforded relief to which he would not previously been entitled to. Smalberger JA then goes on to state the following:

‘[8] The subsection elaborates upon and refines the concept of control by that person. Control is expressed in terms of power. If the person concerned has power, directly or indirectly, to control the company he/she shall be deemed ('geag . . . word') to control the company. 'Power' is not circumscribed in the Act. It can be the power to manage the operations of the company or it can be the power to determine its direction and fate. Where these two functions happen to vest in different hands, it is the latter which, in my view, the Legislature had in mind when referring to 'power' and hence to 'control'. In South African legal terminology that means (essentially for the reasons given by the Court *a quo* at 1998 (4) SA 479 (C) at 492C-F ('the reported judgment')); see also s 195(1) of the Companies Act 61 of 1973) the person who controls the shareholding in the company. Foreign law is a question of fact. If the appellant

²³ Wallis (note 20 above; 199-200).

²⁴ The *Heavy Metal* SCA Supra note 1 at 1105F.

wished to make out a case that the law of the Republic of Cyprus differed significantly from the law of South Africa, it should have adduced evidence to that effect. It did not do so. Consequently there is no reason to surmise that the applicable law in Cyprus differs materially from that of South Africa (cf *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (A) at 954B-E).²⁵

Within the aforementioned paragraph, Smalberger JA notes that control may refer to the power to manage the operations of a company or the power to determine its direction and fate. In this sense, the decision does not depart in any material aspect from what was said in earlier judgments²⁶ as in the *EE sharp* case²⁷, the court held that control refers to ‘overall control’ of the assets and destiny of the company which may be exercised by a majority shareholder but it does not refer to mere ‘day to day management administration’. Smalberger JA then held:

[9] The subsection clearly distinguishes between 'direct' and 'indirect' power. That distinction must be given a meaning. Indirect power can only refer to the person who *de facto* wields power through, and hence over, someone else. The latter can only be someone who wields direct power *vis-à-vis* the company and the outside world and who therefore, in the eyes of the law (ie *de jure*), controls the shareholding and thus determines the direction and the fate of the company. On the facts of the present case Lemonaris is the person in that situation. Of course, the same person may in given circumstances exercise both *de facto* and *de jure* control.

[10] In my view, therefore, direct power refers to *de jure* authority over the company by the person who, according to the register of the company is entitled to control its destiny; and indirect power to the *de facto* position of the person who commands or exerts authority over the person who is recognised to possess *de jure* power (ie the beneficial 'owner' as opposed to the legal 'owner'). This extension of *de jure* power to *de facto* 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.

[11] From the above analysis it follows, in my view, that, if the person who has *de jure* power happens to control, at the relevant times for such control, both companies concerned (ie the company which owns the guilty ship and the company which owns the targeted ship), the

²⁵ The *Heavy Metal SCA* Supra note 1 at [8].

²⁶ Wallis (note 22 above; 203).

²⁷ *E Sharp & Sons Ltd v MV Nefeli* 1984 (3) SA 325 (C). at 326H and 327A.

statutory requirement of a *nexus* between the two companies will have been satisfied. This is the position in which Lemonaris found himself.

[12] On the other hand, if *de jure* control of the respective companies vests in different hands it would still be open to the applicant for arrest to establish that the same person was in *de facto* (ie indirectly) in control of both, thereby also supplying the required statutory *nexus* to satisfy the provisions of s 3(7) (a) of the Act.

[13] The principal purpose of the Act is to assist the party applying for arrest rather than the party opposing it. While the section is designed, in the interests of an applicant, to cater for the situations referred to in paras [11] and [12] above, it is not, in my view, designed to cater for the converse situation where *de jure* control over both vessels (companies) vests in one person but the owner of the targeted ship is able to show that such person is a mere puppet dancing at the string of two different masters. If the latter approach were to be the correct one, the distinction drawn by the Legislature between 'direct and indirect control' would fulfil no purpose. The only issue, on that approach would be *de facto* control. If that had been the Legislature's intention, it need only to have spoken of the 'power to control' in the section. Any approach which effectively negates a clear provision in an Act cannot be sound unless there are compelling reasons to the contrary. No such compelling reasons have been advanced in the judgment of my Colleague

[14] It needs to be emphasised that the subsection does not speak merely of the 'power to control'. If it did, the decision in *Barclays Bank Ltd v Inland Revenue Commissioners* [1961] AC 509 (HL) referred to by my Colleague may have been of greater relevance to its interpretation. There is much to be said for the view that where one speaks simply of a 'power to control' one is concerned with a single repository of power - the person who is in actual, overall control. But the power to control directly or indirectly envisages two possible repositories of power, one *de jure* and one *de facto*. Either form of control can be satisfied to bring the subsection into operation. If there can only be one repository of power in terms of the subsection it would follow that the person who has *de jure* control could be ignored once it has been established that someone else has *de facto* power. This would appear to be contrary to the clear wording of the subsection. By using the words 'directly or indirectly' the Legislature clearly intended to extend and not restrict the expression 'power to control' (cf *Olley v Maasdorp and Another* 1948 (4) SA 657 (A) at 665 ff and *Lipschitz NO v UDC Bank Ltd* 1979 (1) SA 789 (A) at 797D-E).

[15] In my view, and on the undisputed facts, the respondent therefore succeeded in establishing the requisite *nexus* for the conclusion that the *Heavy Metal* was an associated ship of the *Sea Sonnet*. If that 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. It is precisely for that reason, because the creditor is at such a disadvantage in tracing the assets of his debtor, of which this case is a prime example, that the subsection was worded as it is. 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 (cf *National Iranian Tanker Co v MV Pericles* GC 1995 (1) SA 475 (A) at 485C).²⁸

Smalberger JA thereafter held that according to him, the appellant (Belfry Marine Ltd) in the case failed to rebut the inference which had been created on the papers i.e. the two vessels were associated. The majority held that the reasoning behind this harsh judgement can be attributed to the silence on behalf of the appellant who Smalberger JA found had no difficulty in revealing the identity of the beneficial owner of the m.v. *Sea Sonnet* but had refused to identify the beneficial owner of the m.v. *Heavy Metal*.²⁹ Smalberger JA further held that as a result of the appellants presenting a distorted picture as to Mr Lemonaris being majority shareholder, and having refused to identify the beneficial owner of the m.v. *Heavy Metal*, the respondent could not therefore be criticized for leading contradictory evidence.³⁰

3.4.2. Marais JA concurring:

Marais JA firstly notes that he agrees with the conclusion reached by Smalberger JA but on entirely different grounds. Furthermore he agrees with the judgment of Farlam AJA except with the respected judge's assessment of the facts. He then states that what the legislature is concerned with in terms of the concept of 'control' is where the power to control a company actually resides rather than where it appears to reside.³¹ Marais JA held further:

'In my opinion, the manifest purpose of the provision is to enable claimants to penetrate protective facades such as nominee shareholdings and demonstrate that real power to control the company lies in other hands where such is in fact the case. And, if the real *situs* of power to control is the criterion, as I consider it to be, I see no justification for saying that it is only open to a claimant to demonstrate where it lies and that it is not open to the targeted ship's owner to do so.'³²

²⁸ The *Heavy Metal* SCA Supra note 1 at [9]-[15].

²⁹ The *Heavy Metal* SCA Supra note 1 at 1107J.

³⁰ The *Heavy Metal* SCA Supra note 1 at 1109B-C.

³¹ The *Heavy Metal* SCA Supra note 1 at 1110I-J.

³² The *Heavy Metal* SCA Supra note 1 at 1110I-J.

In respect of section 3 (7) (b) (ii) having two repositories of control, Marais JA held that the provisions do not give a claimant a choice between two different repositories of control and thereby allowing a claimant to choose that which suits them the most.³³ The respected judge further held that the provision does not create a fiction which would place innocent third parties at risk of having ‘their ships arrested to secure payment of claims brought against persons or ships of whose existence they were quite oblivious’.³⁴ Marais JA held further that such a purpose would amount to confiscation without compensation and is a purpose which one avoids ascribing to the legislature unless it is what the legislature specifically and unequivocally intended.³⁵ The purpose of the provision, according to Marais JA is to allow the ‘claimant to piece the veil of the apparent or ostensible power to control a company and so reveal the identity of the real holder of power to control the company’.³⁶ Marais JA then found that the words ‘directly or indirectly’ was intended by the legislature to emphasise that the true seat of power, whether it be direct or indirect power, is what is material for the purposes of the provision and further notes that it is not the power to manage the operations of the company but rather the power to determine the fate and direction of it.³⁷

With regard to proving the association, Marais JA notes that it is not necessary to name the actual person who has control but that it would be sufficient to prove that whoever that person may be, it is the same person who exercises control over the respective companies.³⁸ Marais JA then looks at the material facts in the current case : both companies have the same nominee and sole director, the addresses of the respective companies are the same, both vessels were managed (if not operated) by Brave Maritime Corporation Inc., the Greek Shipping Directory portrays both vessels as having the same operating addresses, the managing director of Brave Maritime was noted in a published list of Piraeus Shipping Offices to be Mr Nikolaos Vafias, that he is the registered shareholder of 10% of the shares in Belfry Marine and that there exists a fleet of vessels managed by Brave Maritime many of which have names relating to music.³⁹ Furthermore, when a vessel in that fleet was arrested in another jurisdiction in respect of a claim against another ship in the fleet, security was put forth by Brave Maritime.⁴⁰ Marais JA then looks at the aforementioned facts in light of the

³³ The *Heavy Metal* SCA Supra note 1 at 1111-A-B.

³⁴ The *Heavy Metal* SCA Supra note 1 at 1111C-G.

³⁵ The *Heavy Metal* SCA Supra note 1 at 1111C-G.

³⁶ The *Heavy Metal* SCA Supra note 1 at 1111C-G.

³⁷ The *Heavy Metal* SCA Supra note 1 at 1112E-G.

³⁸ The *Heavy Metal* SCA Supra note 1 at 1113G-I.

³⁹ The *Heavy Metal* SCA Supra note 1 at 1113J-1114D.

⁴⁰ The *Heavy Metal* SCA Supra note 1 at 1114E-H.

responses put forth by the applicants and held that ‘the pattern consists of some specific and, to my mind, selective and limited denials in instances where the facts enabled denials to be made but, for the rest, of either diversionary strategies or argumentation as to what the value was of evidential material placed before the Court by the respondent’.⁴¹ In this case the allegation of providing security when a previous vessel was arrested on the basis of being an associated ship was met with the argument that it was inadmissible evidence of similar facts. The accusations of common control as contained in reliable publications published within the shipping industry were dismissed as hearsay. In essence no attempt was made to counter the allegations put forth by producing a full set of facts disassociating the m.v. *Heavy Metal* from the m.v. *Sea Sonnet*. Marias JA further notes that in the first answering affidavit, Mr Lemonaris failed to identify the beneficial owner of both *Dahlia* and *Belfry* without any explanation as to why such persons would object to such identification. He subsequently filed another affidavit in which he stated that he had been authorised to disclose the beneficial owner of *Dahlia* (Mr Tsavlis) but was not authorised to disclose the identity of the beneficial owner of *Belfry Marine* except that he asserted that the two vessels were not in any way associated. In essence, the appellants adopted a rather a coy approach as Marais JA held that no affidavit was provided by Mr Tsavlis and furthermore no explanation was given as to who holds the share in *Whichita Maritime and Trading Inc.* which was said to own a 48 % share in *Dahlia*. Furthermore, as to the remaining 52% of the shares (which were held by Mr Lemonaris as a nominee shareholder for *Carnation Finance Inc*, which in turn was owned by Mr Tsavlis and thereafter sold by him)⁴², nothing was said as to who the purchaser of the shares was, except that Mr Tsavlis had no interest in the m.v. *Heavy Metal*. Marais JA therefore concluded by stating that:

‘I do not think that a litigant in motion proceedings who resorts to this kind of response in the face of a powerful circumstantial showing that, on the probabilities, whoever ultimately had the power to control the company which owned the guilty ship also has the power to control the company which owns the ship sought to be arrested as an associated ship can shelter behind the principles laid down in the case of *Plascon-Evans Paints Ltd*. In a few words, such an approach should not be regarded as giving rise to a genuine dispute of fact’.⁴³

⁴¹The *Heavy Metal* SCA Supra note 1 at 1114E-H.

⁴² The *Heavy Metal* SCA Supra note 1 at 1114E-1115B.

⁴³ The *Heavy Metal* SCA Supra note 1 at 1108H-I.

