THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1294/2021

Name of ship: MV 'TARIK III'

In the matter between:

CREDIT EUROPE BANK N.V.	**APPELLANT**

and

THE FUND COMPRISING THE PROCEEDS OF THE SALE OF THE MV TARIK III	**FIRST RESPONDENT**
SEVEN SEAS SHIP CHANDLERS L.L.C	**SECOND RESPONDENT**
JUPITER SHIPPING AND TRADING LTD	**THIRD RESPONDENT**
BILGE GIDA KUMANYACILIK SAN. VE TIC.	**FOURTH RESPONDENT**
ARKAS PETROL URUNLERI VE TICARET A.S.	**FIFTH RESPONDENT**
DAMEN SCHELDE MARINE SERVICES B.V.	**SIXTH RESPONDENT**
MARICHEM MARIGASES LIMITED	**SEVENTH RESPONDENT**
KPI BRIDGE OIL LIMITED	**EIGHTH RESPONDENT**

BRYVAL CO LTD TRADING AS ZEBA MARINE	**NINTH RESPONDENT**
MONJASA DMCC	**TENTH RESPONDENT**
WORLDWIDE ENERGY SERVICES LTD	**ELEVENTH RESPONDENT**
NOBLE RESOURCES SRL	**TWELFTH RESPONDENT**
BUNKERNET LTD	**THIRTEENTH RESPONDENT**
TALL SHIPS (PTY) LTD T/A LBH	**FOURTEENTH RESPONDENT**
TRANSNET NATIONAL PORTS AUTHORITY	**FIFTEENTH RESPONDENT**
STURROCK GRINDROD SHIP AGENCIES	**SIXTEENTH RESPONDENT**
GARANTI FINANSAL KIRALAMA A.S.	**SEVENTEENTH RESPONDENT**
ZEOS SHIPPING AGENCY SERVICES AND PETROLEUM TRANSPORT TRADING LTD	**EIGHTEENTH RESPONDENT**

Neutral citation: *MV 'TARIK III' Credit Europe Bank N.V. v The Fund Comprising the Proceeds of the Sale of the MV Tarik III and Others* (Case no 1294/2021) [2022] ZASCA 136 (13 October 2022)

Coram: PONNAN, ZONDI and GORVEN JJA and MAKAULA and CHETTY AJJA

Heard: 22 August 2022

Delivered: 13 October 2022

Summary: Shipping – Admiralty Jurisdiction Regulation Act 105 of 1983 – when an agreement that has been admitted or proved is said to have been terminated – onus of proof on party asserting termination – fund constituted from judicial sale of vessel – claims against fund – whether right to claim dependent upon claimant having effected an arrest of the vessel prior to its sale.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Moodley J, sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel.

JUDGMENT

Ponnan JA (Zondi JA and Makaula and Chetty AJJA concurring)

[1] This appeal relates to claims lodged by certain creditors against the first respondent, a fund (the Fund) constituted by the judicial sale of the motor vessel Tariq III (the vessel).

[2] The appellant contends that the claims of the second to twelfth respondents that had been recommended for payment by a Referee ought to have been rejected by the court below, in which event the claims of the appellant would be the highest ranking claims against the Fund. The appellant accordingly sought an order that its claim be paid from the balance of the Fund.

[3] The circumstances leading up to the litigation between the parties are briefly the following: In October 2007, Esperanza Ltd (Hong Kong) entered into a memorandum of agreement (MoA) with Herex Trading Ltd (Herex) in regard to the

sale of the vessel, which was then known as the mv 'Arisbe'. On 24 October 2007, Herex assigned its rights and obligations under the MoA to the seventeenth respondent, Garanti Finansal Kiralama A.S. (Garanti). And, in accordance with the terms of the MoA, ownership of the vessel passed to Garanti upon delivery thereof in January 2008.

[4] On 31 October 2007, Garanti and Hazar Denizcilik Ic Ve Dis Ticaret (Hazar) concluded a bareboat charter[1] in respect of the vessel for a period of 50 months (the charterparty or agreement). On 14 February 2011, Garanti and Hazar extended the charterparty to 15 December 2015. With effect from 1 January 2014, the business of Hazar was effectively taken over by Caliskan Ic Ve Dis Ticaret Sanayi A.S. (Caliskan) and the former thereafter ceased to exist, with the consequence that Caliskan was substituted for Hazar as the bareboat charterer of the vessel and the agreement continued in the same form.

