



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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MV New Endeavor and Others v Indian Oil Corporation Limited (283/2023) [2024] ZASCA 67 (03 May 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing with costs, including those of two counsel, an appeal against the decision of the KwaZulu-Natal Division of the High Court, Durban (sitting as Admiralty court).

The facts were as follows: On 5 August 2020, the respondent, Indian Oil Corporation Limited (Indian Oil), concluded a voyage charterparty with the third appellant, Porto Emporios Shipping Inc., (Porto), for the carriage of 277 564 metric tonnes of crude oil (the cargo) on Porto's Ship, the *New Diamond* to India. En route from Kuwait to India the *New Diamond* caught fire, salvage services were rendered, a general average was declared and the voyage was abandoned. As a result, Indian Oil transhipped its cargo to two other vessels for onward carriage to India. Part of the cargo was lost and Indian Oil incurred losses in the amount of approximately USD 70 000 000. Consequently, Indian Oil is seeking payment from Porto in the sum of USD 73 047 429,33 plus Indian Rupees (INR) 701 361 274,99 together with interest and costs, being damages suffered by it, as a result of Porto's breaches of its obligations, under the bill of lading and charterparty, alternatively as a result of Porto's negligence or breach of its obligations to Indian Oil in bailment. Indian Oil is pursuing a claim for damages against Porto by way of arbitration proceedings in India.

On 30 May 2022, Indian Oil brought an urgent ex parte application before the high court for additional security for the arrest of the *New Endeavor* as an associated ship of the *New Diamond* in terms of s 3(6) read with s 3(7) of the Act. The application served before Mathenjwa AJ who granted an order in favour of Indian Oil. An application by *New Endeavor* for reconsideration of the above order in terms of rule 6(12)(c) of the Uniform Rules and for its release was dismissed with costs by Sibiya J on 15 December 2022. The present appeal serves before us with leave of the high court.

The single issue that fell to be determined in this appeal was whether Indian Oil discharged the onus of establishing, on a balance of probabilities, the alleged association between the respective ship owning companies of the *New Endeavor* and the *New Diamond*, the ship concerned, in circumstances where, rather than alleging a single source of control, Indian Oil asserted alternative sources of control.

The Appellants contended that by alleging alternative powers of control, Indian Oil failed to prove a single locus of control and therefore failed to establish the association asserted on a balance of probabilities. They further submitted that Adam (founder and owner of Polembros Shipping Limited, a family-owned ship management company) on his own or, separately, Adam and his children, controlled the respective ship owning companies. Therefore, Indian Oil's assertion that NSL owned or controlled the respective ship owning companies, was misguided. Indian Oil on the other hand contended that the appellants' argument was based on certain mischaracterisations, namely that: (a) Indian Oil had never deviated from its central allegation that there was at all material times a single source of control. It merely said that the identity of the single source was one or the other. This was mainly because the

appellants had refused to disclose who was in control. (b) when Indian Oil had alleged that NSL was in turn controlled by Adam, either by himself or together with his children, the appellants took the view that Indian Oil's case on association therefore rested on two mutually destructive alternatives. According to Indian Oil, however, there was no question of who the two different repositories of control of each ship owning company were. Control of both companies was exercised through a single source of control, namely, NSL and (c) that there was nothing in the founding papers to demonstrate the degree to which Adam controlled his children. Indian Oil's answer to this was that the founding affidavit made it clear that it was Adam who controlled and who had brought his children into the business, and who one day would succeed him as owner . . . whether and to what extent Adam was assisted by his children was irrelevant to the inquiry.

In its findings, the SCA held that regarding the issue of onus, it was well established that Indian Oil bore the onus of proving the alleged association on a balance of probabilities. Equally trite, held the SCA, was that security arrests in terms of s 5(3) could be brought by the arrest of an associated ship to the ship concerned. Therefore, according to the SCA, the important question for determination was whether the relevant vessels were associated with each other and who was the controlling force behind the companies that own the vessels. In response to that question, the SCA agreed with the high court and held that an association had been established by Indian Oil. It further held that on the evidence contained in the founding affidavit proof on a balance of probabilities showed that Adam was the central figure of control of NSL and that at the time the claim arose, the *New Endeavor* and the *New Diamond* were associated ships, both owned by NSL. It mattered not whether Adam exercised such control either by himself as head of the family or together with his children. The SCA also held that whilst ownership was recognised as a basis for association, the broader concept of control provided the principal focus of the associated ship jurisdiction in practice. The SCA further concurred with the high court and held that the extent to which Adam was assisted by his children was irrelevant to the inquiry. The identical repository and manner of control applied to each ship-owning company. This factual conclusion, in the absence of any evidence to the contrary from the appellants, satisfied the test for association. Thus in conclusion, the SCA held that it was satisfied that Indian Oil had discharged the onus resting on it on a balance of probabilities. The high court's findings on the issue of association were no doubt correct. In pleading the issue of control in the alternative as it did, Indian Oil was perhaps being cautious. This, according to the SCA was understandable. It was up to the appellants to controvert the evidence by placing credible evidence before the Court. They failed to do so. This was sufficient to tip the balance in favour of Indian Oil. In the result the appeal failed and it was accordingly dismissed with costs, such costs included those consequent upon the employment of two counsel.

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