3.4.3. Farlam AJA dissenting:

In interpreting the term ‘control of a company’, Farlam AJA looked at the House of Lords decision in *Barclays Bank Ltd v Inland Revenue Commissioners* [1961] AC 509 (HL). All the lords in this case agreed that a person could be said to control a company if they could, by their votes, control the company in a general meeting. However there was a difference of opinion in answering the question of whether it made a difference if the shareholder in question might be subject to external control. Viscount Simonds, Lord Cohen and Lord Keith of Avonholm concluded that it was irrelevant. Lord Reid and Lord Denning on the other hand disagreed and held that control means real control and that the shareholder in question did not have control of the company as concluded by the majority on the basis that the shareholder could not exercise his majority vote without consent of his co-trustees.⁴⁴ Farlam AJA then emphasised that Lord Reid was of the view that what was required was ‘real control’ and not ‘apparent control’. Following this, the respected judge held that by using the phrase ‘power, directly or indirectly, to control a company’, parliament did not intend to restrict the enquiry to the company register.⁴⁵ Farlam AJA then stated that what is required for the purposes of section 3 (7) (b) (ii) is ‘real’ control and not ‘apparent’ control as a nominee shareholder who can be directed by an order from a court as to how he must vote at a general shareholders meeting cannot be said to control a company.⁴⁶ He then states the following:

‘The reference to ‘power directly . . . to control’, in my view, is to real control exercised by the person in whose name the relevant shares are registered and who is not subject to external control, while the reference to ‘power . . . indirectly to control’ is once again to real control this time exercised indirectly through the registered shareholder who is entitled to exercise the majority of votes at the general meeting. There is nothing in the section which indicates that apparent as opposed to real, control is sufficient. When one has regard to the mischief at which the section is directed, viz the device of hiding the fact that two vessels are associated in that a single person ‘owned’ them at the relevant times, it becomes obvious that an association based on apparent but not real control was not what Parliament had in mind when it enacted the section. Furthermore if apparent controls were to be held to be sufficient this would lead to the bizarre result to which Mr *Gauntlett* referred.’⁴⁷

⁴⁴ The *Heavy Metal* SCA Supra note 1 at 1102C-E.

⁴⁵ The *Heavy Metal* SCA Supra note 1 at 1103I.

⁴⁶ The *Heavy Metal* SCA Supra note 1 at 1104B-D.

⁴⁷ The *Heavy Metal* SCA Supra note 1 at 1104B-D.

Farlam AJA then concluded that in the present case, the respondents had argued that Mr Lemonaris had direct control. However they later contradicted themselves by stating that he was a ‘post-box’ who was controlled by another person who had indirect control over the companies. The learned judge then stated that in this case, control over the companies may not be in the hands of one person but in the hands two different persons. He therefore held that the respondent had failed to establish that the vessels were controlled by the same person at the relevant times.⁴⁸

3.5. The Critique of the Majority Decision In The *Heavy Metal* Case

The previous chapter aimed at providing an understanding as to what is meant by the term ‘control’. This chapter will now provide a critical analysis of the manner in which the *Heavy Metal* case has interpreted the term. In doing so, the following segment will look at:

- 3.5.1. Whether the reasoning and interpretation provided by the majority in the *Heavy Metal* case in relation to the term ‘control’ accords to the underlying purpose of the provision;
 - 3.5.2. Whether the majority had correctly interpreted the phrase ‘directly or indirectly’ ; and
 - 3.5.3. Whether the decision of the majority has the effect of infringing section 25 (1) of the Constitution i.e. whether it allows for an innocent party to be arbitrarily deprived of property.
- 3.5.1. Does the interpretation of the majority adhere to the underlying purpose of the associated ship provisions?:

In answering this question, it becomes clear that this task inevitably involves an interpretation of a statutory provision. In this respect, it is therefore useful to note some general principles in relation to the interpretation of statutes. In the case of *Natal Joint Municipal Pension Fund*⁴⁹ , Wallis JA states the following:

‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the

⁴⁸ The *Heavy Metal* SCA Supra note 1 at [78].

⁴⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made'.⁵⁰

In this sense, the correct point of departure is the language of the provision itself read in light of the context of the statutory provision, the apparent purpose of the provision and the preparation and the production of the document.⁵¹

⁵⁰*Natal Joint Municipal Pension Fund* supra note 49 at 603F-604C.

⁵¹*Natal Joint Municipal Pension Fund* supra note 49 at 604D. In *Bastian Financial Services (Pty) Ltd v General Hendrick Schoeman Primary school* 2008 (5) SA (1) (SCA) Van Heerden JA stated

‘It has also long been recognised in our case law that the aim of statutory interpretation is to give effect to the object or purpose of the legislation in question’.at [19]. The court further noted that the construction of words in a statutory provision must be interpreted in light of their contextual setting at [17]. See also *Jaga v Dönges, NO and Another; Bhana v Dönges, NO and Another* 1950 (4) SA 653 (A) where Schreiner JA stated:

‘Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that ‘the context’, as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together’.at 662G- 663A.

the above quote from the judgment of Schreiner JA in the *Jaga v Dönges* has been quoted with approval in the constitutional court case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) by Ngcobo J at [89]. See also; *Thoroughbred Breeders' Association v Price Waterhouse*, 2001 (4) SA 551 (SCA) at para 12, *Lauritzen Bulkers A/S v The Chenebourg, The Cape Gulf Maple Maritime Inc v E.A.S.T. International Ltd* SCOSA C 183 at C185-C186 and *Pancoast Trading SA v Orient Shipping Rotterdam BV* SCOSA C188 C 191-C192. Also C Botha *Statutory Interpretation* 5 ed (2012) 112-155 and G Devenish *Interpretation of Statutes* 1 ed (1992) 32-53.

In the case of *Jaga v Dönges*⁵² Schreiner JA held:

‘Seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over the context, and *vice versa*, the less clear it is the greater the part that is likely to be played by the context’.⁵³

It is therefore submitted that although the starting point of interpretation is with the ordinary text, reference must be made to the context of the provision especially in cases where the ordinary words are not clear.⁵⁴

With regard to the phrase ‘intention of the legislature’, it is submitted that this may be something of a ‘loose term’ on the basis that the primary object of statutory interpretation is determining the meaning of the language of the provision itself.⁵⁵ In this sense, courts do not aim to emasculate the legislative purpose, but rather to give effect to the provision within the confines of the language adopted by the legislature.⁵⁶ In essence the correct approach is to therefore take a holistic approach in interpreting a statute i.e. from the outset, to read the words in their contextual setting and in light of the relevant circumstances. Hence, when the provision is read within its contextual setting that is the appropriate meaning to be given to the language used.⁵⁷ However, where the context makes it clear that following the meaning suggested by the plain language of the text will lead to absurdity, irrationality or illogicality, the courts will afford an interpretation which avoids such absurdity.⁵⁸ On the other end, where the language of the provision is ambiguous, the apparent purpose of the provision and the context in which it occurs will serve as guidelines as to the correct interpretation.⁵⁹ In this sense, an interpretation will not be acquiescent to a provision whereby it leads to ‘impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration’.⁶⁰

The main controversy with regard to the *Heavy Metal* case is that it fails to deal with the underlying purpose of the associated ship provisions. In the majority judgment, Smalberger

⁵² *Jaga v Dönges* supra note 51.

⁵³ *Jaga v Dönges* supra note 51 at 664 E-F.

⁵⁴ *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at 219A.

⁵⁵ *Natal Joint Municipal Pension Fund* supra note 49 at 605 C-D.

⁵⁶ *Natal Joint Municipal Pension Fund* supra note 49 at 608 F-G.

⁵⁷ *Natal Joint Municipal Pension Fund* supra note 49 at 609D-F and 610A.

⁵⁸ *Natal Joint Municipal Pension Fund* supra note 49 at 609D-F and 610A.

⁵⁹ *Natal Joint Municipal Pension Fund* supra note 49 at 609D-F and 610A.

⁶⁰ *Natal Joint Municipal Pension Fund* supra note 49 at 610A-C.

JA makes reference to the purpose of associated ship provisions as he held that the objective of the section is to prevent the ‘true’ owner from concealing their assets from the claimant and thereby presenting a false picture to the outside world.⁶¹ Smalberger JA makes reference to a ‘true’ owner, however the legal effect of the majority judgement is that it allows for the situation in which a ship may be regarded as being associated with another ship on the sole basis that the respective ship owning companies share a common nominee shareholder even though the companies may not be connected in any other way. It is therefore submitted that the purpose of the provision is not to permit a situation in which an innocent third party will be put in jeopardy by having their ships arrested to secure payment of a claim of which they are oblivious of.⁶² Furthermore, the legal effect of such an interpretation allow for ‘impractical,unbusinesslike or oppressive consequences’ which should be avoided.⁶³ In essence the judgment by Smalberger JA fails to take into consideration the serious repercussions of arresting a ship as stated by Didcott J in the *Paz*:

‘It is a serious business to attach a ship. To stop or delay its departure from one of our ports, to interrupt its voyage for longer than the period it was due to remain, can have and usually has consequences which are commercially damaging to its owner or charterer, not to mention those who are relying upon its arrival at other ports to load or discharge cargo’.⁶⁴

It is submitted that such concerns raised by Didcott J are factors which should have been considered by the majority interpreting the provision in the manner in which they did. Such factors although being commercial concerns, are still part of the policy considerations which need to be deliberated when determining the underlying purpose and contextual setting of a provision.

Hare submits that the purpose of the associated ship provision was to lift the corporate veil where there exists the same principal debtor in respect of the debt.⁶⁵ Such a purpose bears resemblance to what was stated by the judgment of Marais JA wherein it was held that the purpose of the associated ship provisions is to allow claimants to penetrate the protective facades such as nominee shareholdings and demonstrate where the real seat of control lies.⁶⁶ Hence, it is submitted that although the provisions assist a claimant in obtaining security for a

⁶¹ The *Heavy Metal SCA* Supra note 1 at 1108H-I.

⁶² The *Heavy Metal SCA* Supra note 1 at 1111F-G.

⁶³ *Natal Joint Municipal Pension Fund* supra note 49 at 610A-C.

⁶⁴ *Katagum Wholesale Commodities Co Ltd v The MV Paz* 1983 (3) SA 261 (N) at 269H-270A.

⁶⁵ J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) 113.

⁶⁶ The *Heavy Metal SCA* Supra note 1 at 1110I-J.

maritime claim, it cannot grant such a claimant *carte blanche* in obtaining an arrest to the extent that the vessel of an innocent party may be arrested.

In justifying the decision, Smalberger JA held that the decision is not as harsh as it initially seems but is rather the result of the ship-owner opting to operate behind a cloak of secrecy and that furthermore, the appellant deliberately concealed the identity of the true beneficial owner in circumstances where it was the central issue in dispute.⁶⁷ Wallis submits, and rightly so, that such a premise is entirely misconceived and unjustifiable.⁶⁸ In essence, such reasoning does not correlate to the underlying requirement of establishing an association which is 'control'.⁶⁹ It is therefore submitted that such reasoning further fails to take into consideration the objectives of the provisions which as Staniland submits aims to address the mischief of 'one ship' companies and prevent them from avoiding their debts.⁷⁰

3.5.2. The correctness of the interpretation afforded by the majority to the term 'directly or indirectly':

The majority in the *Heavy Metal* held that the power to control directly or indirectly, sanctions two possible repositories of power namely; one *de jure* and one *de facto* of which either form of control can be satisfied to bring the subsection into operation.⁷¹ In the previous chapter it was submitted that when the word 'control' was used in the associated ship provisions, what it referred to was the ultimate or actual control over the fate and destiny of a company. It is therefore respectfully submitted that the legislature had erred in holding that there may be two repositories of control. To add substance to this submission, this segment will look at the problems associated with the interpretation provided by the majority in the SCA judgment and discuss the usual meaning attached to the phrase 'directly or indirectly'. This segment will further look at the term *de jure* and *de facto* to determine whether it has correctly been compared to 'directly or indirectly'.

The main difficulty with the interpretation provided by the majority is that it allows for situation in which there exist two repositories of control. This would inevitably result in what Wallis describes as a 'tug of war' between two persons which in turn will result in one person being the principal and the other would be a mere subsidiary.⁷² In other words, the principal

⁶⁷The *Heavy Metal* SCA Supra note 1 at 1107G-1108E.

⁶⁸ Wallis (note 20 above; 208-210).

⁶⁹ Wallis (note 20 above; 208-210).

⁷⁰ H Staniland, McLennan J.S 'The Arrest of an Associated Ship' (1985) *102 S.African L.J* 148-149

⁷¹ The *Heavy Metal* SCA Supra note 1 at 1107D.