[5] On 17 March 2014, Caliskan obtained a preliminary injunction from the 11th Commercial Court of Anadolu, Istanbul in terms of the Turkish Enforcement and Bankruptcy Code. The injunction afforded it, *inter alia*, protection from creditors for a period of one year from the date of the order. The period of the injunction was extended by the court and, as at 30 June 2016, Caliskan was still under bankruptcy protection. In terms of the preliminary injunction, various acts, 'including [the] issuance of bill[s] of exchange and withdrawal of money from the banking accounts of the company and all kinds of resolutions, transactions and dispositions' required the joint approval of the two named trustees.

[1] A demise or bareboat charter is a charterparty in terms of which the owner charters (leases) a ship to a charterer on the basis that it is to be crewed and operated by the charterer (*Compagnie Des Messageries Maritimes v The Agricultural Co-operative Union Ltd & Fred Cohen, Goldman & Co Ltd* 1922 NPD 82).

[6] On 15 April 2014, Garanti sent Caliskan a written notice under the agreement (the notice of termination) requiring payment of arrears in the amount of $789 790.68 within 60 days failing which, so it was asserted: the agreement would be terminated; the full outstanding debt of $9 906 376.68 accelerated; and, re-delivery of the vessel sought. Prior to the expiry of the 60-day period, on 24 April 2014, Garanti and Caliskan concluded what was styled a revised payment plan (the revised payment plan).

[7] The vessel was arrested by the appellant, Credit Europe Bank N.V., a company carrying on business as a bank in Amsterdam, Netherlands, on two separate occasions, namely by way of an: (i) *in rem* arrest on 26 May 2014; and, (ii) arrest in terms of s 5(3)*(a)* of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act),[2] pursuant to an order granted by the Kwazulu-Natal Division of the High Court, Durban, in the exercise of its Admiralty Jurisdiction (the high court).

[8] In effecting the arrest of the vessel, the appellant relied on s 1(3) of the Act, which provides that: 'for the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise'[3] (the deeming provision). There were also various other claimants, but only two arrested the vessel, being the fifth respondent, Arkas Petrol

[2] Section 5(3)*(a)* of the Act provides:
'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.'
[3] Although s 1(3) of the Act refers to a charter by demise, for present purposes the terms bareboat and demise are synonymous.

Urunleri Ve Ticaret (Arkas), on 19 November 2014 and the eighth respondent, KPI Bridge Oil Limited (KPI Bridge), on 17 December 2014.

[9] On 23 June 2014, Caliskan brought an application to set aside the *in rem* arrest. However, its attorney of record withdrew on 4 August 2014 and it thereafter played no further role in the legal proceedings relating to the vessel. The vessel being very low on bunkers berthed in the port of Durban on 26 September 2014. On that day, the appellant commenced an application before the high court for the sale of the vessel. Despite opposition to the application by Garanti, the high court granted an order in terms of s 9 of the Act for the sale of the vessel on 5 December 2014.[4] Darryl Cooke, an Advocate at the Cape Bar, was appointed to act as a referee (the referee) in respect of the claims lodged against the Fund. The vessel was sold by judicial auction on 4 February 2015.

[10] The appellant and the second to eighteenth respondents (including Garanti) lodged claims against the Fund. The claims lay against Caliskan and, as such, all of the claimants purported to rely on the deeming provision. The Referee delivered his report on 10 September 2015, in which he: (a) recommended payment of the appellant's damages and preservation claims; (b) recommended the rejection of Garanti's claims; (c) regarded the agreement as being extant at the time of the sale, and further concluded that, as such, all of the claimants (save for Garanti) were entitled to rely on the deeming provision in lodging their claims against the Fund;

[4] Section 9 of the Act headed 'sale of arrested property' provides:
'(1) A court may in the exercise of its admiralty jurisdiction at any time order that any property which has been arrested in terms of this Act be sold.
(2) The proceeds of any property so sold shall constitute a fund to be held in court or to be otherwise dealt with, as may be provided by the rules or by any order of court.
(3) Any sale in terms of any order of court shall not be subject to any mortgage, lien, hypothecation, or any other charge of any nature whatsoever.'

and, (d) recommended, *inter alia*, the payment of the claims of the second to sixteenth respondents. Save for the claim of the twelfth respondent, which was subsequently withdrawn, and one of the claims advanced by the seventh respondent, all of the other claims that the Referee recommended be paid rank above the appellant's damages claim, and if paid, would exhaust the Fund.

