THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 953/2024 and 923/2024

In the matter between:

MV "TAI HARMONY"	**FIRST APPLICANT**
TAI HARMONY MARITIME LIMITED	**SECOND APPLICANT**

and

SURE SUCCESS STEAMSHIP S.A	**FIRST RESPONDENT**
PERFECT BULK LIMITED	**SECOND RESPONDENT**

Neutral citation: *MV "Tai harmony" and Another v Sure Success Steamship S.A and Another* (953/2024 and 923/2024) [2026] ZASCA 60 (28 APRIL 2026)

Coram: MBATHA, MEYER and SMITH JJA and VALLY and NORMAN AJJA

Heard: 05 March 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 28 April 2026 at 11h00.

Summary: Maritime Law – Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act) – s 5(2)(*d*) of the Act – whether s 5(2)(*d*) of the Act was properly construed and whether the court a quo correctly directed that the security already furnished in respect of unpaid hire claim should be increased to secure unpaid bunker claim – s 5(2)(*d*) correctly construed by the high court – whether an order referring the issue of association to oral evidence is appealable – whether a case is made out in terms of s 19 of the Superior Courts Act 10 of 2013, to adduce further evidence on appeal – order not appealable – application struck off the roll – application to adduce further evidence not considered.

ORDER

On appeal from: Eastern Cape Division of the High Court, Gqeberha (per Rossi AJ in one matter and per Zilwa J in another matter sitting as court of first instance):

1 The appeal under case number 953/24 is dismissed with costs, including the costs of two counsel where so employed.

2 The interlocutory application to adduce further evidence under case number 923/24 is struck off the roll with costs, including the costs of two counsel where so employed.

3 The application for leave to appeal under case number 923/24 is struck off the roll with costs, including the costs of two counsel where so employed.

JUDGMENT

Mbatha JA (Meyer and Smith JJA and Vally and Norman AJJA Concurring)

Introduction

[1] This case concerns two different but related matters involving the same parties. They arose from different proceedings but were consolidated for hearing before this Court.

[2] The appeal in case number 953/2024 arose from the proceedings of the High Court Division, Eastern Cape, Gqeberha, per Rossi AJ (the high court) (exercising its Admiralty Jurisdiction). The application which served before the high court was for an increase in security in terms of s 5(2)(*d*) of the Admiralty Jurisdiction

Regulation Act 105 of 1983 (the Admiralty Act), which the high court granted. This matter now serves before us with leave of the high court.

[3] The second matter in case number 923/2024 arises from the refusal of an application for leave to appeal against an order issued by Zilwa J on 23 May 2023, directing that the issue of association be referred for the hearing of oral evidence. Zilwa J refused leave to appeal. The applicants thereafter approached this Court, and the matter was referred for oral argument in terms of s 17(2)(*d*) of the Superior Courts Act 10 of 2013 (the SC Act). The application for leave to appeal thus remains before this Court for determination. The appeal and the application for leave to appeal arise from the same factual matrix as the first matter.

Background Facts

[4] The appellants and applicants in the consolidated matters are MV "Tai Harmony" (Tai Harmony) and Tai Harmony Maritime Limited (Tai Harmony Ltd). The respondents are Sure Success Steamship S.A. (Sure Success) and Perfect Bulk Limited - Belize (PBL). I will interchangeably in this judgment refer to the parties herein as the appellants and the respondents, where the context requires.

[5] On 19 May 2022, Sure Success and PB Ltd concluded a time charterparty with PBL for the charter of the MV 'Ever Success' (the ship concerned), owned by Sure Success. The hire period was for 11 to 14 months. Amongst other material terms of the charterparty, it provided that PBL, as charterer, would pay the hire. At the same time, under clause 7 of the charterparty, PBL was obliged to provide and pay for all bunkers while the vessel was on hire. Most importantly, clause 23 provided that PBL would not permit any lien or encumbrance having priority over the owner's title and interest in the vessel. In addition, PBL undertook not to procure supplies or services,

including bunkers, on the credit of Sure Success. The charterparty also provided that English law would govern the relationship between the parties and that disputes would be referred to arbitration in London.

[6] PBL took delivery of the ship concerned on 29 June 2022. It was redelivered to Sure Success on 9 May 2023, earlier than the agreed date. This resulted in Sure Success asserting (claiming) unpaid hire charges. A further claim by Sure Success arose from an unpaid bunker stem which occurred between 31 December 2022 and 15 January 2023, in Vizag, India, relating to the supply of approximately 999,95 metric tonnes of fuel. Sure Success alleged that PBL had breached the charterparty and demanded payment for the alleged claims. Consequently, Sure Success pursued the arbitration route in London, with the aim of recovering the losses arising from the alleged contractual breaches. These claims were met by PBL's denial of liability.

[7] PBL denied liability on several grounds. It contended that it was not involved in the bunker stem and that, as a matter of English Law, no lien attaches over a ship concerned arising out of a time charter. Sure Success ultimately settled the bunker stem liability with the contractual suppliers in the sum of USD 350 000. Sure Success alleged that it did so to protect its interests. Having made this payment, it called upon PBL to indemnify it for its losses but received no acknowledgment of liability from PBL.

[8] On 19 January 2024, Sure Success sought leave to amend its claims to incorporate the bunkers claim as part of the arbitration proceedings in London. The bunkers claim was subsequently incorporated into the claims that served before the London Arbitration.

[9] Prior to the incorporation of the bunkers claim in the London arbitration, on 18 August 2023, Sure Success had caused the arrest of Tai Harmony on South African shores to secure its claim in the London arbitration. The arrest was effected in terms of s 5(3) of the Admiralty Act, pursuant to an order granted by Makaula ADJP on 18 August 2023, in the Gqeberha High Court. The security sought for the release of Tai Harmony related only to the unpaid hire claim. At the same time, Sure Success, in its founding affidavit, expressly reserved its rights to seek increased security in respect of the bunkers claim. At that stage, the bunkers claim had not yet crystallised, as Sure Success was still negotiating with the contractual suppliers of the bunkers. The claim became quantifiable only upon Sure Success's payment in settlement of the contractual suppliers' claim.