⁷² Wallis (note 20 above; 212).

will have final say as to the fate of the company whilst the subsidiary will be subject to the will of the former and thus cannot be said to be the person in actual control of the company.⁷³ The Majority in the *Heavy Metal* opted for an approach which differentiated between direct and indirect control and equated direct control to *de jure* power and indirect control to *de facto* power to control a company. The problem presented within such an approach is that it not only allows control to be placed in more than one person but also results in different forms of control.⁷⁴ Bradfield notes that the error of the majority judgment results in the formation of two different sources of power/control as opposed to one source of power/control that may be exercised in two possible ways.⁷⁵

The approach adopted by the majority in the SCA decision aimed to separate direct and indirect control on the basis that such an interpretation is what the legislature intended. Essentially the usual interpretation given to the phrase ‘directly or indirectly’ when it is used is as Wallis suggests, a ‘composite adverbial phrase to indicate that the statutory or contractual provision will apply irrespective of the means by which the particular result that is its subject is achieved’.⁷⁶ Put differently, such a phrase is used to ensure that all possible situations are accommodated for, irrespective of the manner in which they occur. It is further submitted that if it was the intention of the legislature to differentiate between these two terms then it would have most likely included a precise definition in respect of each term. However, there exists no such definition within the Act. To substantiate further, it will be useful to discuss the manner in which the term ‘directly or indirectly’ has been used in other

⁷³G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012) 143, in this respect Hofmeyr states that the ‘view of the majority is far reaching’ as he provides the following example where:

‘x , nominee majority shareholder in company A, required to vote as directed by Y, is also a nominee majority shareholder in company B, required to vote as directed by Z, a ship owned by B can be arrested as an associated ship in respect of a claim against the ship owned by A. There is much to be said for the view that in truth X exercised no control over either company’ 143.

Hofmeyr submits further that on the majority decision, X exercises *de jure* control and that this does not adhere to the underlying meaning of the associated ship provisions. Hare in this respect also submits that where two companies are completely unrelated except insofar as they have the same nominee shareholder or director, they should not be regarded as being controlled by the same person .143. Hare (note 65 above; 112).

⁷⁴Wallis (note 20 above;213).

⁷⁵G Bradfield, ‘Guilt By Association in South African Admiralty Law’ (2005) *LMCLQ* 246. Bradfield submits that this is as a result of which the majority ‘treated ‘directly or indirectly’ as adjectives qualifying the noun ‘power’, rather than as adverbs modifying the verb ‘control’.

⁷⁶Wallis (note 20 above; 216-217).

statutes. For this purpose, this dissertation will look at sub-section 9 (3) and (4) of The Constitution,⁷⁷ The Employment Equity Act⁷⁸ and the Currency and Exchanges Act.⁷⁹

Sub-section 9 (3) and (4) of The Constitution state:

‘9 (3)The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation , age, disability, religion, conscience, belief, culture, language and birth.

9 (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination’.

The provisions mentioned above must be read in light of the apartheid regime which existed in South Africa until the latter part of the 20th century during which non-whites, more specifically black people, were excluded from most aspects of social life.⁸⁰ It is such discrimination which the provisions seek to remedy through ‘remedial or restitutory equality’.⁸¹ In this respect Woolman notes that direct discrimination refers to where a provision explicitly differentiates on the basis of a listed or unlisted ground and provides the example where the common law definition of marriage only referred to the relationship of a male and female thus explicitly discriminating against same-sex couples on the basis of their sexual orientation.⁸² Indirect discrimination refers to the situation where a provision appears to be neutral but nevertheless has the effect of discriminating on a listed or unlisted ground e.g. where a legal provision treats people who reside in one area differently from those who reside in another is actually based on the fact that black people predominantly stay in the former area whilst non-blacks stay in the latter area.⁸³ Although direct and indirect discrimination may be distinguished, Woolman submits that the distinction is not relevant ‘since our jurisprudence focuses on the impact of the impugned law on the complainant and enables courts to look beneath any masked prejudice to discover the true face of discrimination’.⁸⁴ It is therefore submitted that the phrase ‘directly or indirectly’ applies in

⁷⁷ The Constitution of the Republic of South Africa, 1996

⁷⁸ Act 55 of 1998.

⁷⁹ Act 9 of 1933.

⁸⁰ A Govindjee...et al *Introduction to Human Rights Law* 1 ed (2009) 73.

⁸¹ Govindjee (note 80 above; 73).

⁸² S Woolman...et al *Constitutional Law of South Africa* 2 ed (2008) volume 3 35-47.

⁸³ Woolman (note 82 above; 35-47).

⁸⁴ Woolman (note 82 above; 35-47).

the constitution so as to cater for all types of discrimination irrespective of its appearance. In other words, courts in such cases will look beyond the out-ward appearance of the act and determine whether or not the effect of the relevant provision does in fact unfairly discriminate. The advantage of such wording is that it allows for a broad interpretation which caters for all types of discrimination regardless of its form.⁸⁵

The Employment Equity Act 55 of 1998 also contains a similar provision which aims at equality in the workplace. In this respect, section 6 (1) of the Employment Equity Act states:

‘No person may unfairly discriminate, either directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language or birth’.

The above provisions complement the equality clause in The Constitution and the Labour Relations Act⁸⁶ in the sense that it aims to remove express and any hidden demographic imbalances in the workplace. The Employment Equity Act requires employers to promote equal opportunity in the workplace which will involve promoting affirmative action and preventing unfair discrimination within the work environment itself.⁸⁷ Similar to the section 9 of the Constitution, direct discrimination for the purposes of the Employment Equity Act refers to when people are discriminated against because they possess one of the characteristics in the Act, such as where a potential employee is refused a job on the basis that such a person is a homosexual which therefore amounts to discrimination on the basis of their sexual orientation. Indirect discrimination refers to where ‘seemingly objective or ‘neutral’ barriers exclude members of particular groups because members of those groups happen to be unable to surmount the barriers’.⁸⁸ The main reasoning for the inclusion of phrase ‘directly or indirectly’ within labour law is to cover any employment practice which has the effect of unfairly discriminating against a person/s regardless of the manner in which the discrimination takes place or the motive behind the discrimination.⁸⁹

⁸⁵For further information see Govindjee (note 80 above;73-81)

⁸⁶Act 66 of 1995.

⁸⁷J Grogan *Workplace Law 10* ed (2009) 95.

⁸⁸Grogan (note 87 above;96).

⁸⁹Grogan (note 87 above; 95).

To substantiate further, in the case of *Couve and another*⁹⁰, the court looked at Regulation 10(1) (c) of the Exchange Control Regulations promulgated in terms of s 9 of the Currency and Exchanges Act 9 of 1933 which forbade any person from entering into any transaction whereby capital or any right to capital is directly or indirectly exported from the republic, except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose. In interpreting the term ‘directly or indirectly’, the court stated firstly that the phrase has received little judicial consideration and thereafter held that the phrase was used by the legislature to denote the widest meaning.⁹¹

With reference to the above mentioned legislation and case law, it is therefore submitted that the use of the phrase ‘directly or indirectly’ allows for a broad interpretation so as to cater for all circumstances and situations regardless of the manner in which they occur. It is based on an enquiry of whether the actual substance of the matter fits within the context of the relevant legislation and not the form in which it appears.

The majority used the terms *de jure* and *de facto* without providing any real meaning of the terms. It is thus important to provide an understanding of the terms so as to determine whether it was correctly used in the context of associated ship arrests.

In respect of these terms, Radin⁹² states the following:

De facto: ‘a term used to describe a situation which is acknowledged to exist but of which the legality or justice may be in question. It is frequently applied in international law to a government of a nation which is in fact in power but which may have come into power by violence or unlawful means’.⁹³

De jure: ‘a term used to describe a situation of which the rightfulness is admitted, whether or not it is carried out in fact’.⁹⁴

The Dictionary of Modern legal usage states the following in respect of the Latin terms ‘the use of either phrase implies the question whether something exists merely in fact (*de facto*) or by right or according to law (*de jure*)’.⁹⁵

⁹⁰*Couve and another v Reddot International (Pty) Ltd and others* 2004 (6) SA 425 (W).

⁹¹*Couve and another* supra note 90 at 432 A-C

⁹²M Radin *Law Dictionary* 2 ed (1970) 87.

⁹³Radin (note 92 above; 87).

⁹⁴Radin (note 92 above; 88).

⁹⁵B Garner *A Dictionary of Modern Legal Usage* 2 ed (1995)254.

Black's Law Dictionary states the following in respect of *de facto*:

'in fact, in deed, actually. This phrase is used to characterize an officer, a government, a past action, or a state of affairs which must be accepted for all practical purposes, but is illegal or illegitimate. In this sense it is the contrary of *de jure* which means rightful, legitimate, just or constitutional'.⁹⁶

The majority noted that 'Indirect power can only refer to the person who *de facto* wields power through, and hence over, someone else'.⁹⁷

What can be noted from the above mentioned dictionaries is that the term *de facto* refers to whether something exists in fact, while *de jure* on the hand refers to something which is legitimate and exists in law. In this respect, Wallis is correct in his submission that *de facto* power to control a company refers to the person who factually controls the company and thus refers to 'real' or 'actual' control regardless of whether or not it derives from an existing legal right or is exercised directly or indirectly.⁹⁸ Upon the ordinary understanding of the term, it is clear that it is broad enough to cover the situation where a shareholder may own the shares in their own name as well as where a shareholder may opt to register the shares in the name of another e.g. a nominee holder.⁹⁹ The majority in the *Heavy Metal* used a narrow interpretation of the term *de facto* in the sense that it refers to someone having power over another. It is submitted that the majority erred in this regard.

It is respectfully submitted that by including the term 'directly or indirectly' in AJRA, the legislature opted to extend the provisions in AJRA to include all possible circumstances irrespective of the manner in which they occur. The inclusion of the phrase was not however to allow a claimant to arrest a ship in respect of a debt in which the owner of that ship bears no resemblance. Such an understanding of the term not only accords to the interpretation given by academics but also compliments the notion that 'control' for the purposes of associated ship arrests refers to 'overall' or 'ultimate' control. In this respect, Hofmeyr states, 'why should the legislature, in stipulating the circumstances which will give rise to an association, be concerned with who wields apparent power over a company as opposed to who wields real power?'.¹⁰⁰ Hofmeyr submits further and correctly so, that the legislature

⁹⁶Black's Law Dictionary 4 ed (St Paul: West, 1951) 479.

⁹⁷The *Heavy Metal* SCA Supra note 1 at [9].

⁹⁸Wallis (note 20 above;215).

⁹⁹Wallis (note 20 above;215).

¹⁰⁰Hofmeyr (note 73 above; 143).

would only extend liability to an associated ship if there exists a ‘meaningful nexus’ between the guilty ship and the associated ship through the exercise of control and not on the basis of a common nominee shareholder who acts under the directives of another and thus does not actually exercise any control in their own right.¹⁰¹ It is therefore submitted that if the legislature was only concerned with the registered shareholder i.e. the person who has ‘direct’ control (applying the ratio of the majority), there would be no reason to use the phrase ‘directly or indirectly’ as the enquiry would end upon determining the identity of the registered shareholder.

3.5.3. The Constitutionality of the majority decision in the *Heavy Metal* case:

Section 25 (1) of The Constitution¹⁰² states that:

‘no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property’.

The effect of the *Heavy Metal*, as stated earlier, is that it allows for an association to be formed on the basis of a common nominee majority shareholding between ship owning companies even if the respective ships are not actually related to each other. The result is that an innocent ship owner’s vessel may be arrested and such a ship owner will thereafter be forced to provide security for the respective claim. It is therefore submitted that the decision of the majority allows for the arbitrary deprivation of property. This section served as a brief introduction to this issue which will be discussed in more detail in the postscript of this dissertation.

3.6. **Conclusion**

This chapter aimed at analysing the majority decision of the *Heavy Metal* case. In doing so, it discussed the High Court decision as well as the three decisions in the Supreme Court of Appeal. Following this discussion, it is therefore submitted that the majority in the Appeal Court erred in the manner in which it had interpreted the associated ship provisions on the basis that it failed to support the underlying purpose of the provision which is to locate the true debtor and hold this person liable for the maritime claims. Furthermore, the court adopted a narrow interpretation of the phrase ‘directly or indirectly’ and aimed to distinguish ‘direct’ from ‘indirect’ by equating the terms to *de jure* and *de facto* respectively. Such an

¹⁰¹Hofmeyr (note 73 above; 144).

¹⁰²The Constitution of the Republic of South Africa, 1996.

understanding diverts from the usual interpretation attached to the phrase which is, as stated earlier in this chapter, to ensure that all possible forms of ‘control’ are allocated for regardless of the manner in which they occur. The latter understanding supports the underlying notion; that what is required for ‘control’, is the ultimate or actual control of a company which may, depending on the particular facts of the case, extend beyond the register or nominee shareholdings of the company concerned. A further problem in respect of the majority decision is that it may fail to pass Constitutional muster on the basis that it allows for the arbitrary deprivation of property.