[11] In October 2015, the appellant commenced an application for the partial confirmation of the Referee's report. Relief was sought in two parts – A and B. The relief sought under Part A related to confirmation of the Referee's report in respect of the claims of the thirteenth, fourteenth, fifteenth and sixteenth respondents, and those of the appellant, and the payment out of the Fund of those claims ranking in terms of s 11(4)*(a)* (the preservation claims) and s 11(4)*(b)* of the Act.[5] The appellant also sought relief in relation to the legal costs. The relief sought in Part B was, *inter alia*, for the immediate payment of the appellant's damages claim from the Fund, subject to the retention of sufficient funds in the Fund to satisfy the payment of any legal costs outstanding pursuant to Part A of the order, and thereafter the payment of any residue left in the Fund to the appellant once those costs had been paid. In the alternative, the appellant sought an order that the second to twelfth respondents be directed to commence actions *in rem* against the Fund so as to prove their claims, and that the appellant be given leave to defend those claims on behalf of the Fund.

[12] On 12 January 2016, the high court granted an order in relation to certain of the relief sought under Part A, including the recognition of the appellant's claims,

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[5] Sections 11(4)*(a)* and *(b)* provide:

'*(a)* a claim in respect of costs and expenses incurred to preserve the property in question or to procure its sale and in respect of the distribution of the proceeds of the sale;

(b) a claim to a preference based on possession of the property in question, whether by way of a right of retention or otherwise.'

the payment of certain claims identified for immediate payment (which have been paid) and directed that the balance of the funds be retained in the Fund pending the determination of the application. The relief sought in Part B was opposed by Arkas, KPI Bridge and the tenth respondent, Monjasa DMCC (collectively referred to as the opposing suppliers), who are represented by the same attorneys, as well as by Garanti (who does not oppose this appeal).

[13] The appellant contends that: first, each individual claimant against the Fund bears the onus of proving that its claim is valid and enforceable against the Fund, which in the present context includes proving the existence of the bareboat charter at the material times; and, second, it is necessary for a claimant in the position of the opposing suppliers to have arrested the vessel *in rem* in order to lodge a claim against the Fund arising from its reliance upon the deeming provision.

As to the first

[14] The appellant contends that the Referee erred in concluding that the agreement had not terminated and was still extant at the time of the sale and that the second to twelfth respondents could rely on the deeming provision in lodging their claims against the Fund. The appellant objected to various claims lodged against the Fund on the basis that the relevant claimants had not demonstrated on a balance of probabilities that the agreement was extant at the relevant times, being in the case of Arkas and KPI Bridge, the dates of their respective arrests of the vessel, and in the case of the other claimants, who had not arrested the vessel (and alternatively in the case of Arkas and KPI Bridge), at the time when the Fund was constituted in place of the vessel.

[15] Neither the appellant, nor the opposing suppliers, have any personal knowledge of the dealings between Caliskan and Garanti. According to the opposing suppliers, that Caliskan was indeed the charterer of the vessel is apparent from the following: (a) The agreement was concluded on 31 October 2007 and, by a further agreement dated 14 February 2011, the period of the charterparty was extended until 15 December 2015 (being a date long after the sale of the vessel by judicial auction). (b) Caliskan was substituted as the charterer of the vessel with effect from 1 January 2014. (c) Both Garanti and Caliskan, the parties to the agreement, agree that at all material times it was valid and binding – in that regard Garanti, through its duly authorised representative, Mr Tasliyurt, stated that: 'The bareboat charter was not terminated at any point prior to the judicial sale of the vessel on 5 February 2015.' This has been repeatedly reaffirmed by Garanti, through its representative, Mr Tasliyurt. (d) The master and crew remained in Caliskan's employment after 15 June 2014 until their repatriation by Caliskan on 17 October 2014. (e) Garanti intervened in the preservation of the vessel in early August 2014 and to this end paid: (i) hull insurance premiums for the vessel on 8 August 2014; (ii) the vessel's agents and P&I insurance on 12 August 2014; (iii) the salaries of the master and crew on 17 August 2014; (iv) further hull insurance premiums on 19 August 2014; (v) the salaries of the master and crew on 12 September 2014; and, (vi) the vessel's P&I insurance on 19 September 2014 - this was the last payment made by Garanti in relation to the vessel and the appellant thereafter continued to finance her preservation. (f) At the same time, Caliskan, through its attorney, stated under oath in its founding affidavit dated 23 June 2014 in the application to set aside the vessel's arrest that Caliskan was 'the current bareboat charterer of the vessel'. (g) That the agreement was still in force on 15 August 2014, was recognised by the appellant itself when it did not object to the arrest of the vessel on 15 August 2014 by the