[10] On 22 August 2023, Tai Harmony and Tai Harmony Ltd furnished security for the unpaid hire claim by way of a Gard Letter Of Undertaking (the LOU) in the amount not exceeding USD 876 000.84. This led to the release of Tai Harmony.

[11] Before Makaula ADJP, Sure Success advanced that Tai Harmony Ltd was the registered owner of the associated ship, Tai Harmony, as confirmed by the Sea Searcher Report. The Sea Searcher Report also indicated that the beneficial owner of Tai Harmony is Perfect Shipping Co. Limited (Perfect Shipping), a company registered in Hong Kong. Sure Success contended that both Perfect Shipping and Tai Harmony Ltd were ultimately owned and controlled by Zheng Jiangwei (ZJ), who was the sole shareholder. In addition, it was submitted that the time charterer, PBL, was at all material times owned and controlled by ZJ.

[12] Sure Success further contended that PBL was a special purpose vehicle established solely to conclude the charterparty and that it neither owned vessels nor

possessed assets capable of satisfying any arbitral award. Despite demands for payment addressed to PBL's legal representatives, HFW and Reed Smith in Hong Kong, no substantive response was received. In these circumstances, Sure Success inferred that PBL would be unable to satisfy any award made in its favour. Accordingly, it maintained that it had demonstrated both a prima facie claim and a genuine and reasonable need for security in terms of s 5(3)*(a)* of the Admiralty Act, given the real risk of non-payment.

[13] Accordingly, Makaula ADJP found that Sure Success had established all the jurisdictional requirements set out in s 5(3)(*a*) of the Admiralty Act and granted the orders as prayed for by Sure Success. On 18 September 2023, Tai Harmony, Tai Harmony Ltd, and PBL brought an application to set aside the arrest on the basis that Tai Harmony was not associated with the ship concerned. This application was set down for hearing on 9 May 2024.

[14] Upon the settlement of the bunkers claim by Sure Success on 13 November 2023, Sure Success contended that the security furnished as per Makaula ADJP's orders were no longer adequate for the two claims. A demand for increased security was addressed to the solicitors of Tai Harmony and Tai Harmony Ltd on 4 December 2023. Liability for increased security was denied on 6 December 2023. This prompted Sure Success to lodge an urgent application seeking increased security for the amount of USD 435 508.50 in respect of the unpaid bunkers claims. At that stage, the bunkers claim had already been incorporated in the London arbitration proceedings.

[15] The urgent application served before Rossi AJ. The high court held that urgency was justified by the imminent hearing of the application to set aside the

arrest of the Tai Harmony. It found that the deviation from ordinary periods was minimal and appropriate.

[16] On the merits, the high court dismissed the lack of jurisdiction challenge, failure to establish a prima facie case, and the alleged absence of an association between PBL and Tai Harmony and Tai Harmony Ltd. Consequently, it granted the following orders in favour of Sure Success:

'1. The security currently provided to and held by the Applicant in the Gard Letter of Undertaking dated 22 August 2023 (the 'Gard LOU') be increased by the amount of USD 435 508.50, as additional security for the Applicant's unpaid bunker claim against the Third Respondent, in terms of s 5(2)(*d*) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the top-up security').

2. The top-up security shall be in the form of either:

2.1 An additional letter of undertaking in the amount of USD 435 508.50 in respect of the unpaid bunker claim issued in favour of the Applicant on the same terms as the Gard LOU; or

2.2 A new letter of undertaking for the increased amount of USD 1 311 509.34 (being USD 876 000.84 in respect of the unpaid hire claim and USD 435 508.50 in respect of the unpaid bunker claim) on the same terms as the Gard LOU, but will replace the Gard LOU.

3. The Respondents are directed to furnish the top-up security to the Applicant within 5 (five) court days of the grant of this order, failing which the Applicant is granted leave, on notice to the Respondents to approach this court on the same papers, duly supplemented for an order setting aside the Second Respondent's application to set aside the arrest of the TAI Harmony and/or such further and alternative relief as this court may be (sic) deem appropriate.

4. The costs of this application shall be costs in the cause of the setting aside application.'

[17] The high court, in coming to the aforementioned conclusion, made the following findings on the merits of the case. On the assertion that it lacked jurisdiction to entertain the topping-up application, it held that the high court was vested with jurisdiction as it had already exercised admiralty jurisdiction through the security arrest. The respondents had submitted to its jurisdiction by furnishing

security and by filing an application to set aside the arrest. It further held that it was empowered by s 5(2)(*d*) of the Admiralty Act to increase security in respect of 'any claim', including a claim pursued in foreign arbitration proceedings.

[18] The high court was satisfied that Sure Success had established a prima facie case, which was a low-level test for the granting of additional security. It held that, on a prima facie basis, PBL was obliged under the charterparty to pay for bunkers and not to permit a lien to arise over the ship concerned. In addition, it was satisfied that a genuine and reasonable need for additional security was required. This was on the basis that PBL was a special purpose vehicle incorporated in Belize, an opaque jurisdiction. Furthermore, PBL had no identifiable assets and had failed to secure Sure Success' claim. Absent the increased security, it held that there was a likelihood that Sure Success would not be able to recover its claim if successful in the London Arbitration.

[19] In the exercise of its discretion, having weighed all the facts before it, the high court rejected the contention that the quantum of security should be limited to the value of the arrested vessel (the *res*). It accepted that the quantum claimed was properly motivated by Sure Success.