It is submitted that the law as interpreted by Marais JA and Farlam AJA is to be preferred. In this respect, what can be concluded for the purposes of associated ship arrests is that control refers to ultimate or actual control.¹⁰³ This will refer to the real seat of control which will lie with a single controller.¹⁰⁴ The purpose of the associated ship arrest is therefore to penetrate the façade presented by the shipping company concerned to the outside world as to who controls the said company in order to determine who actually controls the company. This will involve an enquiry which extends beyond the company register or nominee shareholdings. Although the two Judges were consistent in the manner in which they interpreted the law, they differed in respect of the application. It is therefore respectfully submitted that decision by Marais JA is to be preferred as in this case as there appeared many factors which were emphasised by Marais JA which portray the image that the companies were controlled by the same person which in this case was most likely Mr Vafias.

Following the difficulties outlined in this chapter, chapter four will aim to determine the legal impact of the *Heavy Metal* case so as to determine the practical difficulties faced by courts in strictly applying the *ratio* of the majority judgment.

¹⁰³The *Heavy Metal* SCA Supra note 1 at 1110I-J.

¹⁰⁴The *Heavy Metal* SCA Supra note 1 at 1111A-B

CHAPTER 4: THE LEGAL IMPACT OF THE *HEAVY METAL* CASE

4.1. Introduction

Chapter two of this dissertation provided insight as to what is required to establish associated ship jurisdiction. In light of this understanding chapter three looked at the leading case in this regard which is the *Heavy Metal* case¹. This chapter also looked at the decision of both the High Court as well as all three judgments of the Supreme Court of Appeal. In determining the correctness of the majority decision in the SCA, chapter three concluded that the majority erred in the manner in which it had interpreted the associated ship provision firstly because the interpretation provided by the majority failed to reconcile with the underlying purpose of the associated ship provision as it had the effect of allowing for the arrest of a vessel which belonged to an innocent third party. Secondly, the chapter noted that the majority erred in the interpretation of the phrase ‘directly or indirectly’ as contained in section 3 (7) (b) (ii) of AJRA on the basis that it allowed for two repositories of control.

In this light of this background and the difficulties presented by the majority decision in the *Heavy Metal* case as outlined in chapter three, this chapter now seeks to determine the actual legal impact of the majority decision. In other words, what this chapter aims to do is look at what challenges and difficulties courts faced when attempting to strictly apply the *ratio* of the majority in the *Heavy Metal*. This will provide an understanding as to whether legislative intervention is needed to rectify the discrepancies mentioned above.

4.2. The Legal Impact of the *Heavy Metal* case

Wallis submits that the *Heavy Metal* has not thus far generated as much problems as anticipated as practitioners have applied a common-sense approach in such cases.² In this respect, it is submitted that the decision of the *Heavy Metal* nevertheless creates an undesirable situation as it creates confusion as to what is meant by the term ‘control’. This difficulty is further amplified when regard is given to the fact that only the Supreme Court of Appeal or the Constitutional Court on appeal from the SCA can alter the decision of the court

¹*MV Heavy Metal: Belfry Marine v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA).

² M Wallis *The Associated Ship & South African Admiralty Jurisdiction* 1 ed (2010) 221.

in that case.³ In order to measure the merits of these assertions, this segment of the chapter will look at the following three cases:

4.2.1. The *M.V. La Pampa Louis Dreyfus Armateurs SNC v Tor Shipping*.⁴

4.2.2. *Sino West Shipping Co Ltd v NYK- Hinode Line Limited*.⁵

4.2.3. *M.V. Ivory Tirupati; M.V. Ivory Tirupati v Badan Urusan Logistik (aka Bulldog)*.⁶

The reason for looking at the above mentioned cases is that each of them made reference to the *Heavy Metal* case. Looking at these cases will therefore provide insight as to the difficulties presented in strictly applying the principles laid out by the majority.

4.2.1. The *M.V. La Pampa Louis Dreyfus Armateurs SNC v Tor Shipping* :

The respondent (Tor shipping) caused the m.v. *La Pampa* to be arrested on the basis that it was an associated ship with the vessel which gave rise to the cause of action i.e. the m.v. *Stefanie H*. The applicant, Louis Dreyfus Armateurs SNC ('LDA'), applied for an order setting aside the arrest. LDA is a company duly incorporated and registered in France and carries out its business as the owner of the m.v. *La Pampa*. Tor Shipping Ltd ('Tor') is a company duly incorporated and registered according to the laws of Cyprus and which carries out business as the charterer of vessels.⁷

In this case, the m.v. *Stefanie H* was chartered to Tor Shipping by the owners of that vessel, Sealight Marine Ltd of Panama (Sealight). Tor Shipping then sub-chartered the said vessel to Takamaka Marine Ltd (Takamaka). Takamaka is a company with limited liability registered and incorporated according to the company laws of Jersey and carries out business as a charterer of vessels. Takamaka was cited here as the second respondent.⁸ According to the orders of Takamaka, the m.v. *Stefanie H* proceeded up the River Seine in France to discharge coal at Rouen. Due to lack of water, she was unable to reach the discharge berth and was forced to wait at the lay-by berth.⁹ Overnight, a tidal bore which had been predicted passed the vessel and caused her to drift across the river. As a result of this tidal bore, she sought the

³ Wallis (note 2 above; 221).

⁴ *MV La Pampa Louis Dreyfus Armateurs SNC v TOR Shipping* 2006 (3) SA 441 (D).

⁵ *Sino West Shipping Co Ltd v NYK- Hinode Line Limited* SCOSA C203.

⁶ *MV Ivory Tirupati; MV Ivory Tirupati v Badan Urusan Logistik (aka Bulldog)* 2002 (2) SA 407 (C).

⁷ m.v. *La Pampa* supra note 4 at 443I-J.

⁸ m.v. *La Pampa* supra note 4 at 444A.

⁹ m.v. *La Pampa* supra note 4 at 444C.

assistance of four tug vessels which conducted a salvage operation and which resulted in her being safely berthed.¹⁰

Sormar (representing the tug vessels) commenced arbitration proceedings against the owners of the m.v. *Stefanie H* claiming salvage reward. Sealight Marine (owners of the m.v. *Stefanie H*) then commenced arbitration proceedings against Tor Shipping on the basis that it had breached the charter-party agreement by failing to warrant the safety of the port, berth or any anchorage. Tor Shipping in turn, commenced arbitration proceedings against Takamaka and claimed indemnity in respect of their liability to Sealight Marine Ltd.¹¹ In order to secure its claim against Takamaka, Tor Shipping arrested the m.v. *La Pampa*.¹² Tor Shipping relied on a series of factors which showed that LDA or its holding company, the Louis Dreyfus Group, directly or indirectly controlled Takamaka. Firstly, it argued that LDA's chartering broker represented that Takamaka was a wholly owned subsidiary of LDA. Secondly, it argued that LDA indirectly controls Takamaka as it controls 50% of the shareholding of Takamaka; that LDA could enter into contracts on behalf of Takamaka without prior consultation or consent of the latter; that LDA could receive money on Takamaka's behalf and that LDA gave all the instructions in respect of the m.v. *Stefanie H* on behalf of Takamaka.¹³ In summation, Tor Shipping's argument was that because LDA owns the m.v. *La Pampa* and LDA controls Takamaka, the two vessels i.e. the m.v. *La Pampa* and the m.v. *Stefanie H* are therefore associated for the purposes of the Act.

In respect of the assertion that the agent of LDA represented that Takamaka was a wholly owned subsidiary of LDA, Tshabalala JP found favour with the argument presented by Mr Shaw (for the applicants). Mr Shaw argued that there is nothing on the papers to suggest anything other than that the decision taken by Tor Shipping to enter into the charter-party agreement with Takamaka was influenced by the fact that LDA would provide the guarantee.¹⁴ In other words, the evidence on the papers merely showed that Tor Shipping was

¹⁰m.v. *La Pampa* supra note 4 at 444D-E.

¹¹m.v. *La Pampa* supra note 4 at 444F-H.

¹²According to section 3 (7) of the AJRA , Takamaka is deemed to be the owner of the ship as a sub-charterer. Section 3 (7) (C) states:

‘(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’

¹³m.v. *La Pampa* supra note 4 at 446D-F.

¹⁴m.v. *La Pampa* supra note 4 at 454A

more inclined to enter into a charter-party agreement with Takamaka on the basis that LDA would provide the necessary guarantees.

In respect of the second argument by Tor Shipping that LDA indirectly controls Takamaka, the court applied the rule of law as laid down by the majority in the *Heavy Metal* case. Tshabalala therefore held:

‘It is unnecessary in *casu* to decide whether both 'powers' referred to by the learned Judge of Appeal vest in one or two persons or entities. What is important is that in his decision Smalberger JA said that, in our legal terminology, determining the direction and fate of the company means 'the person who controls the shareholding in the company'. In *casu* we were told, and it was common cause between counsel, that LDA controls only 50% of the shares in Takamaka. In the circumstances LDA cannot be said to be in control of the shareholding of the company since by having 50% of the shareholding no resolution binding the company can be taken by LDA alone’.¹⁵

The court therefore concluded that if Takamaka is owned as a 50/50 shareholding, then neither shareholder may be said to control the company, either directly or indirectly.¹⁶ Therefore LDA did not have the requisite control over Takamaka.

It is however important to note that in this case, Tor Shipping had accepted security in the form of a bank guarantee after it threatened to arrest another vessel owned by the applicant i.e. the m.v. *La Sierra*. One of the issues of the case was therefore whether or not Tor Shipping was entitled to arrest the m.v. *La Pampa* i.e. whether it had a reasonable and genuine need for security for the claim which would justify the arrest of the m.v. *La Pampa*. The court however held that Tor Shipping failed to prove that the bank guarantee which had been given to the company provided no security or if it did, such security was inadequate for the purpose of settling the claimed amount. The court therefore held that on this basis the arrest was unjustified.¹⁷ The application for the setting aside of the arrest was therefore upheld.

Analysis of the *M.V. La Pampa Louis Dreyfus Armateurs SNC v Tor Shipping*:

In this case Tor Shipping’s original claim lay with Takamaka in relation to m.v. *Stefanie H*. In order to obtain security for this claim, Tor Shipping invoked section 5 (3) (a) of AJRA for

¹⁵m.v. *La Pampa* supra note 4 at 454G-H.

¹⁶m.v. *La Pampa* supra note 4 at 454I-J.

¹⁷m.v. *La Pampa* supra note 4 at 449H-I.

a security arrest.¹⁸ Tor Shipping however did not arrest the guilty vessel for the basis of obtaining security for its claim, but rather sought the arrest of the m.v. *La Pampa* as an alleged associated ship of the guilty vessel. Therefore to obtain and maintain such an arrest, Tor Shipping would have to satisfy the requirements of a security arrest and also prove that the m.v. *Stefanie H* and m.v. *La Pampa* were associated vessels.¹⁹ One of the essential requirements in establishing a security arrest is that a party must establish on a balance of probabilities that there is a genuine and reasonable need for security.²⁰ It is submitted that even if the court found that the vessels in question were in fact associated ships for the purposes of AJRA, the arrest of the m.v. *La Pampa* will still nevertheless be set aside on the basis that Tor Shipping failed to prove that the bank guarantee which had been provided to it did not provide security or alternatively, if it did provide security that such security was insufficient in relation to the claim. In this respect it is submitted that the decision by the court was correctly decided. However for the purpose of this dissertation, the discussion here will focus more in the manner in which the court has interpreted the associated ship provisions.

The court in this case followed the judgment of the majority in the *Heavy Metal* case wherein Smalberger JA held that the person who controls the direction and fate of a company is the person who controls the shareholding of the company.²¹ Applying this reasoning to the facts, the court noted that LDA only owned 50% of the shareholding in Takamaka. Therefore because Takamaka is owned as a 50/50 shareholding neither party may be said to ‘directly or indirectly’ control Takamaka as no resolution taken alone may bind the company. The difficulty with such reasoning and strict application of the judgment of Smalberger JA is that it allows for the anomaly where a company may be said, albeit rather technically, to not be under the control of any person/s or even a company for that matter. This situation is difficult to fathom as it is absurd to state that a company may exist for all purposes yet there is no person to control its fate or direction or even to develop the necessary company policies. As

¹⁸Section 5 (3) (a) of AJRA states :

‘(3) (a) A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property or which would be so enforceable but for any such arbitration or proceedings.’

¹⁹m.v. *La Pampa* supra note 4 at 443-449.

²⁰m.v. *La Pampa* supra note 4 at 448E-D. See also *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) and *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) wherein the courts discussed the requirements of a security arrest in terms of section 5 (3) (a).