thirteenth respondent, Bunkernet Limited (Bunkernet), which was premised on the charterparty. The appellant, moreover, as part of this application, caused Bunkernet's claim to be paid from the Fund. (h) The charterparty was expressly recorded as being in existence in the Turkish International Ship Registry until after the judicial sale of the vessel which, so it is contended, provided *prima facie* evidence of the existence of the charterparty, although not conclusive proof thereof. (i) The insured in respect of the vessel was Horizon (Caliskan's agent) and Hazar (whose rights and obligations under the charterparty were assumed by Caliskan). Caliskan was recorded in the relevant policy documentation as 'Managing Owner', whereas Garanti was not an insured. Horizon continued to act as the vessel's manager on behalf of Caliskan after 15 June 2014 and Caliskan/Horizon arranged the bunker supply for the vessel in September 2014.

[16] Up until 18 February 2015, everyone, including the appellant, had accepted that Caliskan was at all material times the demise charterer of the vessel. The first suggestion that the charterparty may have terminated arose after the sale of the vessel, when on 18 February 2015, Garanti's South African attorney, Mr Andrew Clark deposed to an affidavit and stated that he 'was recently advised by Mr Senol [Garanti's Turkish lawyer] that [Garanti] cancelled the bareboat charter with effect from 15 June 2014'. This was contrary to all of the prior statements confirming the continued existence of the charterparty, as also the conduct of both Caliskan and Garanti. On 10 June 2015, Garanti itself contradicted the hearsay advice of Mr Sinan Senol, when Mr Ilker Tasliyurt, the head of the risk monitoring department of Garanti, stated:

'6. Mr Senol has drawn my attention to paragraph 70 of Mr Clark's supporting affidavit filed on behalf of Garanti in support of its claim against the Respondent, which reads as follows:

"I was recently advised by Mr Senol that the Claimant cancelled the bareboat charter with effect from 15 June 2014. This information had not been relayed to me until very recently. I annex hereto marked "AC36.1" a notice from the Claimant to Caliskan and the guarantors dated 15 April 2014 in Turkish, and marked "AC36.2" a sworn English translation thereof. According to the Notice, payment of the outstanding hire had to be made within sixty days, failing which the charter would be terminated without further notice. I am advised by Mr Senol that as a matter of Turkish law, the charter terminated on 15 June 2014, as the outstanding hire was not paid by that date."

7. I confirm that annexure "AC36.1" to Mr Clark's affidavit is a valid notice that was given by Garanti to Caliskan and the individual guarantors mentioned in the notice. The notice is dated 15 April 2014 and I confirm that it was served on Caliskan on 17 April 2014.

8. On 24 April 2014, however, Garanti and Caliskan agreed to extend the Financial Leasing Agreement with an amended payment plan. I annex hereto marked "IT1" a copy of the signed amended payment plan dated 24 April 2014 and marked "IT2" a sworn translation thereof.

9. The effect of signing the payment plan referred to above was, by agreement between Garanti and Caliskan, to suspend the operation of the notice dated 15 April 2014. In the circumstances, I can confirm that the bareboat charter between Garanti and Caliskan was <u>not</u> terminated on 15 June 2014, or at all. I can furthermore confirm that the bareboat charter remained in place, valid and binding on the parties, until the judicial sale of the vessel in South Africa in February 2015.'

[17] This was confirmed by Mr Senol in these terms:

'8. During February 2015, I was provided with a notice that Garanti had prepared, dated 15 April 2014, in terms of which Caliskan was called upon to effect payment of the outstanding hire within sixty days, failing which the charter would be terminated without further notice. I confirm that this notice is annexure "AC36.1" to Mr Clark's supporting affidavit filed in respect of Garanti's claim against the Respondent and that annexure "AC36.2" is a sworn English translation thereof.