The First Appeal: Additional Security Under Section 5(2)(d) of the Admiralty Act

[20] Before this Court, Tai Harmony and Tai Harmony Ltd submitted that the high court misdirected itself in upholding the arrest and granting the topping-up order.

a) First, they submitted that there was no basis for the associated arrest of Tai Harmony, as ZJ did not control PBL at any relevant time. On that aspect, it was advanced that this Court should not follow the approach adopted in *MV*

Heavy Metal; Belfry Marine Ltd v Palm Base Maritime SDN BHD (the *Heavy Metal*).[1] The majority judgment in the *Heavy Metal*, has always been followed as authority on the question of control in terms of s 3(7)(*b*) of the Admiralty Act. They argued that the minority view should have been followed.

b) Second, they argued that since the arrest was flawed, the topping-up application, which is subordinate to the arrest, was also invalid. In the absence of a valid arrest warrant, there was no legal basis for the increase in security. On that basis, they argued, the application for topping-up should have been rejected.

c) Third, they submitted that Sure Success failed to establish a prima facie case for the bunkers claim. They averred that the bunkers were supplied to the ship concerned at the instance of a sub-charterer and not PBL. PBL did not incur the liability to the contractual suppliers, which Sure Success settled. In that regard, Sure Success failed to establish a contractual relationship between them and the contractual suppliers. Furthermore, no lien under US law would attach to the ship concerned. In settling the claim, Sure Success went on a frolic of its own.

d) Fourth, that Sure Success failed to disclose the defences that they raised in the London Arbitration in relation to the bunkers claim. Those defences were relevant as to whether a prima facie claim existed.

e) Fifth, that the high court misdirected itself in the exercise of its discretion, Tai Harmony Ltd was irregularly dragged to the jurisdiction of the court by an ex parte arrest, the merits of which were contested, and where already substantial security had already been paid. The additional topping-up security aggravated the prejudice.

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[1] *MV Heavy Metal; Belfry Marine Ltd v Palm Base Maritime SDN BHD* [1999] ZASCA 44; [1999] 3 All SA 337 (A); 1999 (3) SA 1083 (SCA).

f) Last, they also raised other consequential procedural grounds, which I will deal with later.

[21] Conversely, Sure Success submitted that the application in terms of s 5(2)(*d*) of the Admiralty Act to increase security fell within the jurisdiction of the high court. In terms of s 5(2)(*d*) of the Admiralty Act, the high court was empowered to order additional security where it considered it necessary to do so. The arrest remained extant, and on that basis, the high court had jurisdiction to increase security. An arrest order remains binding until set aside. In addition, it was contended that the high court had no authority to revisit the association issue when considering the topping-up application. Besides that, Sure Success was satisfied that it produced sufficient and tangible evidence of the associated ship link between the two vessels. Sure Success maintained that the *Heavy Metal* judgment remains the binding authority of this Court, and there was no basis to revisit it under the doctrine of *stare decisis*, merely because it has been criticised by certain prominent Maritime Law authors.

[22] In relation to the bunkers claim, Sure Success submitted that the respondents were contractually liable *in personam*, and that it acted reasonably in settling the claim to protect its interests. It further emphasised that the bunkers claim had been incorporated into the London Arbitration proceedings. Sure Success also contended that there was no duty upon it to disclose the confidential submissions made in those proceedings. Finally, it denied that any procedural irregularities arose in the bringing of the topping-up application to justify appellate interference.

[23] Section 5(2)(*d*) of the Admiralty Act provides as follows:

'A court may, in the exercise of its admiralty jurisdiction –

(d) notwithstanding the provisions of section 3(8), order that in addition to property already arrested or attached, further property be arrested or attached in order to provide additional security for any claim, and order that any security given be increased, reduced or discharged, subject to such conditions as to the court may appear just.'

It is apposite that I also set out the provisions of s 3(8) of the Admiralty Act. That section provides that -

'[p]roperty shall not be arrested and security therefor shall not be given more than once in respect of the same maritime claim by the same claimant.'

[24] It is trite that the claimant seeking additional security bears the onus of proof in an application for topping-up. The claimant must prove, on a prima facie basis, that the security already held is insufficient to support a claim. In addition, the claimant must demonstrate that there is a genuine and reasonable need for security. The claimant carries the duty to make a full and frank disclosure of all the material facts, as such applications are generally brought on an *ex parte* and urgent basis. If a claimant successfully makes out a prima facie case for additional security, the burden may shift to the respondent to prove why such security should not be granted.

[25] The arrest of Tai Harmony for security was based on its association with the ship concerned. At all material times, PBL was the time charterer of the ship concerned in terms of the deeming provisions of s 3(7)(*c*) of the Admiralty Act. Section 3(7)(*c*) of the Admiralty Act provides that 'if a charterer or sub-charterer of a ship by demise, and not the owner thereof, is alleged to be liable in respect of a maritime claim, the charterer or sub-charterer, as the case may be, shall for the purpose 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 sub-charterer, and not the owner, is alleged to be liable'. This Court in *MV Nyk Isabel Northern Endeavour Shipping Pte Ltd v Owners of MV Nyk Isabel and Another* (the

Isabel),[2] confirmed, albeit indirectly, that s 3(7)(*c*) of the Admiralty Act includes all types of charterparties. This is in line with the intended purpose of the enactment of the association, in that it prevents the frustration of a maritime claim.

[26] In establishing a prima facie case, the claimant has to establish that it has a maritime claim against the respondent party against whom security is sought.[3] It must also be established on a prima facie basis that it has a claim with reasonable prospect of success in the main action that will be enforced in the forum in respect of which security is sought.[4] Section 5(2)(*d*) of the Admiralty Act vests the high court with a wide discretion to vary security, which falls to be exercised judicially having regard to all the relevant circumstances. Following the grant of an initial security order, the South African courts retain an oversight role, although such oversight does not extend to determining the merits of the claim.

[27] It is common cause that security was provided in respect of the first claim, which related to the breach of hire of the ship concerned. The first thing that Rossi AJ had to consider was whether Sure Success established that it has a maritime claim. Clause 7 of the charterparty provides that 'The Charterers, while the vessel is on hire, shall provide and pay for all bunkers except as otherwise agreed…'. In relation to the topping-up application, clause 9(*b*) of the charterparty specified that the charterers shall supply bunkers of a quality suitable for burning in the vessels' engines. The owners reserved the right to claim against the charterers for any damage to the engines caused by the use of unsuitable fuels. These clauses of the charterparty

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[2] *MV Nyk Isabel Northern Endeavour Shipping Pte Ltd v Owners of MV Nyk Isabel and Another* [2016] ZASCA 89; [2016] 3 All SA 418 (SCA); 2017 (1) SA 25 (SCA).
[3] Op cit fn 1 para 46.
[4] Ibid.

appear to expressly state who was responsible for the bunkers. There is no clause in the charterparty which creates an exception to clause 7 in respect of a sub-charterer.