²¹ m.v. *La Pampa* supra note 4 at 454G-H.

irrational and illogical as this may seem, the abovementioned position is nevertheless a direct consequence of the strict application of the majority decision in the *Heavy Metal* case. It is respectfully submitted that a further difficulty of the decision of Tshabalala JP in this case is that no mention is made as to who owns the other 50% of the shareholding in Takamaka. The identity of this shareholder was merely dismissed from the enquiry altogether. It is further submitted that even if the other 50% was found to be owned by a company which is a wholly owned subsidiary of LDA, then although as a matter of substance LDA would control Takamaka, the association will still not be formed based on strict application of the *Heavy Metal* case as according to the register, LDA still only owns 50% of the shareholding. A further difficulty in respect of this judgment is that it fails to look at the founding documents of the company itself so as to determine whether or not LDA does in fact have authority to create legally binding resolutions in respect of Takamaka.

It is therefore submitted that by changing the enquiry to one which seeks the identification of the ‘actual’ or ‘ultimate’ controller of the company, the absurdity as noted above can be easily removed. This enquiry will look beyond the registers and nominee shareholdings of the company so as to determine the true source of control. In determining the ‘actual’ or ‘ultimate’ control, courts will also investigate the company laws of the state in which the companies in question were registered as well as the internal structures of the respective companies.²²

4.2.2. *Sino West Shipping Co Ltd v NYK- Hinode Line Limited* SCOSA C203

On 24 May 2012, NYK-Hinode Line Limited (respondent) arrested the m.v. *Sino West* as an associated ship of the m.v. *Asian Forest* which had been the subject of a charter-party agreement between the respondent and CPM Corporation Ltd (CPM). The purpose of the said arrest was to provide NYK with security for arbitration proceedings which it wished to proceed with in London against CPM. The claim in this case was the result of the sinking of the m.v. *Asian Forest* following the liquefaction of iron ore fines.²³ Security was provided and the vessel was released. The applicant, Sino West Shipping Co Ltd (Sino West) as owner

²²see *Transportes Del Mar SA v Jade Bay Shipping Co Ltd* SCOSA C42 and *China National Chartering Co Ltd v The Guangzhou* SCOSA C197.

²³The m.v. *Sino West* supra note 5 at C204G.

of the arrested vessel, sought an order setting aside the deemed arrest of the m.v. *Sino West* on the basis that it was not an associated ship with the m.v. *Asian Forest*.²⁴

Sino West is the registered owner of the m.v. *Sino West* and is a company duly incorporated according to the laws of Hong Kong as a shipping company.²⁵ NYK-Hinode Line Limited is a company duly incorporated and registered according to the laws of Japan and conducts its business as an operator of sea vessels.²⁶ The respondent alleges that when the maritime claim arose, a Mr Wang controlled CPM and also owned all the shares in *Sino West*. Thus according to the respondent, the m.v. *Sino West* and the m.v. *Asian Forest* were associated ships for the purposes of the Act. In dealing with this assertion the court opted to firstly analyse the relationship between Mr Wang and CPM and then secondly, the relationship between Mr Wang and *Sino West*.

Mr Wang's relationship with CPM:

The court began by highlighting the general principle of 'control' as stated in the case of *EE Sharp and Sons Ltd v MV Nefeli*²⁷ wherein the court noted that control refers to overall control of a company i.e. control of the assets and destiny of the company, not its day-to-day management.²⁸ The court thereafter referred to the decision of the majority in the *Heavy Metal* where Smalberger JA held that 'indirect' power to control refers to *de facto* control where a person exerts authority or control over a person who has *de jure* authority and where 'direct' power refers to *de jure* power and refers to the person who has authority in the eyes of the law to control the company²⁹. The applicant however argued that CPM is not controlled by Mr Wang but by Ms Wang Bo and Ms Zhang Xinying. The applicant further alleged that in 2006 the shares in CPM were transferred to these two persons and the consideration of each share was the nominal price HKD (Hong Kong Dollars) 50. The transfer of this transaction was not recorded in writing and the share certificates in respect thereof were only recorded towards the end of May 2012.

Madondo J found that according to the circumstantial evidence present, the only reasonable inference which could be drawn is that Ms Wang Bo and Ms Zhang Xinying were not

²⁴The m.v. *Sino West* supra note 5 at C203-204.

²⁵The m.v. *Sino West* supra note 5 at C204D.

²⁶The m.v. *Sino West* supra note 5 at C204E.

²⁷ 1984 (3) SA 325 (C).

²⁸ The m.v. *Sino West* supra note 5 at C206E citing *EE Sharp and Sons Ltd v MV Nefeli* 1984 (3) SA 325 (C) at 326I-327A.

²⁹ The m.v. *Sino West* supra note 5 at C206G citing *Heavy Metal* at 1106D-G.

majority registered shareholders or owners of CPM but were rather nominees of Mr Wang. The conclusion by Madondo J was therefore that Mr Wang controlled CPM. To support this conclusion, Madondo J firstly noted that according to the facts of the case Mr Wang was the sole director and shareholder of a company called Vasteast of which both Ms Wang Bo and Ms Zhang Xinying were registered employees for the past ten years. The court found that it was highly unlikely that Ms Wang Bo and Ms Zhang Xinying would work as employees of Vasteast, a third party, whilst simultaneously putting time and effort into their own business ventures.³⁰ Secondly, at all social events of CPM (which also shared the same premises as Vasteast), Mr Wang was the main host of the events and neither Ms Wang Bo nor Ms Zhang Xinying were introduced as representatives.³¹ Thirdly, the fact that Ms Wang Bo and Ms Zhang Xinying bought the shares of CPM at a nominal price of which no record was in writing until almost 6 years after the alleged purchase and when it was necessary to produce such documentation so as to secure the release of the vessel arrested raised questions as to the authenticity of the said purchase.³² Fifthly, the court looked at the fact that previously, in collusion with Mr Wang, Ms Wang Bo and Ms Zhang Xinying were registered as nominal employees of Vasteast so as to obtain social benefits from the Chinese National Social Security Fund. The court found that this showed that it was therefore a real possibility that Ms Wang Bo and Ms Zhang Xinying could thus camouflage themselves as majority shareholders so as to conceal the identity of Mr Wang as the true controller of CPM.³³ Lastly, the court noted that on the business card of Mr Wang it described him as ‘president’ of Vasteast and CPM. In light of the abovementioned factors, the court concluded that Ms Wang Bo and Ms Zhang Xinying were merely nominee shareholders of Mr Wang and it is the latter that had control over CPM.

Mr Wang’s relationship with Sino West Shipping Company Limited:

After having found that Mr Wang had control over CPM, the court held that the question which now needs to be determined is whether Mr Wang was the *de jure* controller of Sino West.³⁴ The court then noted that in determining who controls a company, one looks at the immediate legal control of the company.³⁵

³⁰ The m.v. *Sino West* supra note 5 at C209F-H.

³¹ The m.v. *Sino West* supra note 5 at C209I-C210B.

³² The m.v. *Sino West* supra note 5 at C210C.

³³ The m.v. *Sino West* supra note 5 at C210G-H.

³⁴ The m.v. *Sino West* supra note 5 at C212A.

³⁵ The m.v. *Sino West* supra note 5 at C212C.

The applicant argues that Mr Wang held the shares in Sino West as a nominee shareholder for numerous investors until 2011 when the shares were transferred to a company called Smoothie Goodie Ltd. (a Seychelles company). According to Mr Wang, he allegedly transferred the shares to Smoothie Goodie Ltd. because he was no longer prepared to be reflected on the applicant's public record as the sole registered shareholder of the company.³⁶ It was however common cause between the parties that when the vessel was arrested, Mr Wang was the registered owner of all the shares of Smoothie Goodie Ltd. Once again, it was alleged by Mr Wang that he held such shares as a nominee shareholder for numerous investors and that he only beneficially owned 20% of the shares.³⁷ The contention which is put forth by the applicants is that Mr Wang does not have the power directly or indirectly to control Smoothie Goodie Ltd. and that he acted only on the instructions of the beneficial owners. It is important to note however that there was only a gentleman's agreement in place between Mr Wang and the 'investors' according to which he would be a nominee shareholder.³⁸ The court looked at the relevant authorities and acknowledged that nominee shareholders do not have the liberty to exercise the voting rights attached to the shares which they hold in a manner contrary to the instructions of the beneficial holder of the said shares. The choices of the nominee shareholders are therefore confined to the instructions given by the beneficial owner.³⁹ Madondo J however held that:

'It appears from the decided authorities that the claimant cannot look beyond the register of members and seek the individual who controls the company concerned in order to enforce his or her maritime claim against that particular company. Likewise, in my view, the court cannot look beyond the company and declare a person, who is not the registered shareholder of the company concerned, to be in control thereof. The ultimate control over a company's affairs is exercised by its members in general meetings.'⁴⁰

Madondo J therefore held that in this case, Mr Wang is the sole registered shareholder in Smoothie Goodie Ltd. in which he holds a 100% shareholding. The court thus held that Mr Wang had 'controlling interest' of the Company.⁴¹ Furthermore, the court held that as a result of being the sole shareholder of Smoothie Goodie Ltd, he had ultimate control over Sino

³⁶The m.v. *Sino West* supra note 5 at C212D.

³⁷The m.v. *Sino West* supra note 5 at C212G-H.

³⁸The m.v. *Sino West* supra note 5 at C213B.

³⁹ The m.v. *Sino West* supra note 5 at C213-214.

⁴⁰ The m.v. *Sino West* supra note 5 at C216C-D.

⁴¹ The m.v. *Sino West* supra note 5 at C216G-217B.

West and thus has the power directly to control both companies by voting the majority of the shares. The court further stated:

‘Whether or not Mr Wang in fact exercises that power himself or whether it is exercised through him by others is immaterial. He is deemed to control Sino West Shipping Company Limited whether he does so and in fact not so’⁴²

Lastly the court made mention of the *Heavy Metal* case and noted that according to that case, if a person who has *de jure* control over the company which owns the ship concerned and the company which owns the alleged associated ship, the statutory nexus between the two companies will be met.⁴³ Ultimately the court concluded that in this case, the arresting party had succeeded on a balance of probabilities that Mr Wang controlled both CPM and Sino West.

Analysis of Sino West Shipping Co Ltd v NYK- Hinode Line Limited SCOSA C203

The main difficulty presented in this case is that the manner in which the court has interpreted the associated ship provisions is conflicting. On the one hand, in respect of the Mr Wang’s relationship with CPM, the court adopted a broader understanding of the term ‘control’ and decided to go beyond the share certificate of CPM so as to determine who actually controlled it. In this regard, the court concluded that Mr Wang was the controller of the said company. On the hand, in respect of Mr Wang’s relationship with Sino West, the court adopted a rather narrow understanding of ‘control’ and based the enquiry solely on who the *de jure* or the registered shareholder was. The court noted that in respect of Sino West, Mr Wang was the sole registered shareholder of Smoothie Goodie Ltd. which is the company which owned all the shares in Sino West. The court therefore concluded that on this basis he had *de jure* control over the latter in terms of the majority decision in the *Heavy Metal* case. To amplify this matter, this analysis will firstly look at the manner in which the court looked at Mr Wang’s relationship with Sino West after which it will look at the manner in which the court assessed Mr Wang’s relationship with CPM.

In respect of Sino West, the courts narrow interpretation of the term ‘control’ is immediately prevalent as at the outset the court stated that what would need to be determined in respect of this company is whether Mr Wang is the *de jure* controller i.e. the legal controller which is an

⁴² The m.v. *Sino West* supra note 5 at C217B-C.

⁴³ The m.v. *Sino West* supra note 5 at C217E-F.

enquiry based on the who is the majority registered shareholder.⁴⁴ According to Mr Wang, he no longer wanted to be reflected as the sole registered shareholder of Sino West as it affected his business in the Far East. As such he transferred the shares to Smoothie Goodie Ltd. However it was later discovered that he was the sole registered shareholder of Smoothie Goodie Ltd. In respect of these shares he argued that he was a mere nominee shareholder however the nature of the agreement was that it was a mere ‘gentleman’s agreement’.⁴⁵ Mr Wang stated that he held such shares in respect of numerous parties. However no evidence was provided to supplement this allegation either in the form of affidavits or other documentation. The court further acknowledged the fact that nominee shareholders act upon the instructions of the beneficial owners for whom those shares are held⁴⁶. The court however held that according to the authorities, one cannot look behind the register so as to determine who controls the company as the ultimate control of a company’s affairs is decided by its members in a general meeting.⁴⁷ The court thus concluded that because Mr Wang is the registered shareholder of all the shares in Smoothie Goodie Ltd. which in turn owns all the shares of Sino West, it can therefore be stated that he controls Sino West.⁴⁸ In respect of Mr Wang’s control over Sino West, the court stated the following:

‘Whether or not Mr Wang in fact exercises that power himself or whether it is exercised through him by others is immaterial. He is deemed to control Sino West Shipping Company Limited whether he does so and in fact not so’⁴⁹

This statement clearly notes the difficulty presented as it states ‘whether he does so and in fact not so’. It is respectfully submitted that the problem in this regard is that the statement creates the paradox where a person may be said to control a company but then not control it all. This approach is creates much confusion as to the manner in which the associated ship provisions should be interpreted as the court adopts a completely different approach when determining who controls CPM. In respect of CPM, the court adopted a broader understanding which aimed to look at the ‘ultimate’ or ‘actual control’ of CPM. The court found that there was an abundance of factors which portrayed the image that Ms Wang Bo and Ms Zhang Xinying were mere nominee shareholders of Mr Wang who had actual control over CPM. This broad interpretation of ‘control’ adopted in respect of the enquiry into CPM

⁴⁴The m.v. *Sino West* supra note 5 at C212C.