9. I had not previously been provided with a copy of this notice and when I read the notice and considered the fact that the outstanding hire had not been paid with in sixty days, I came to the conclusion that, as a matter of Turkish law, the charterparty had terminated on 15 June 2014.

10. I instructed Mr Clark accordingly in February 2015 and confirm that this was the first time that I had sent the notice dated 15 April 2014 to him and that I had indicated to him that the bareboat charterparty had terminated on 15 June 2014. This was immediately queried by Mr Clark who explained that this point had never been raised previously by Garanti and who reminded me that the challenge to the application to sell the vessel was premised on the basis that the bareboat charterparty remained in place, valid and binding between the parties. I agreed with Mr Clark's assessment of the matter and explained that this development was likewise surprising to me and that it was the first time that I have been made aware of the notice dated 15 April 2014.

11. Accordingly, when Mr Clark filed his supporting affidavit in respect of Garanti's claim against the Respondent, he made the averment in paragraph 70 of his supporting affidavit that the charterparty had terminated on 15 June 2014. I confirm that he did so on the basis of my instructions at the time.

12. In the course of preparing a reply on behalf of Garanti to the Referee's request for further information and representations, my attention has been drawn to the agreement reached between Garanti and Caliskan on 24 April 2014, extending the payment period under the Financial Leasing Agreement. The relevant document is annexure "IT1" to the affidavit of Mr Tasliyurt.

13. Upon further consideration, it is my view that as a matter of Turkish law the payment plan agreement between Garanti and Caliskan had the effect of suspending the notice dated 15 April 2014 with the effect that the bareboat charter was <u>not</u> terminated on 15 June 2014. I confirm that this accords with Garanti's instructions to me and the instructions that I was given in regard to this issue in 2014.

14. Upon reflection, it appears that I inadvertently overlooked the payment plan agreement between the parties dated 24 April 2014 and made an error in asserting that the bareboat

> charter terminated on 15 June 2014. This was an unintentional error in respect of which I apologise to the Referee, the other creditors and the court, for the confusion that has arisen.'

[18] Garanti has on numerous occasions thereafter reaffirmed that the charterparty remained of full force and effect until the sale of the vessel. Importantly, it did not simply state that the hearsay advice by Clark that the charterparty had been cancelled was wrong; it gave an explanation, first to the Referee and thereafter to the high court, as to the circumstances which gave rise to the incorrect advice. Garanti's explanation has been confirmed under oath on more than one occasion by Tasliyurt, Senol and Clark himself. Nonetheless, the appellant appears to have latched on to Clark's statement as the foundation for its opposition to the claims of the opposing suppliers and other necessary suppliers, all of whom have claims that rank ahead of the appellant. Given the clear and uncontradicted evidence before the high court to the effect that the charterparty was in effect at all material times prior to the judicial sale of the vessel, there was simply no basis on the papers before the Court for that evidence to be disregarded in favour of what can only be described as the conjectural hypothesis sought to be advanced on behalf of the appellant.

[19] The appellant's contention that the agreement had terminated is made in circumstances where, as it admits, it is a stranger to the agreement and has no personal knowledge at all as to what transpired between Garanti and Caliskan. The appellant seeks to suggest that a dispute of fact exists, notwithstanding that it had itself relied on the existence of the very charterparty for its own claim against the Fund and has produced no direct evidence of its termination. As between the parties to the agreement there is no dispute at all. On the contrary, Garanti (*qua* defendant) itself concedes and has consistently maintained that the vessel was indeed chartered

to Caliskan at all material times and has been at pains to reaffirm that it never cancelled the agreement. Furthermore, all of the evidence both expressly and impliedly points to the fact that Caliskan, the counterparty to the agreement, confirms its existence and that it was in force at the material times.

[20] The appellant, not having adduced any direct evidence itself – there is no conflict of testimony. In these circumstances there can be no genuine dispute of fact on this issue and the various considerations relied upon by the appellant in support of its foundational hypothesis that the agreement had terminated can hardly trump the direct evidence alluded to above, which cannot simply be rejected on the papers. The fact is that the claims of the opposing suppliers are claims against the Fund, which stands in the stead of the vessel, and are not claims against the appellant. Those claims are not disputed by the vessel's owner, Garanti, who concedes that the vessel is liable to pay those claims by virtue of the operation of the deeming provision. Equally, Caliskan, does not dispute either the claims or that they are recoverable against the vessel. Thus, as between those parties (being notionally the only relevant parties to the claims) there is no dispute; on the contrary it is common cause between them that the agreement was extant and had not terminated when the claims were brought. There was accordingly no *lis* that remained for determination and no question of onus arose as between them in relation to the fact that the agreement was extant at all relevant times.[6]