[28] A settlement agreement with the contractual suppliers embodying the settlement terms was attached to the application which served before the high court. The undisputed fact is that the claim for bunkers has been incorporated into the London Arbitration proceedings, which confirms its existence on a prima facie basis. The nature of the defences raised in those proceedings is of no relevance to the topping-up application.

[29] Clauses 3(*c*) and 4(*c*) of the general terms and conditions of sale provide that the order of the bunkers was considered to emanate from the Master of the vessel. Therefore, delivery of the bunkers to the vessel created a primary lien over the vessel. It also provided that the US laws shall always apply with respect to the existence of a maritime lien, regardless of where the maritime action is taken. This confirms that Sure Success had no alternative other than to settle the liability to protect its interest from the contractual suppliers. A genuine and reasonable need for security has been established.

[30] The respondents have not disputed that PBL is a special-purpose vehicle formed solely to enter into contractual arrangements, such as charterparties. They have not rebutted the allegations that it is not a ship-owning company, but a mere shell. Furthermore, despite demand for payment of the bunkers liability through its solicitors, no substantive responses were received. It therefore appears that PBL would not be in a position to settle an award in favour of Sure Success.

[31] At the time of the arrest of the Tai Harmony, Sure Success had reserved the right to increase security in respect of the unpaid bunkers claim. At that stage, the claim had not yet crystallised. It was only upon reaching a settlement with the contractual suppliers that the bunkers claim crystallised. The security provided as per the LOU, dated 22 August 2023 evidences that factor.

[32] Tai Harmony and Tai Harmony Ltd submitted that the high court failed to address the question of association in the topping-up application. They argued that the topping-up is inherently subordinate to the arrest, and that in the absence of a valid arrest, there is no basis for ordering additional security. It was further contended that the high court did not properly consider the value of the *res* in granting the order. They also submitted that the high court misdirected itself in finding that the respondents submitted to the high court's jurisdiction. In fact, they argued, the high court had no jurisdiction over Tai Harmony Ltd. Accordingly, the high court lacked the authority to increase security, and Sure Success have failed to comply with the provisions of s 3(2)(*d*) of the Admiralty Act.

[33] Conversely, Sure Success submitted that it had only to satisfy the jurisdictional requirements of s 5(2)(*d*) of the Admiralty Act. The high court correctly construed s 5(2)(*d*) of the Admiralty Act and properly ordered the provision of additional security. The high court had no duty to consider whether the arresting court had properly construed the association, as the topping-up application requires only that there be an extant order for security, the establishment of a maritime claim on a prima facie basis, and a genuine and reasonable need for security.

[34] The high court correctly found that the requirements for arrest under s 5(3)(*a*) of the Admiralty Act had been satisfied in an *ex parte* application which served

before Makaula ADJP, that is, a prima facie claim enforceable by a claim *in personam* against the owner concerned or against the *res*. In that matter, the claim was *in personam*, as it related to the failure to pay the hire, that is, a breach of a contractual obligation. Sure Success had also established that there was a genuine and reasonable need for security. PBL was used only as a special vehicle to enter into charterparties but did not own any vessels or assets that could be attached to settle Sure Success's claim in the event of it being successful in the London Arbitration proceedings. It was always contemplated that the arrested vessel would provide security; however, in practice, it is the owner who does that.

[35] Section 5(2)(*d*) of the Admiralty Act is directed at conferring powers to be exercised on matters wherein Admiralty jurisdiction has already been exercised by arrest, attachment, submission, or otherwise. Tai Harmony and MV Tai Harmony Ltd relied on the judgment in *The MV Zlatni Piasatzi: Frozen Foods International Ltd v Kudu Holdings (Pty) Ltd and Others*,[5] where it states that a security arrest is a device for bringing the *res*, and not a person before the high court. Furthermore, that the application for increased security is personal in nature and cannot be entertained <u>unless the court</u> <u>has jurisdiction over the person of the respondent</u>.[6] (Emphasis added) As a result, Sure Success cannot rely on the arrest of Tai Harmony to establish jurisdiction. This proposition made by the appellants contradicts s 4(4)(*a*) of the Admiralty Act, which provides as follows:

'Notwithstanding anything to the contrary in any law relating to attachment to found or confirm jurisdiction, a court in the exercise of its admiralty jurisdiction may make an order for the attachment of the property concerned although the claimant is not an incola either of the area of jurisdiction of that court or of the Republic.'

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[5] *The MV Zlatni Piasatzi: Frozen Foods International Ltd v Kudu Holdings (Pty) Ltd and Others* 1997 (2) SA 569 (C) at 575B-C.
[6] Ibid at 575G-I.

It is also contrary to the findings in *Cargo Laden and Lately Laden On Board The MV Thalassini Avgi v MV Dimitris* (*The Thalassini Avgi*) *case and MV Pasquale Della Gatta; MV Filippo Lembo; Imperial Marine Co v Deiulemar Compagnia Di Navigazione Spa* judgments,[7] which confirm that the purpose of a security arrest is not to found jurisdiction or confirm jurisdiction.

[36] This Court in the *Isabel* dealt with the question whether a slot charterer under s 3(7)(*c*) qualifies as a charterer in terms of the Admiralty Act.[8] In *Isabel*, it was held that once slot charterers were recognised as charterers under s 3(7)(*c*) of the Admiralty Act, the logical consequence was that NYK was deemed to be the owner of the Northern Endeavor for purposes of liability.[9] Since NYK controlled the company that owned the MV Isabel, the statutory requirements for an associated ship arrest were satisfied.[10] This Court emphasised that the deeming provision does not alter private law rights between the owner and a charterer, it merely enables procedural enforcement.[11] This significantly reinforced the principle that an associated ship arrest is a procedural enforcement tool, not a reallocation of substantive ownership or contractual responsibility.