⁴⁵ The m.v. *Sino West* supra note 5 at C213B.

⁴⁶The m.v. *Sino West* supra note 5 at C213-214.

⁴⁷The m.v. *Sino West* supra note 5 at C216C-D..

⁴⁸The m.v. *Sino West* supra note 5 at C216G-217B.

⁴⁹The m.v. *Sino West* supra note 5 at C217B-C.

is however impossible to reconcile with narrow, restrictive interpretation provided to 'control' in respect of the enquiry into Sino West. This judgment creates much perplexity as to what is required for the purposes of establishing 'control' in AJRA.

It is submitted that the court was correct in its approach in the enquiry as to who controls CPM. In this respect there were numerous factors which showed that Ms Wang Bo and Ms Zhang Xinying were not the actual controllers of CPM but were mere nominee shareholders who acted on behalf of the instructions of Mr Wang. One of the significant factors in this regard was that the transfer of the shares to Ms Wang Bo and Ms Zhang Xinying was not recorded in writing and the share certificates in question were only signed at the end of May 2012 i.e. after the arrest of the m.v. *Sino West* which was arrested on 24 May 2012. It is further submitted that the conclusion reached by the court that Mr Wang controls Sino West is correct. However it is respectfully submitted that the court erred in the manner in which it has interpreted the associated ship provisions in this regard. It is submitted that this conclusion could have been reached by adopting a much simpler approach. In this respect, according to the facts of the case, the most likely conclusion is that Mr Wang held the shares in his own name i.e. he was the beneficial owner for the shares which he held in respect of Smoothie Goodie Ltd. The reason for this submission is that Mr Wang expressed the view that he no longer wished to be represented as the sole registered shareholder of Sino West and thus he transferred the shares to Smoothie Goodie Ltd. Based on this decision, it is therefore unlikely that Mr Wang would thereafter opt to be registered as the sole registered shareholder of Smoothie Goodie Ltd. unless he was in fact the beneficial holder of these shares. Furthermore, Mr Wang stated that he merely held such shares as a nominee shareholder however all that was stated in this regard is that it was merely a 'gentleman's agreement'. No further evidence was provided in the form of affidavits or other statements which would add probative value to the statement that he was merely a nominee shareholder. In absence of any further evidence, it is therefore difficult to attach any real merit to such *ipse dixit* statements on behalf of Mr Wang. It is further submitted that it seems unlikely that one would entrust another with shares belonging to the former without any sort of documentation which proves that the nature of the agreement is one of a nominee shareholding. Failure of such documentation would put such a party in a precarious situation where the nominee holder in question acts in a manner contrary to the formers instructions. Such a party will be left with very little legal recourse. It is therefore submitted that in this case, Mr Wang most likely held

the shares in Smoothie Goodie Ltd. in his own right and was therefore the ‘ultimate’ or ‘actual’ controller of these shares.

4.2.3. *M.V. Ivory Tirupati; M.V. Ivory Tirupati v Badan Urusan Logistik (aka Bulldog):*

In this case, the m.v. *Amer Prabha* was arrested in Singapore according to a claim by the respondent for compensation arising out of damage to a cargo of rice. OM, the indemnity insurers for the vessel, issued an undertaking in which it undertook to pay the sum amount as decided by the Supreme Court of Hong Kong or any appeal thereof. The undertaking also included terms that the respondent was to release the m.v. *Amer Prabha* from arrest and was precluded from taking any action against any other vessel in the same association, under the same management or control of the arrested vessel in respect of the said claim. Furthermore, according to the undertaking, OM was required within 14 days of a request from the respondent to instruct solicitors to accept on behalf of the m.v. *Amer Prabha*, service of the proceedings and to file an acknowledgment of the said proceedings. OM failed in its obligation in respect of the latter which resulted in the Hong Kong Court giving judgment for the respondent and ordered the owners/ demise charterers to pay USD 331 332,30. OM failed in its undertaking to pay this amount. The respondent then arrested the applicant vessel, the m.v. *Ivory Tirupati* as an associated vessel of m.v. *Amer Prabha*.⁵⁰

In dealing with the issue of association, the court looked at the background as to the ownership and management of the vessels. At the time of the arrest, the m.v. *Ivory Tirupati* was owned by Pembroke Shipping Corporation Ltd (Pembroke), incorporated in Liberia. Pembroke is a wholly owned subsidiary of Amer Reefer Company (Amer Reefer). Amer Reefer conducts its business through wholly-owned subsidiary companies where each company owns a single vessel. All the vessels obtain management and technical support from three affiliated companies namely Amer Shipping Ltd (ASL), Amer Shipping Management (ASM) and Foresight Ltd. ASL is a registered in Cyprus and acts as the manager of each vessel according to the management agreement with each company. In terms of this agreement, ASL subcontracts the technical management of each vessel to ASM and the general agency responsibilities to Foresight. According to the affidavit by the witnesses, Amer Reefer operated seven of its vessels in this manner which included the m.v. *Ivory*

⁵⁰m.v. *Ivory Tirupati* supra note 6 at 411-413.

Tirupati. Most of the shareholding in these companies was held by members of the firm Loikis Papaphilippou and Co.⁵¹

The court also looked at a report of the activities of Amer Reefer which was lodged with the United States Securities and Exchange Commission which stated:

‘Amer Reefer is a Cypriot limited liability company organised to own all the outstanding capital stock of the vessel-owning subsidiaries. Quantoc Shipping Investments Ltd a Cypriot company (QSIL), owns all the outstanding capital stock of Amer Reefer. The shares of QSIL are held by trustees of a Cypriot trust which was established for the benefit of the respective lineal descendants of the late Chotre Lal Mehrotra and his spouse (the trust). Sashi Mehrotra, chief executive officer of Amer Reefer, is among the class of trust beneficiaries who collectively own 100% of the company's outstanding common stock.’⁵²

The m.v *Amer Prabha* was owned by Casterbridge Navigation Co Ltd (Casterbridge) which is registered in Cyprus and shares the same address as Loikis Papaphilippou and Co. The m.v. *Amer Prabha* was also managed by ASL and like Pembroke, Casterbridge also has as one of its major shareholders as Elpico Nominees (Elpico).⁵³ In respect of Pembroke, Elpico owns 15% of the shareholding and Elpico Management Ltd holds 15% of the shares. In respect of Casterbridge, Elpico owns 23% of the shareholding.⁵⁴

In terms of the aforementioned factors, Mr Wragge for the respondents, sought to draw the following conclusion: the m.v *Amer Prabha* shares the same prefix (Amer) as with most of the vessels within the Amer Reefer fleet and therefore it was most likely that it was one of the vessels operated by the Foresight Group, Casterbridge and Amer Reefer have the same address which is that of Loikis Papaphilippou and Co, all the shares in ASL were registered in Elpico Nominees and Elpico Managers of which the majority shareholder of both

⁵¹m.v. *Ivory Tirupati* supra note 6 at 413F-J.

⁵²m.v. *Ivory Tirupati* supra note 6 at 414D. The report further stated:

‘Each of the Amer Shipping Ltd (ASL), Amer Ship Management (ASM) and Amer Reefer are members of the Foresight Group, an informal organisation of companies established in 1984 to co-operatively market, operate and manage dry cargo vessels, jack up drilling rigs, crude oil tankers, product tankers, chemical tankers and reefer cargo vessels. The existing vessels receive management services from ASL. ASL serves as the fleet manager pursuant to a management agreement with each vessel-owning subsidiary, and pursuant thereto ASL has subcontracted with ASM for technical management services and with Foresight Ltd for general agency services. ASL provides each vessel-owning subsidiary with certain commercial management services such as maintaining day to day liaison with charterers, ship agents and the crews of existing vessels, accounting services and ensuring compliance with Cypriot and Liberian regulations, as the case may be, pertaining to the existing vessels.’ at did 414A-C.

⁵³m.v. *Ivory Tirupati* supra note 6 at 414E.

⁵⁴m.v. *Ivory Tirupati* supra note 6 at 414E.

companies is Ms Athienite who is believed to be Mr Papaphilippou's daughter. The Majority shareholding in Casterbridge was held in the name of a Mr Andreas Phellas who is also the registered shareholder of four of the seven vessels beneficially owned by Amer Reefer and was said to be related to Mr Papaphilippou.⁵⁵ Mr Wragge also relied on the case of *Shipper D' Singapore Pte Ltd v M.V. Amer Whitney*⁵⁶, where Squires J looked at the relationship between ASM, ASL, the Amer Reefer Company and the Foresight Group and concluded that the companies were all controlled by a Mr Ravi Kumar Mehotra. Davis J in the case at hand noted that this case provided support for the position that control of the respective companies could all be traced back to Ravi Kumar Mehrotra. Mr Wragge therefore argued that the beneficial owners of the shareholding of Pembroke and Amer Reefer controlled Casterbridge or have the power to control it. Alternatively, Mr Wragge argued that Pembroke, Amer Reefer and Pembroke were all controlled by the same person.⁵⁷ The court therefore held:

'In matters of shipping, as with much of offshore tax and corporate planning, it is extremely difficult to prove with any measure of exactitude where ownership resides; the very purpose of the structures employed in cases such as this one is to hide beneficial ownership through the interposition of nominee directors and offshore companies and trusts. An enquiry based upon the substance of the evidence rather than upon a rigid reliance on the legal form is clearly appropriate in such cases. In this case a strong inference can be drawn from the facts which have been put before the Court by respondent.'⁵⁸

The court therefore noted that in this case the registered shareholders of Casterbridge (owner of the m.v. *Amer Prabha*) are nominees for Loikis Papaphilippou and Co or Amer Reefer or the beneficiaries of a trust which had been established for descendants of the late Mr Ravi Mehrotra. In respect of the beneficial owners of Pembroke and Amer Reefer, the court noted that except for Elpico Nominees and Elpico Managers, are all members of the firm Loikis Papaphilippou and Co. The court also found that each of these companies fall within the Foresight Group of which it appears the owner thereof is Mr Ravi Mehrotra. The court therefore held that the overwhelming probabilities are that the beneficial owner of Pembroke and Amer Reefer controls or has the power to control Casterbridge or alternatively Pembroke, Amer Reefer And Casterbridge are controlled by the same person/s.

⁵⁵ m.v. *Ivory Tirupati* supra note 6 at 414G-I.

⁵⁶ Unreported case No A 16399 dated 28 September 2000 in D & CLD.

⁵⁷ m.v. *Ivory Tirupati* supra note 6 at 414I-J.

⁵⁸ m.v. *Ivory Tirupati* supra note 6 at 415D-E.

The applicants failed to rebut the above assertions and in this respect the court applied the *dictum* of Smalberger JA in the *Heavy Metal* where the respected judge held that the outcome reached by the court in that case is a direct and foreseeable consequence of a shipowner who chooses to operate behind a cloak of secrecy and who fails to rebut the inferences put forth on the papers.⁵⁹ Therefore the court in this case asserted that in light of the failure by the applicant to rebut the circumstantial evidence put forth, the decision that the two vessels are associated is therefore justified.