[21] There was however a further string to the appellant's bow, namely that as a matter of Turkish Law the agreement had terminated. In the alternative, it was

[6] See *Dinath v Breedt* 1966 (3) SA 713 (T); *Louw v Nel* [2010] ZASCA 161; 2011 (2) SA 172 (SCA) para 17.

asserted that 'to the extent that the Court may find itself unable to determine the Turkish Law issues on the papers, the inevitable conclusion must be that the opposing suppliers have failed to prove their respective cases on a balance of probabilities'. I remain far from persuaded that it would even have been open to one of the parties to the agreement to raise the point.[7] Much less a person in the position of the appellant, a stranger to the agreement, particularly where, as here, the parties thereto have performed in accordance with its terms.[8] However, as this formed an important plank upon which the appellant's case rested, I shall, in what follows, proceed on the assumption (without deciding) that it is indeed open to the appellant to do so.

[22] The parties relied upon advice procured from various Turkish lawyers and academics, which came to be revised from time to time as new facts came to light. The appellant engaged the following Turkish experts: Mr Cavus of the Law Firm Cavus and Coskunsu, who provided advice during the claims process and subsequently Professor Halil Akkanatof of the Civil Law Department of Istanbul University, who provided two legal opinions, the first dated 28 June 2016 and the second dated 19 April 2017, in the application. The opposing suppliers relied initially on Professor Marut Topuz of the Faculty of Law, Marmara University,

[7] In this regard it is perhaps important to appreciate '. . . the distinction in principle between setting aside the result of an invalid agreement completely performed, and the enforcement of a term of such an agreement alleged to have been disregarded. It by no means follows that because a court cannot enforce a, contract which the law says shall have no force, it would therefore be bound to upset the result of such a contract which the parties had carried through in accordance with its terms' (per Innes J in *Wilken v Kohler* 1913 AD 135 at 144). *J R 209 Investments (Pty) Ltd and Another v Pine Villa Country Estate (Pty) Ltd, Pine Villa Estates (Pty) Ltd v J R 209 Investments (Pty) Ltd* [2009] ZASCA 3; 2009 (4) SA 302 (SCA); [2009] 3 All SA 32 (SCA). See also F Myburg 'On Constitutive Formalities, Estoppel and Breaking the Rules' 2016 (2) *StellLR* 254, where it is argued that 'sometimes it would be in the public interest to allow estoppel to operate so that, indirectly, effect is given to a formally invalid agreement'.

[8] *Absa Bank Bpk v CL Von Abo Farms Bk En Andere* 1999 (3) SA 262 (O). See also *Trust Bank van Afrika Bpk v Eksteen*1964 (3) SA 402 (A).

during the claims process and subsequently Dr Kerem Ertan, a qualified lawyer and member of the Istanbul Bar Association and thereafter, Professor Cevdet Yavuz in the application. Garanti settled for the evidence of Mr Senol.

[23] Professor Yavuz's opinion, which is dated 10 March 2017, came to be introduced into evidence in response to Professor Akkanat's opinion. Mr Patrick Holloway, one of the attorneys representing the opposing suppliers, who deposed to a further answering affidavit, explained:

'6. In Credit Europe's replying affidavits, deposed to by Mr Jeremy David Prain ("Mr Prain") and his colleague, Ms Nicola-Ann Nel ("Ms Nel"), Credit Europe has relied extensively on a new legal opinion, dated 28 June 2016, by Professor Dr Halil Akkanat ("Professor Akkanat")

7. In the result, and in its replying papers, Credit Europe has raised a series of new contentions regarding various aspects of Turkish law (that were not foreshadowed in the founding papers), and made fresh allegations as to the validity and/or invalidity of various acts and agreements relevant to these proceedings, and their alleged impact on the continued existence of the bareboat charterparty at the centre of this application. The opinion of Professor Akkanat constituted an attack (in reply) on the previously uncontested opinion of Professor Topuz (which Credit Europe had annexed without criticism to their own founding papers), and on which the Opposing Suppliers relied.