[37] The security provided after the arrest of Tai Harmony specifically addressed the owner's liability, arising from a breach of contract. In cases where provision of security has been provided, the South African courts retained jurisdiction on the

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[7] *Cargo Laden and Lately Laden On Board The MV Thalassini Avgi v MV Dimitris* [1989] ZASCA 76; [1989] 3 SA 820 (A);*See also MV Pasquale Della Gatta*; *MV Filippo Lembo*; *Imperial Marine Co v Deiulemar Compagnia Di Navigazione Spa* 2012 (1) SA 58 (SCA); [2011] ZASCA 131; 2012 (1) SA 58 (SCA); [2012] 1 All SA 491 (SCA) para 23.
[8] Op cit fn 2 para 30.
[9] Ibid.
[10] Ibid.
[11] Op cit fn 2 para 29.

basis that there is a continuing deemed arrest of the arrested ship in terms of s 3(10)(*a*)(i) of the Admiralty Act, which provides as follows:

'Property shall be deemed to have been arrested or attached and to be under arrest or attachment at the instance of a person if at any time, whether before or after the arrest or attachment, security of the property or to obtain the release thereof from arrest or attachment or an undertaking has been given to prevent the arrest or attachment of the property or to obtain the release thereof from arrest or attachment.'

The continued deemed arrest also entitled Tai Harmony and Tai Harmony Ltd to challenge the validity of the original arrest.

[38] In *Transnet Ltd v The Owner of the MV 'Alina II'* (the *Alina II*),[12] it was held that when the *Alina II* entered an appearance to defend, it had a duty to establish who is the defendant, the owner or the *res* by invoking Rule 22(2)(*b*)(i) of the Admiralty Proceedings Rules to ascertain the identity of the defending party. This court went further to say that, 'by giving notice of intention to defend the action the owner of the *Alina II* came to the South African court to resist allegations that it was in breach of contractual obligations or alternatively guilty, directly or vicariously, of negligence for which it was liable in delict'.[13] An important question was raised, 'whether the owner of the *Alina II* submitted itself to the jurisdiction of the South African court in respect of these claims and that such a submission may occur without any proceedings yet having been brought against the owner'.[14]

[39] Submission is a question of fact, as found in the *Alina II*, it can arise from conduct in litigation commenced against a person before a court that lacks

[12] *Transnet Ltd v The Owner of the Alina II* [2011] ZASCA 129; 2011 (6) SA 206 (SCA); [2011] 4 All SA 350 (SCA) para 11.
[13] Ibid para 12.
[14] Ibid para 13.

jurisdiction in respect of that person or claim.[15] In this case, the entry of intention to defend was not qualified or limited in any way. The appellants even requested further particulars, which is an indication of submission to the jurisdiction of the court. In cases that involve the associated ship provisions, security provided by the respondent, even if they dispute association, brings the matter under the jurisdiction of the court.

[40] The challenge to the validity of the arrest based on the issue of association can only be challenged in the setting aside application. It is only in those proceedings that the appellants should have challenged the findings on the association. It is not for the court that deals with the topping-up application to reconsider the issue of association. It does not sit as a reviewing or court of appeal.

[41] It is incorrect for the appellants to suggest that the security arrest does not bring the owner within the court's jurisdiction. Though the arrest is directed at the *res*, it serves to bring the owner within the court's jurisdiction. In this case, the owners were cited as parties to the litigation. In *Isabel*, this Court, in analysing rule 8(2) of the Admiralty Proceedings Rules (the Rules),[16] found that it was textual and purposive. Its wording expressly states that a person entering an intention to defend does so 'as a party'.[17] This Court rejected the argument that formal joinders were required, highlighted the practical and cost-effective nature of admiralty proceedings and found that requiring additional procedural steps would undermine the efficiency that admiralty law seeks to promote, given the transient nature of maritime defendants.[18] This reasoning promotes procedural certainty and avoids artificial

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[15] Op cit fn 12 para 14.
[16] Admiralty Proceedings Rules, GN R571, 18 April 1997 (as amended).
[17] Op cit fn 2 para 34.
[18] Ibid.

distinctions between vessels and their interested owners once an appearance is entered.

[42] Topping-up proceedings are not a distinct action *in personam* from the security proceedings. The suggestion by counsel for the appellants that the requirements of s 3(2) of the Admiralty Act ought to have been complied with is misplaced. Section 3(2) of the Admiralty Act provides that an action *in personam* may only be instituted against a person who is -

'(a) resident or carrying on business at any place in the Republic;

(b) whose property within the court's area of jurisdiction has been attached by the plaintiff or applicant, to found or confirm jurisdiction;

(c) who has consented or submitted to the jurisdiction of the court;

(d) in respect of whom any court in the Republic has jurisdiction in terms of Chapter IV of the Insurance Act, 1943 (Act 27 of 1943);

(e) in the case of a company, if the company has a registered office in the Republic.'

In *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi vs MV Dimitris,* this Court made it clear that a security arrest is a proceeding that is different from an attachment to found or confirm jurisdiction.[19]

[43] Wallis JA in *Imperial Marine Company v Motor Vessel Pasquale Della Gatta*[20] stated as follows:

'A security arrest is not directed at establishing the court's jurisdiction in future proceedings but at obtaining final relief in the form of an order that security be provided for the outcome of proceedings in another forum, usually in another jurisdiction. This is a special jurisdiction vested in our courts under the Act and in determining whether to order an arrest it is inappropriate for the court to shut its eyes to admissible and relevant evidence that is not and cannot be disputed.'

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[19] *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi vs MV Dimitris* 1989 (3) SA 820 (A).

[20] *Imperial Marine Company v Motor Vessel Pasquale Della Gatta* 2011] ZASCA 131; 2012 (1) SA 58 (SCA); [2012] 1 All SA 491 (SCA) para 23.