Analysis of M.V. Ivory Tirupati; M.V. Ivory Tirupati v Badan Urusan Logistik (aka Bulldog)

The *Heavy Metal* case is a decision which was heard in the Supreme Court of Appeal and as stated already is the decision which binds the lower courts. As such, lower courts must apply the principles laid down by the court in that case. What is interesting in the *m.v. Ivory Tirupati*, is the manner in which the court applied a common-sense approach which aimed at locating the ‘actual’ or ‘ultimate’ controller of the companies in question and almost circumvented the *Heavy Metal* decision entirely. The court in this case acknowledged that it is extremely difficult to determine who controls or owns a particular shipping company as such companies employ the use of corporate structures so as to shield the true beneficial owners of the said company. In this respect, the court suggested that what is required in such cases, is an enquiry which is based on the substance of the evidence presented as opposed to one based on strict legal form.⁶⁰ Applying these principles to the facts of the case, in forming the association between the companies, the court investigated the background of each ship-owning company including its subsidiary or associated companies. The court further investigated the beneficial owners of the companies so as to locate the common thread between them and also looked at reports which were lodged with the United States Securities and Exchange Commission which provided information as to the manner in which the companies were incorporated. The court also looked at the case of *Shipper D’ Singapore Pte*

⁵⁹ *m.v. Ivory Tirupati* supra note 6 at 415H-J where the court made reference to the dictum of Smalberger JA in the *Heavy Metal* case at 1107F-H which is as follows:

‘In my view, and on the undisputed facts, the respondent therefore succeeded in establishing the requisite *nexus* for the conclusion that the *Heavy Metal* was an associated ship of the *Sea Sonnet*. If that conclusion results in the bizarre position referred to in . . . my Colleague's judgment, that is the direct and foreseeable consequence of a shipowner choosing to operate behind a cloak of secrecy. It is precisely for that reason, because the creditor is at such a disadvantage in tracing the assets of his debtor, of which this case is a prime example, that the subsection was worded as it is. . . . Apart from that, it seems to me that the appellant in any event failed to rebut the inference arising on the papers that the power behind Lemonaris in respect of the *Heavy Metal* is in fact the same entity who is the power behind Lemonaris in respect of the *Sea Sonnet*.’

⁶⁰ *MV Ivory Tirupati* supra note 6 at 415D-E.

*Ltd v M.V. Amer Whitney*⁶¹, where Squires J looked at the relationship between ASM, ASL, the Amer Reefer Company and the Foresight Group and concluded that the companies were all controlled by a Mr Ravi Kumar Mehotra. What is clear from the approach of the court is that it conducted a holistic investigation into the respective companies which extended beyond the registered shareholding. The court therefore aimed to locate the true seat of control so as to determine whether such control was common to both shipping companies. The court therefore held that the overwhelming probabilities are that the beneficial owner of Pembroke and Amer Reefer controls or has the power to control Casterbridge or alternatively Pembroke, Amer Reefer and Casterbridge are controlled by the same person/s. In its reasoning, the court did not make reference to the *Heavy Metal* case except insofar as it related to the applicants failure to rebut any of the facts presented. Other than this, the court avoided applying any of the principles laid down in the *Heavy Metal* which related to the interpretation of ‘control’ in terms of AJRA.

4.3. **Conclusion**

The objective of this chapter was to provide perspective and insight as to the practical problems experienced by the courts when attempting to strictly apply the *ratio* of the majority in the *Heavy Metal* case. Although Wallis submits in this regard that the case has not generated much problems as initially anticipated, it is respectfully submitted that upon a review of the cases mentioned above, it can be seen that the *Heavy Metal* does present an array of difficulties. The most obvious problem with the cases applying the *Heavy Metal* is that there is no consistency in the manner in which courts have interpreted the associated ship provisions. In *Sino West Shipping Co Ltd*⁶² this can be clearly seen as the court applied a broad interpretation of the term ‘control’ in respect of one company whilst the court adopted a narrow interpretation in respect of the other company. It is submitted that the reason for such a paradoxical judgment is that in respect of the company CPM, there appeared numerous factors which portrayed the image that the shareholders in question were mere nominee shareholders of Mr Wang who can for all purpose be said to be the beneficial owner of those shares. To strictly apply the *Heavy Metal* judgment in respect of this company and to hold that the nominee shareholders in question were the *de jure* controllers of the company, it is submitted that the court would be setting a very dangerous precedent. It is further submitted that the court was aware of this difficulty especially in light of the prevailing

⁶¹ Unreported case No A 16399 dated 28 September 2000 in D & CLD.

⁶² m.v. *Sino West* supra note 5.

factors which strongly portrayed the image that holders in question were merely nominee shareholders. In respect of the Sino West however the court seemed more comfortable to apply the *Heavy Metal* decision as in respect of that company there were not strong factors which showed that Mr Wang was merely a nominee shareholder. Further difficulties in strictly applying the *ratio* can also be seen in the *The M.V. La Pampa Louis Dreyfus Armateurs SNC*⁶³ case, where the effect of that judgment is that if a company is owned as a 50/50 shareholding, then neither party may be said to control the company. This creates a ludicrous situation where a company merely exists but has no controller. Similarly even when courts adopt a common sense approach by looking at the ultimate or actual control of a company it results in the circumvention of the *Heavy Metal* case yet the *Heavy Metal* is the leading authority as it is a Supreme Court of Appeal decision which binds all lower courts. It is therefore submitted that legislative intervention is needed to clarify the meaning of the term ‘control’.

⁶³ *m.v. La Pampa* supra note 4 at 454G-H.

CHAPTER 5: CONCLUSION

5.1. Introduction

The two core principles governing company law i.e. the company as a separate legal entity and the concept of limited liability provided the perfect tools which allowed ship-owners to shield themselves from maritime claimants. These principles effectively allowed ship-owners to escape the jurisdiction of the 1952 Arrest Convention⁶⁴ which allowed for the arrest of ‘sister-ships’ i.e. ships which are owned by the same person/company. When South Africa enacted its reform legislation in 1983, it aimed to dust the cob webs of South African maritime law which remained dormant for almost a century.⁶⁵ In doing so, the legislature hoped to provide consistency, coherency and finality within the maritime legal sphere. During the reform process, the legislature was aware of the mischief created by one-ship companies and thus saw an opportunity to seal this *lacuna* as the Law Commission stated that the associated ship provisions are an extension of the provisions of the 1952 Arrest Convention and that ‘since the conclusion of the Convention its provisions have been defeated by the proliferation of ‘one-ship’ companies, that is to say, companies owning one ship and therefore avoiding the Convention’.⁶⁶ To defeat this ‘proliferation of one-ship companies’, the legislature took a bold approach and enacted the associated ship provisions.⁶⁷

The true novelty in respect of the associated ship provisions and what makes it unique when compared to any other arrest *in rem* proceeding in the world is that ‘control’ and not ownership now forms the central enquiry in determining whether or not a ship may be arrested. The purpose therefore of these provisions was to allow maritime claimants to penetrate the protective corporate shields of a ship-owning company so as to locate the true debtor in question and hold this person liable for the said debt.⁶⁸ The general understanding

⁶⁴ The 1952 International Convention for the Unification of Rules relating to the Arrest of Sea-going ships.

⁶⁵ G Bradfield ‘Guilt by Association in South African Admiralty law’ (2005) 2 *LMCLQ* 237.

⁶⁶ The South African Law Commission Report on the Review of the Law of Admiralty titled ‘Project 32’ 15 September 1982.

⁶⁷ *Euromarine International of Mauren v The Ship ‘Berg’ and Others* 1986 (2) SA 700 (A) at 711E-F.

⁶⁸ *MV Heavy Metal: Belfry Marine v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) at 1110I-J.

therefore in associated ship cases was that the provisions concerned themselves with the ultimate or actual control of a shipping company.

The leading case in interpreting the term ‘control’ is the *Heavy Metal*. The interpretation provided by the majority in the Supreme Court of Appeal was unfortunate in the sense that the court afforded a restrictive and narrow interpretation to the term ‘control’. The majority based its enquiry on the registered shareholder of the respective ship-owning companies as opposed to locating the true seat of control. The court further distinguished between ‘direct’ control and ‘indirect’ control and equated it with the Latin term ‘*de jure*’ and ‘*de facto*’ respectively. The majority thus allowed for two repositories of control.⁶⁹ This case therefore created much uncertainty and mystification as to what is required in terms of ‘control’. This dissertation therefore aimed to provide meaning and understanding as to what is required in order to establish the requisite ‘control’ for associated ship arrests.

5.2. Summary of the Findings

Chapter one of this dissertation provided the background to the associated ship provisions in order to understand the aims, objectives and underlying purpose of the provisions. It was found that, even at this early stage of the dissertation, the purpose of the provisions were transparent. As stated in the introductory section of this chapter, the purpose of the associated ship provisions was to allow a maritime claimant to overcome the corporate strata shielding the identity of the true debtor in order to locate and hold this person liable for the respective maritime claim. By shifting the enquiry from ‘ownership’ to ‘control’, ship-owners were no longer protected from liability through their creative use of the corporate form.

Following this introduction, chapter two attempted to interpret the term ‘control’ so as to determine its correct meaning. In doing so, the chapter firstly noted that a potential arrestor must prove the association i.e. on the basis of either control or ownership on a balance of probabilities.⁷⁰ In this respect, it was submitted that the reasoning for this burden of proof was to prevent an innocent ship-owner having their vessel arrested. By comparing the original associated ship provisions and its subsequent amendments, it was found that even the earlier cases acknowledged that there is a substantial difference between the control of a company and the control of all its shares as the former was not dependant on the latter.⁷¹ The

⁶⁹ The *Heavy Metal* SCA Supra note 5 above at paragraphs [8]-[15].

⁷⁰ *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 581 B-F.

⁷¹ *Dole Fresh Fruit International Ltd v MV Kapetan Leonadis and Another* 1995 (3) SA 112 (A) at 119F.

chapter further noted that whereas the original provisions were restrictive on the basis that they focused on the ownership of the shares, the 1992 amendments allowed for a broader interpretation to be acquainted to the term control as it focused on the control of the company concerned. This chapter also looked at the various meanings which can be associated with the term ‘control’ and found that the meaning which gave effect to underlying purpose of the provisions is the ‘actual’ or ‘ultimate’ control of the company. This meaning allowed a claimant to overcome factors such as *inter alia* bearer shares, nominee shareholdings and pyramid schemes. In terms of the notion of ‘beneficial ownership’, it was submitted that it referred to the situation where the true holder of the benefits of the shares in the company opts to register the said shares in the name of another. Hence it is the former who will exercise actual or ultimate control.

The aforementioned understanding of ‘control’ provided the yardstick through which the findings of the majority in the SCA decision of the *Heavy Metal* case was critically analysed. Chapter three looked at the findings of the High Court decision as well as the three judgments of the Supreme Court of Appeal. In respect of the latter, it was found that the majority erred in its interpretation of ‘control’, firstly on the basis that the interpretation failed to adhere to the underlying purpose of the statutory provisions. Secondly, it was found that the court adopted a narrow interpretation of the phrase ‘directly or indirectly’ which had the effect of allowing for two repositories of control. This chapter also made brief mention of the Constitutionality of the majority decision however this aspect will be discussed in more detail in the postscript of this dissertation. Ultimately, this chapter noted that the reasoning of Marais JA and Farlam AJA is to be preferred in terms of the interpretation which should be afforded to the associated ship provisions.

Chapter four looked at the legal impact of the majority decision in the *Heavy Metal* case on courts strictly applying its *ratio*. This segment focused on three cases, namely; *M.V. La Pampa*⁷², *Sino West Shipping*⁷³ and the *M.V. Ivory Tirupati*⁷⁴. In terms of this enquiry it was clearly apparent that there is no consistency in the manner in which courts have interpreted the associated ship provisions which is a direct consequence of the confusion created by the majority decision in the *Heavy Metal*. Furthermore, by restricting the enquiry to the registered shareholding, courts have difficulties applying the *ratio* of the majority in cases of

⁷² The *M.V. La Pampa Louis Dreyfus Armateurs SNC v Tor Shipping* 2006 (3) SA 441 (D).

⁷³ *Sino West Shipping Co Ltd v NYK- Hinode Line Limited* SCOSA C203

⁷⁴ *MV Ivory Tirupati; MV Ivory Tirupati v Badan Urusan Logistik (aka Bulldog)* 2002 (2) SA 407 (C).

50/50 shareholdings. Other difficulties include the situation such as in the *Sino West Shipping* case, where the court adopted a narrow understanding of ‘control’ in respect of one company (Sino West) whilst it adopted a broad understanding of ‘control’ in respect of the other company, CPM. It was further noted that the reason as to why the court opted to use a broad approach in respect of CPM is that there existed numerous factors which showed that the registered shareholders were not the actual controllers of the company. The court in that case could not therefore ignore these overwhelming factors and strictly focus on the registered shareholding of the CPM. In respect of the *M.V. Ivory Tirupati* case, the chapter aimed to show how some courts opted to ‘side-step’ the Heavy Metal decision and focus on an enquiry based on the ultimate or actual control of the company.