8. As a result of the new matter raised in reply by Credit Europe, and more specifically the opinion of Professor Akkanat, it became necessary for the Opposing Suppliers to obtain a further Turkish legal opinion. To this end, the Opposing Suppliers sought an opinion from leading Turkish academic lawyer, Professor Dr Cevdet Yavuz ("Professor Yavuz") in answer to the issues raised in reply pursuant to the opinion of Professor Akkanat.

. . .

10. The Opposing suppliers rely on the legal opinion of Professor Yavuz in support of their claims, and in opposition to the relief sought by Credit Europe. . . . In all events, the

Opposing Suppliers deny that the bareboat charterparty terminated as alleged by Credit Europe.

11. It will be noted that, in his opinion, Professor Yavuz makes reference to the Turkish International Ship Registry, and the fact that the record of the bareboat charter in the Turkish International Ship Registry was not deleted. I am advised by Mr Tufekci, who has personally inspected the Register, that that annotation regarding the bareboat charter was never deleted. I annex a copy of the relevant portion of the record in the Registry marked "PMH 2" together with a certified translation thereof marked "PMH 3".

12. Professor Yavuz deals with the evidence and opinions which have been placed before him and concludes that the bareboat charter was in existence at the time the ship was sold on judicial auction in Durban.'

[24] The overarching issue in relation to which the various Turkish lawyers advised is whether, and if so when, the agreement terminated. This, in turn, *inter alia*, raised the following sub-issues: (i) whether the notice of termination complied with the formal requirements of Turkish Law; (ii) whether the notice of termination complied with the substantive requirements of Turkish Law; (iii) whether in purporting to agree to the revised payment plan, Garanti can be said to have unilaterally withdrawn the notice of termination; (iv) the effect, if any, of Caliskan still being reflected as the bareboat charterer of the vessel on the Turkish Ship Register; and, (v) the legal consequences, if any, of the fact that Caliskan was still in possession of the vessel until October 2015, when her crew were repatriated.

[25] It is trite that the relevant Turkish Law must be proved as matter of fact. In that, so contends the appellant, the onus is on the opposing suppliers. It consequently becomes necessary to restate the basic rules that govern the incidence of the onus of proof, for it is upon them that a decision on this aspect of the case must ultimately rest. To paraphrase from the oft-quoted dictum of Davis AJA in *Pillay v Krishna*:

The first principle is that if one person claims something from another then she has to satisfy the Court that she is entitled to it. The second, which must always be read with the first, is that where a person sets up a special defence then she is regarded, *quoad* that defence, as being the claimant and it will be for her to satisfy the court that she is entitled to succeed on it. There is also a third rule that the person who asserts proves and not she who denies, or put differently, the onus is on the person who alleges something, not on her opponent who merely denies it.[9]

[26] It was suggested on behalf of the appellant that the question that confronts us in this case is answered by the following in *The Kingston* (per Bristowe J):

'I agree with Mr Wallis that a negative need not be proved. In other words, where a claim is disputed, I should, I believe, take the view that each such claim must be established by the claimant who has advanced it and adopt the normal approach that "he who asserts must prove". See *Pillay v Krishna* 1946 AD 946 and *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A). To my mind this is especially so in those cases where the referee recommended that claims should not be accepted. . .'[10]

[27] I am not sure however that what was said there necessarily advances the enquiry here.[11] This, because the onus of proof is fixed by the pleadings.[12] In this regard, the ordinary principles relating to applications apply.[13] In motion proceedings, the affidavits, which constitute both the pleadings and the evidence,

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[9] *Pillay v Krishna* 1946 AD 946 at 951-2.
[10] *The Kingston In Re Creditcorp Ltd* SCOSA D80 (D&CLD) at D85 C-E.
[11] See for example *The Madagascar Maree NO v Fund Constituted from the Sale of the Madagascar* SCOSA D 322 (D) where the court, which was concerned with the sufficiency in law of the allegations made on affidavit to sustain a cause of action, treated the opposition in the matter as an exception to the claim. See also *The Stainless Kobe (No 2) 't Wapen Van Marion BV v The Fund Constituted by the Sale of the MV Stainless Kobe* SCOSA D69 (D).
[12] *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 710H.
[13] Hofmeyr G *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012) 289; *The Kingston* at D85 D-E. See also *The Madagascar Maree NO v Fund Constituted from the Sale of the Madagascar* SCOSA D 322 (D).

serve to define the issues between the parties.[14] In the founding affidavit filed in support of the application, the issue was raised by the appellant in these terms:

'60. The applicant has obtained advice from Mr Cavus to the effect that notwithstanding the amendment to the Leasing Agreement on 24 April 2014, the notice of 15 April . . . was irrevocable and given Caliskan's failure to comply therewith, the Leasing Agreement would have terminated without any requirement for further notice upon the expiry of the 60 day notice period. . .