[44] In fact, the effect of the security arrest is to compel the owner to provide security for a claim, at the risk of losing the vessel. Protection is only afforded to third parties, like the mortgagee, who has entered an appearance to defend. Such third parties can only incur liability for costs, but not for the claim. Security arrest is also distinguishable from an ordinary action *in rem*, where the applicant has to satisfy the requirements of the provisions of s 3(2) of the Admiralty Act. In this case, I find that the high court had jurisdiction to entertain the topping-up claim, and there was no need to attach and establish jurisdiction for the topping-up security claim. The bunkers claim is contractual and therefore an *in personam* claim. This puts paid to the suggestion that the security exceeded the value of the *res*.

[45] The bunkers claim was expressly mentioned in the security arrest. There was also no defence raised in the papers that the initial security had also covered the bunkers claim. The bunkers claim was also foreshadowed in the LOU for the initial security arrest. The LOU specifically states that 'which claim remains subject to the crystallisation and in terms of which the right to obtain top-up security is strictly reserved'. The suggestion by counsel for the appellants that the initial security covered the bunkers claim is misplaced. Sure Success detailed the amounts that were required for security in their founding papers. The appellants did not challenge the figures in their answering affidavit, nor did they allege that the amount was inclusive of the bunkers claim. In fact, in the LOU it was recorded that the bunkers claim was subject to crystallisation and 'in terms of which the right to obtain top-up security is strictly reserved.' If the bunkers claim was already included in the security it would make no sense to have it 'crystallised'.

[46] The purpose of the LOU was set out in the founding affidavit. It only recorded that it was furnished without admission of liability and without prejudice to the right

and contention of the owners of the Tai Harmony. Nowhere did it record that it was inclusive of the bunkers claim.

[47] Security arrest is procedural in nature, directed against the owner, rather than the *res*. This is so, because of the owner's personal liability. It was submitted on behalf of the appellants that this Court should apply the principles in *The Monica S* [21]and the *Dictator*.[22] According to M Wallis[23] the *Monica S* approach is used to validate the arrest, while South African law has tailored the *Dictator* principles to ensure that security arrests serve their specific purpose without automatically imposing full liability on ship owners. Those principles were found not to be compatible with the Admiralty Act or the Constitution. At arrest, the claimant acquires a statutory lien over the vessel. This accrues as of the date of arrest. An arrest whether actual or deemed is an essential feature of the security arrest. The owner of the vessel is impleaded irrespective of the outward form of the proceedings. It is only when he does not intervene that the claim will be limited to the value of the *res*. The claimant will then have the option of proceeding with an action *in rem*.

[48] In *Alina II*, the claim was based on personal liability of the owner of the vessel who was arrested *in rem* by virtue of s 3(4)(*b*) of the Admiralty Act. The vessel was again arrested by four creditors. The appellant, Transnet, attached the vessel, *ad fundandam et confirmandam jurisdictionem* upon being advised that security can only be limited to the value of the *res*. The owner of the vessel opposed the attachment, contending that it was impermissible and that the first attachment led to the submission to the jurisdiction of the court. This Court held that a claimant whose

[21] *Monica S* [1967] Vol. 2 *Lloyds List Law Reports* 115.
[22] *Dictator* [1892] 1891 Aller Reports 360.
[23] M Wallis, *The Associated Ship* (2010) at 367.

debt has not been satisfied after proceeding *in rem* is entitled to pursue a claim *in personam* thereafter. This would be the case where the claim exceeds the value of the *rem* and is not defended. The claimant may pursue the claim *in personam* by attaching the *res*. This case is distinguishable from *Alina II*. The appellants submitted that for the topping-up claim, Sure Success ought to have attached the property of the appellants to found jurisdiction. In *Alina II*, this Court found that when it entered an appearance to resist that it was in breach of a contractual or delictual obligation, those issues concerned the liability of the owner. Similarly, in this case the appearance was not qualified, even though this was a security arrest and not an *in rem* action. The provision of security under the LOU in terms of s 3(10)(*a*) of the Admiralty Act is considered a submission to jurisdiction. In that case, security can be increased, even where the association is disputed.

[49] A very important feature of a security arrest is that a claim can exceed the value of the vessel. The appellants have not given the value of the vessel to support their argument that the security exceeds the value of the *res*. A claim for unpaid bunkers is not exclusively a claim *in rem*. It is a claim *in personam* that can be enforced *in rem* in many jurisdictions. Security for a claim does not strictly have to be limited to the value of the *res*. Security is generally governed by the value of the claim.

[50] On the question of whether there was an irregularity in entertaining the topping-up claim on an urgent basis, I find that the high court did not misdirect itself. Such applications are urgent by their nature. Sure Success gave a full disclosure of all the pertinent facts in the urgent application. Accordingly, I dismiss the appeal with costs, including the costs of two counsel where so employed.

The Second Appeal: Appealability of Referral to Oral Evidence and Application for Leave to Appeal

[51] I now proceed to deal with the application for leave to appeal under case number 923/2024. In this application, the applicants, Tai Harmony and Tai Harmony Ltd (the applicants), sought an order for leave to appeal against the judgment and order of the Eastern Cape Division of the High Court, Gqeberha (the high court), per Zilwa J. In addition, the applicants requested the setting aside of the costs order granted by the high court in dismissing the application for leave to appeal, as well as that the costs of this application and the costs of the application for leave to appeal before the high court, be costs in the appeal.

[52] This application involves the determination of various issues. First, whether a referral of an issue in an opposed motion for the hearing of oral evidence constitutes a final judgment and is thus appealable. Second, whether the application for leave, referred to oral argument under s 17(2)(*d*) of the SC Act, should be granted. Third, if so, whether this Court should interfere with the high court's discretion to refer the issue of association to oral evidence. Last, whether this Court should grant an order admitting new evidence on appeal.

[53] This application is directly linked to the security arrest proceedings under s 5(3) of the Admiralty Act initiated by Sure Success for the arrest of Tai Harmony. Following the applicants' provision of security and the release of Tai Harmony, the applicants filed an application to set aside the arrest. The security arrest was challenged on the basis that the Tai Harmony is not an associated ship with the ship concerned. Sure Success opposed the application on several grounds.