5.3. Conclusion

The *Heavy Metal* case was decided nearly fifteen years ago, and as such it creates an undesirable situation on the basis that there is uncertainty as to the meaning of the term ‘control’. The fact however, is that only the SCA or the Constitutional Court on appeal can alter the decision of the *Heavy Metal* case.⁷⁵ It seems as though the position as it stands, is that the lower courts are bound by the decision of the *Heavy Metal*.⁷⁶ It is therefore submitted that legislative intervention is needed to clarify the meaning of the term ‘control’ as until the decision is changed by the SCA, courts will nevertheless be bound by the decision in the *Heavy Metal* and the legal Pandora’s Box will yet to be sealed.

⁷⁵M Wallis *The Associated Ship & South African Admiralty Jurisdiction* 1 ed Cape Town (2010) 220-221.

⁷⁶ Wallis (note 12 above; 221).

POSTSCRIPT: THE CONSTITUTIONALITY OF THE *HEAVY METAL* CASE

In chapter three of this dissertation brief mention was made as to the Constitutionality of the majority decision in the *Heavy Metal* case in so far as it relates to the arbitrary deprivation of property in terms of section 25(1) of the Constitution.¹ In that chapter it was noted that the effect of the majority decision allows for such deprivation. However for the purpose completion, this section will aim to look at the Constitutionality of the case in more detail.

The Constitution is the supreme law of the land and as such, any law or conduct which is inconsistent with it is deemed to be invalid.² The constitution is therefore not just a list of rights but a lens through which laws must be interpreted. When interpreting any legislation, courts must therefore ‘promote the spirit, purport and objects of the Bill of rights’.³ The question therefore which need to be determined in respect of the majority decision in the *Heavy Metal* case is whether the decision may pass constitutional muster in terms of Section 25 (1) of The Constitution⁴ which states that ‘no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property’. It is important at the outset to determine firstly whether or not s 25 applies to companies and secondly whether or not they apply to shipping companies which are incorporated in foreign countries.⁵ In this respect, section 8 (2) of the constitution states that the bill of rights applies both to natural and juristic persons ‘taking into account the nature of the right and nature of any duty imposed by such a right’.⁶ It is further submitted that the phrase ‘no one’ as

¹ The Constitution of the Republic of South Africa, 1996.

² Section 2 of The Constitution of the Republic of South Africa, 1996.

³ Section 39 (2) of The Constitution of the Republic of South Africa, 1996. See further *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at [91] where it was held:

‘The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the ‘spirit, purport and objects of the Bill of Rights’.

see also *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others* 2011 (3) SA 148 (SCA) AT [25].

⁴ The Constitution of the Republic of South Africa, 1996.

⁵ M Wallis *The Associated Ship & South African Admiralty Jurisdiction* 1 ed (2010) 269.

⁶ Section 8(2) The Constitution of the Republic of South Africa, 1996. states ‘a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’ see also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at [57] and *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at [18].

contained in section 25 (1) of the Constitution is broad enough to apply to companies which may be registered in foreign states.⁷

The Constitution therefore allows for the protection of property as a fundamental human right and in doing so ensures that it is in accordance with international standards.⁸ At first glance, the provision may seem contrary in the sense that it protects property rights on the one hand whilst on the other, it allows for state interference. However when read with section 36 of the Constitution, this confliction is removed as no human right can be absolutely guaranteed.⁹ Section 25 therefore protects private property but permits state intervention under certain circumstances.¹⁰ Although the provision does not specifically state what types of property is to be included, it is submitted that it is broad enough to encompass all kinds of property including but not limited to real property, movable, immovable, corporeal and intellectual incorporeal.¹¹ The prime focus of section 25 is to protect private property on a vertical level i.e. from state interference or abuse; however it also applies horizontally amongst private individuals or non-state entities.¹² The provision guarantees that the deprivation of property will only take place when authorised by an enabling statute and in this regard, deprivations will be regarded as arbitrary if they only affect a single person/group of persons or where deprivation in question is unjustified.¹³

The most relevant case in this respect is that of *First National Bank of SA Ltd T/A Wesbank v Commissioner of SARS*¹⁴ (Hereafter 'Wesbank'). In this case, FNB leased two vehicles and sold another in terms of an instalment sale to two companies. FNB remained the owner of the vehicles in all instances and in respect of the instalment sale; ownership was to be transferred upon payment of the final instalment. The commissioner of SARS detained and obtained a lien over one of the vehicles to obtain security for customs-related debts which were owed to it by the first company. The commissioner further obtained another lien over the other leased vehicle and the other vehicle under the instalment agreement in respect of a similar debt which was owed by the second company. Section 114 of the Customs and Excise Act 91 of

⁷ Wallis (note 5 above; 269).

⁸ AJ Van De Walt & G J Pienaar *Introduction to the Law of Property* 6 ed (2009) 306. See also PJ Badenhorst... et al *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 521-583.

⁹ AJ Van De Walt & G J Pienaar (note 8 above; 306).

¹⁰ AJ Van De Walt & G J Pienaar (note 8 above; 307).

¹¹ AJ Van De Walt & G J Pienaar (note 8 above; 307).

¹² H Mostert & A Pope *The Principles of the Law of Property in South Africa* 1 ed (2010) 118-119. AJ Van De Walt & G J Pienaar (note 8 above; 309-310).

¹³ AJ Van De Walt & G J Pienaar (note 8 above; 309).

¹⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

1964 enabled the commissioner to sell goods without the need for prior judgment or judicial authorisation for the purposes of collecting a debt owed.¹⁵ In order to satisfy the debt, the commissioner could sell property belonging to the original debtor as well as that of innocent third parties which were attached. FNB challenged this provision and asserted that it infringed section 25 of The Constitution. They further argued that the deprivation and sale of property not belonging to the customs debtor amounted to expropriation and the failure to provide such an innocent party with any compensation was unjustified and therefore unconstitutional.¹⁶ In providing an understanding of the term ‘deprivation’ the court held that deprivation for the purposes of section 25 (1) refers to ‘all property’ and ‘all deprivations’. If a particular law infringes or limits section 25 (1) and cannot be justified in terms of section 36 it amounts to a deprivation and is unconstitutional.¹⁷ Ackermann J further held that if the deprivation does not infringe section 25 (1) or is a justified limitation in terms of section 36 then the question which must be determined is whether it amounts to expropriation in terms of section 25 (2).¹⁸ The court further held that ‘arbitrary’ refers to whether there is insufficient reason for the particular deprivation or it is procedurally unfair¹⁹. The court held that sufficient reason will be determined by looking at *inter alia*; the relationship between the means employed and the purpose of the law, the relationship between the purpose of the

¹⁵The relevant part of section 114 reads:

‘(1)(a)(i) The correct amount of duty for which any person is liable in respect of any goods imported into or exported from the Republic or any goods manufactured in the Republic shall from the date on which liability for such duty commences; and

(ii) any interest payable under this Act and any fine, penalty or forfeiture incurred under this Act shall, from the time when it should have been paid, constitute a debt to the State by the person concerned, and any goods in a customs and excise warehouse or in the custody of the Commissioner (including goods in a rebate store-room) and belonging to that person, and any goods afterwards imported or exported by the person by whom the debt is due, and any imported goods in the possession or under the control of such person or on any premises in the possession or under the control of such person, and any goods in respect of which an excise duty or fuel levy is prescribed (whether or not such duty or levy has been paid) and any materials for the manufacture of such goods in the possession or under the control of such person or on any premises in the possession or under the control of such person and any vehicles, machinery, plant or equipment in the possession or under the control of such person in which fuel in respect of which any duty or levy is prescribed (whether or not such duty or levy has been paid), is used, transported or stored, may be detained in accordance with the provisions of ss (2) and shall be subject to a lien until such debt is paid...

(b) The claims of the State shall have priority over the claims of all persons upon anything subject to a lien contemplated in para (a) or (aA) and may be enforced by sale or other proceedings if the debt is not paid within three months after the date on which it became due’ .as mentioned in *Wesbank* supra note 14 at [11]

¹⁶*Wesbank* supra note 14 at [7]-[10].

¹⁷*Wesbank* supra note 14 at [58].

¹⁸*Wesbank* supra note 14 at [59].

¹⁹*Wesbank* supra note 14 at [100].

deprivation and the person whose property has been affected and the relationship between the purpose of the deprivation, the nature of the property and the extent of such deprivation.²⁰

Applying the principles above, the court held that the end result which was sought by the Act is to extract payment for customs debt. Such a purpose is essential to the financial status of the country and it is in the best interest of all its inhabitants that such debts be paid. The court further held that in achieving this end, section 114 of the Act casts the net too wide as the means it uses to achieve its end or purpose has the effect of allowing for the total deprivation of a person's property in circumstances:

‘where (a) such *person* has no connection with the *transaction* giving rise to the customs debt; (b) where such *property* also has no connection with the *customs debt*; and (c) where such person has not transacted with or placed the customs debtor in possession of the property under circumstances that have induced the Commissioner to act to his detriment in relation to the incurring of the customs debt.’²¹

The court ultimately held that in the absence of a nexus between the innocent third party and the customs debt, there can be no justification in terms of section 114 to deprive such persons of their property.²² Therefore such deprivation is arbitrary for the purpose of s 25(1). The court further noted that in terms of the section 36 enquiry, the object achieved by s 114 is wholly disproportionate to the infringement of FNB's rights.²³

The court further held that even though money may be recovered by the sale of property belonging to an innocent party, such income cannot justify the deprivation.²⁴ Ultimately the court held that the ‘infringement by s 114 of s 25(1) is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The provision is accordingly constitutionally invalid’.²⁵

The effect of the *Heavy Metal*, as stated earlier, is that it allows for an association to be formed on the basis of a common nominee majority shareholder between ship owning companies even if the respective ships are in no manner related to each other. On face value,

²⁰ *Wesbank* supra note 14 at [100]. Therefore when determining the arbitrariness of a provision, it is imperative to look whether there is a rational nexus between a legitimate government purpose and the manner in which that purpose is achieved. H Mostert & A Pope (note 12 above; 123).

²¹ *Wesbank* supra note 14 at [108].

²² *Wesbank* supra note 14 at [109].

²³ *Wesbank* supra note 14 at [111].

²⁴ *Wesbank* supra note 14 at [112].

²⁵ *Wesbank* supra note 14 at [113].

this seems to infringe section 25 of the constitution as it allows for the arbitrary deprivation of property in the sense that a ship-owner may have their ship arrested even though such an owner is not in any manner related to the ship concerned. Wallis further submits that such a deprivation cannot be justified in terms of s 36 of the constitution²⁶. It is submitted that there may be a justification for the arrest where the two ships are in fact associated ships for the purposes of the provision however where the two ships are not associated it is submitted that such justification ceases to exist. The result is that an innocent ship owner's vessel may be arrested and such a ship owner will thereafter be forced to provide security for the respective claim. The fact that upon the provision of security, the owner can obtain the immediate release of the vessel, does not remove the 'arbitrariness' in terms of the original arrest.²⁷

Section 39(2) of The Constitution²⁸ states that when 'interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Therefore the effect of section 39(2) read with section 25 (1) is that when interpreting a legislative provision, the courts should afford an interpretation to the particular provision which prevents the arbitrary deprivation of property. However as stated above, the legal effect of the *ratio* of the majority in the *Heavy Metal* case is one which allows for a situation which promotes the arbitrary deprivation of property. It is such factors which further question the correctness of the decision in the *Heavy Metal* case.

It is therefore submitted that the majority decision is problematic in this aspect also and thus further adds to the presumption that the overall reasoning of the majority was incorrect in terms of its interpretation of the term 'control'. Applying the principles of the *Wesbank* case it is clear that if an innocent third parties property is attached in order to satisfy a debt to which the same party bears no link, such deprivation will be regarded as arbitrary and will thus infringe section 25 (1) of the constitution. This can be seen in the example: where there are

²⁶Section 36 of The Constitution of the Republic of South Africa, 1996.
states :

- ' the rights in the bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- a) the nature of the right;
 - b) the importance of the purpose of the limitation;
 - c) the nature and extend of the limitation;
 - d) the relation between the limitation and its purpose; and
 - e) less restrictive means to achieve the purpose.'

²⁷G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012) 144.

²⁸The Constitution of the Republic of South Africa, 1996.

two ships S1 and S2 which are owned by companies namely C1 and C2 respectively. Furthermore, X is the majority nominee shareholder of both companies but acts under the instruction of Mr A in respect of C1 and under the instruction of Mr B in respect of C2. Applying the *ratio* in the *Heavy Metal* case, the two ships (S1 and S2) will be regarded as being associated on the basis that they share a common nominee shareholder yet actual or ultimate control rest with two different persons. In this sense the debts of Mr A may be attached to Mr B and *vice versa*. This will therefore amount to the arbitrary deprivation of property as an innocent ship-owner may have their vessel arrested against the provision of security.

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