[54] After considering the parties' submissions, the high court issued the following orders:

'29.1. The application is postponed to a date to be arranged with the Registrar of this Honourable Court for the hearing of oral evidence on the issue of association.

29.2. Zheng Guanwei (ZG), Zheng Jiangwei (ZJ), and Feng Shuo are directed to testify at such hearing.

29.3. Within 30 days of this order's issuance, the parties shall take a discovery oath in terms of Uniform Rule 35 of this Court's Rules.

29.4. If any party wishes to introduce the testimony of any witness other than those who have deposed to affidavits in this application, they must file witness statements in the form of an affidavit no later than 30 days before the scheduled hearing for oral evidence.'

[55] Dissatisfied with the outcome, the applicants sought leave to appeal the decision of the high court to this Court, in the alternative, to the Full Court of the Eastern Cape Division of the High Court. The application for leave to appeal, opposed by Sure Success, was dismissed with costs. They then sought leave to appeal from this Court. On 7 October 2024, the said application was referred for oral argument before this Court under s 17(2)(*d*) of the SC Act. The parties were also directed to be prepared, if called upon, to address the court on the merits.

[56] The merits of the application for leave to appeal must be considered against the background of the test for leave to appeal. It is now trite that section 17(1)(*a*)(i) of the Superior Courts Act[24] have raised the threshold for grating leave to appeal. Bertelsmann, J in *The Mont Chevaux Trust v Goosen*[25] explains:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van*

[24] Act 10 of 2013.

[25] *The Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC) para 6.

Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'

This Court in *S v Smith*[26] also had occasion to consider what constituted reasonable prospects of success in terms of section 17(1)(*a*)(i):

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

There must therefore exist more than just a mere possibility that another court will, not might, find differently on both facts and law.

[57] The applicant's dissatisfaction before this Court primarily rests on the high court's referral of the association issue to oral evidence, which it challenged. They submitted that, properly applying the principles governing referrals to oral evidence in motion proceedings, nothing precluded the high court from deciding the application to set aside the arrest on the papers before it. They contended that the high court misdirected itself on this aspect, as there was sufficient evidence before it to determine the issues at hand. In addition, referral to oral evidence should only be made where there are strong indications that *viva voce* evidence will materially affect the probabilities.

[26] *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

[58] It was further contended that the ordering of specified foreign deponents to give *viva voce* evidence was a gross misdirection by the high court. The main reason being that the applicants pointed out that the proceedings in the setting aside application were ancillary to the main proceedings, scheduled before the London Arbitration. As a result, the direction to summon the *peregrini* to testify in the ancillary proceedings would be detrimental to the applicants and have no final effect. More so, the proceedings in South Africa did not relate to the merits of the matter, but to the security arrest. It was also pointed out that the said direction by the high court would lead to inordinate delays, which would be prejudicial to the applicants.

[59] The applicants further advanced that a prolonged trial would cause them to suffer ongoing financial prejudice, having provided security, whilst Sure Success remained secure in the order granted in its favour. It was pointed out that the high court addressed a single enquiry related to the control of Tai Harmony Ltd but failed to deal with the issue of control in respect of PBL. Most importantly, the applicants, advanced that the high court lacked jurisdiction over the foreign deponents, who are not subject to the South African courts' personal jurisdiction. Moreover, there was no evidence indicating their submission to the jurisdiction of the high court. In that regard, Rule 6(5)(*g*) of the Uniform Rules of Court cannot be used to compel foreign deponents to testify before courts that have no jurisdiction over them.

[60] The applicants further contended that the contentious issue of association, which was referred to oral evidence, was a cornerstone of both the topping-up and setting-aside applications. Consequently, this Court would be well-positioned to determine the existence of the association in both matters. On the merits, the applicants submitted that this Court should set aside the arrest; alternatively, materially vary the terms of the high court order. In the determination of the merits,

they advanced the argument that the association, at the time when the claim arose and at the time of the arrest of MV Tai, had not been established by Sure Success. Last, this Court was implored to grant and consider a separate application to adduce further evidence. This evidence related to the admission of the 2024 Annual Returns, that, according to the applicants, would prove that (ZJ) was not in control of Tai Harmony Ltd at the time of the arrest of Tai Harmony.

[61] Conversely, Sure Success submitted that there was no misdirection on the part of the high court in referring the issue of association to oral evidence, due to multiple disputes of facts on the papers before the court. The referral to oral evidence was justified based on objective facts. Sure Success argued that the appeal was not ripe as the court had not yet fully determined the issue of control, and that there was nothing amiss with its failure to decide on association in relation to PBL. Sure Success strongly opposed the admission of new evidence on appeal, arguing that the applicants' 2024 Annual Returns were not conclusive. They highlighted several anomalies and inconsistencies in the 2024 Annual Returns.

[62] Sure Success also challenged the appealability of the high court's order, arguing that it was not final in nature and thus not appealable. On the merits, it submitted that this Court should not interfere with the exercise of the high court's discretion to refer the issue of association to oral evidence on non-existent grounds.

[63] The initial consideration for this Court is whether the high court order is appealable. This is a jurisdictional issue. Absent an appealable decision, this Court would have no authority to entertain the application by the applicants. In addition, the finding of appealability will have a direct impact on whether this Court should grant the application for leave to appeal.

[64] On the question of appealability, Sure Success submitted that the high court order was not appealable on the grounds of its interim nature. It is interlocutory and does not definitively determine the parties' rights. Consequently, it fell outside of the *Zweni v Minister of Law and Order* (*Zweni*)[27] triad. In addition, the order granted by the high court left the door open for any of the litigants to approach the court to relax any of the orders granted by the high court. For instance, the applicant's representative could bring an application to adduce evidence virtually. On the other hand, the applicants contended that the order was final in effect, more so because it failed to take into account that the court had no jurisdiction over the foreign deponents it ordered to give oral evidence before it.

[65] The traditional approach to appealability of court orders is generally regarded as being that set out in *Zweni*. In that case it was held that for an order to be appealable, 'the decision must be final in effect and not susceptible to alteration by the court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings'.[28] These principles have been confirmed in various decisions as extrapolated in the judgment of this Court in *FirstRand Bank Ltd v McLachlan and Others*.[29] However, as noted recently by this Court, there have subsequently been significant developments in our law in this regard.

[66] In *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and others* (*TWK*),[30] this Court dealt with the issue of appealability and, in

[27] *Zweni v Minister of Law and Order* [1992] ZASCA 197; [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A).
[28] Op cit fn 28 para 12.
[29] *FirstRand Bank Ltd v McLachlan and Others* [2020] ZASCA 31; 2020 (6) SA 46 (SCA) para 21-22.
[30] *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* [2023] ZASCA 63; 2023 (5) SA 163 (SCA) para 19.

particular the role of the overarching principle of the interests of justice. It favoured the doctrine of finality as the lodestar guiding the determination of whether an order is appealable.

[67] *TWK* did not consider the Constitutional Court's judgment in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* (*Lebashe*),[31] which affirmed the role of the interests of justice in this Court's consideration of the question of appealability. The effect of *Lebashe* is that just because an order is interlocutory is not decisive as to its appealability.[32] This Court recently held in *Nedbank Limited and another v Survé and others* (*Survé*)[33] that '(i)n a matter where no case was made out for an interim interdict and the order accordingly ought never to have been granted in the first place, along with other relevant considerations, interests of justice might well render an interim interdict appealable despite the *Zweni* requirements not having been met'. In *Lebashe*, the Constitutional Court was moved to consider an interim order appealable because of the grave prejudice it caused to the constitutional protection of freedom of expression.[34] In *Survé* this Court similarly found an interim order that was based on a prima facie finding, by the equality court, that the interdicted party had committed an act of unfair racial discrimination, to be appealable. In arriving at that decision, this Court took into account the serious reputational repercussions for the interdicted party in allowing an order to stand in circumstances where it ought never to have been made in the first place.[35]

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[31] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2023 (1) SA 353 (CC); 2022 (12) BCLR 1521 (CC).
[32] *Cyril and another v The Commissioner for the South African Revenue Service* [2024] ZASCA 32, 2024 JDR 1335 (SCA) para 8.
[33] *Nedbank Limited and Another v Survé and Others* [2023] ZASCA 178; 2023 JDR 4811 (SCA); [2024] 1 All SA 615 (SCA) para 18.
[34] Op cit fn 32 para 45.
[35] Op cit fn 34 para 30.

[68] In sum, then, on the jurisprudence as it stands, an interim order may be appealable, taking into account a range of factors. The *Zweni* requirements play an important role in determining the issue of appealability in a particular case, but they are not immutable. The interests of justice continue to play a substantial role in the inquiry. What those interests are involves a finely weighed consideration of relevant factors in each case. In addition, to establish appealability, two jurisdictional facts must ordinarily be present: (i) leave to appeal, and (ii) that the impugned ruling constitutes a 'decision' as contemplated by s 16(1)(*a*) of the SC Act. The grant of leave does not render a non-appealable order appealable. If the second jurisdictional fact is absent, the appeal must be struck from the roll for want of jurisdiction.[36]

[69] A referral to oral evidence under Rule 6(5)(*g*) of the Uniform Rules of Court does not finally determine the issue of association, the validity of the arrest, or the topping-up issue. It is a mere procedural mechanism that courts use to resolve disputes of facts in litigation. The high court expressly deferred all substantive determinations to oral evidence. The orders granted by the high court are procedural in nature and regulate the further conduct of proceedings. Applying the principles set out in the authorities that I have referred to above, the order lacks finality and is not appealable. The witnesses mentioned in the order deposed to affidavits under oath as part of the evidence in the motion proceedings. In any event, a referral to oral evidence does not offend the interests of justice principle as the parties will be able to air the facts relied upon either in their claim or defence through oral evidence and thus anchoring their respective positions.

[36] Op cit fn 28 para 5.

[70] One question that needs to be considered is whether the orders are final in nature, more particularly in their effect, rather than their form. What needs to be considered is whether the consequences and conditions of the orders may not be capable of being undone. I find that none of the orders have a final effect, rendering them appealable from the high court's orders. In addition, no grave injustice or prejudice would result from the said orders, given their interlocutory nature.

[71] Accordingly, considerations of convenience, costs, or delays as advanced by the applicants do not convert an interlocutory order into an appealable one. The focus will always be on the legal effect of the order, not its practical consequences. Consequently, the application for leave to appeal cannot succeed.

[72] Section 19(*b*) of the SC Act empowers the court to receive further evidence on appeal. However, this power can only be used sparingly and in exceptional circumstances.[37] An appeal court can only admit evidence that would be practically conclusive. In this case, the Annual Return for 2024, which sought to be admitted by the applicants, is not for consideration by this Court in terms of the findings I have made in this matter.

[73] The finding regarding the appealability of the impugned order means that this Court lacks jurisdiction to deal with the merits of the application to adduce further evidence. The evidence that the appellants seek to introduce relate to the merits of the matter, which have not yet been decided and is thus not before this Court. In this appeal, I have not determined the matter on a narrow technical basis divorced from principle. We do not have jurisdiction to determine the matter on the merits. This is

[37] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) para 41-43.

distinguishable to principles set out in *Spilhaus Property Holdings (Pty) Limited and Others v Mobile Telephone Networks and Another*,[38] where the Constitutional Court cautioned appellate courts from deciding only 'a chosen' limited point when the decision would result in piecemeal litigation or a waste of judicial resources.

Order

[74] In the result, I make the following order:

1 The appeal under case number 953/24 is dismissed with costs, including the costs of two counsel where so employed.

2 The interlocutory application to adduce further evidence under case number 923/24 is struck off the roll with costs, including the costs of two counsel where so employed.

3 The application for leave to appeal under case number 923/24 is struck off the roll with costs, including the costs of two counsel where so employed.

YT MBATHA
JUDGE OF APPEAL

[38] *Spilhaus Property Holdings (Pty) Limited and Others v Mobile Telephone Networks and Another* [2019] ZACC 16; 2019 (6) BCLR 772 (CC); 2019 (4) SA 406 (CC).

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