. . .

62. Webber Wentzel, apparently on behalf of KPI Bridge, also procured advice from a Turkish lawyer, Associate Professor Topuz, in relation to [the] effect of the notice of 15 April . . . Associate Professor Topuz expressed the opposite view to Mr Cavus, to the effect that the Leasing Agreement had in the circumstances not terminated pursuant to the notice of 15 April.

63. This honourable Court will note that the Referee preferred the advice of Associate Professor Topuz as regards the effect of the revised payment plan, although I am advised by Mr Cavus that he stands by his previous advice.'

It is so that the appellant's case evolved somewhat over time, but I cannot see how what was said in *The Kingston*, without more, necessarily resolves the far more narrowly defined controversy that confronts us in this matter, namely whether or not the agreement had indeed terminated and, more importantly, who bears the onus in that regard.

[28] As Didcott J observed in *Prinsloo v Van der Linde & Another*:[15]

'[55] Something must next be said generally about the onus of proof in civil actions, and especially about its location there, so that we may then proceed to focus within that field on the import of section 84. Wigmore wrote in his treatise on *Evidence*: "The characteristic . . . of this

[14] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) para 28; *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) para 43.
[15] *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC).

burden of proof (in the sense of a risk of nonpersuasion) in legal controversies is that the law divides the process into stages and apportions definitely to each party the specific facts which will in turn fall to him as the prerequisites of obtaining action in his favor by the tribunal. It is this apportionment which forms the important element of controversy for legal purposes. Each party wishes to know of what facts he has the risk of nonpersuasion. By what considerations is this apportionment determined? Is there any single principle or rule which will solve all cases and afford a general test for ascertaining the incidence of this risk? By no means. It is often said that the burden is upon the party having in form the affirmative allegation. But this is not an invariable test, nor even always a significant circumstance; the burden is often on one who has a negative assertion to prove . . . . It is sometimes said that it is upon the party to whose case the fact is essential. This is correct enough, but it merely advances the inquiry one step; we must then ask whether there is any general principle which determines to what party's case a fact is essential. Still another consideration has often been advanced as a special test for solving a limited class of cases, ie the burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false . . . . But this consideration furnishes no universal working rule . . . . This consideration, after all, merely takes its place among other considerations of fairness and experience as a most important one to be kept in mind in apportioning the burden of proof in a specific case. The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations . . . . There is . . . no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any. There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness."

I have quoted at length from the book because the state of affairs existing in South Africa echoes exactly, in all its force and resonance, that description of the American one. Our common law likewise contains no comprehensive rule on the onus of proof in civil proceedings which is inflexibly free from exceptions. Here too the onus does not always lie upon the plaintiff asserting a claim but, on issues peculiar to the nature of the case, is sometimes borne by the defendant in his

or her resistance to that. One thinks, for instance, of the issues raised when self-defence is pleaded in answer to a claim for damages suffered as the result of an assault, when a contract admitted or proved is said in an action for its enforcement to have been cancelled or novated, when some special defence is presented as a means of escape from liability on a bill of exchange, and when a host of other situations arise in which confessions and avoidances are familiar. Hoffmann and Zeffertt have discussed the topic in their *South African Law of Evidence*, furnishing further examples of an onus placed on the defendant in this country and commenting on the lack of any general theory or policy to account for that side of it which seems logical, coherent and consistent. It is therefore no surprise to see that the sentences in earlier editions of Wigmore's work which are matched by the parts of my excerpt from the current one appearing in italics have been reproduced or paraphrased with approval by judges of our Appellate Division, the first passage in *Mabaso v Felix* and the second in *Pillay v Krishna and Another* and *Nydoo en Andere v Vengtas*.

[56] In our adversarial system of civil litigation one side or the other has to bear the onus of proof. Differentiation between the parties in that regard is thus inevitable. So is the disadvantage under which the side carrying the load often labours. Its location for specific issues depends not on doctrinaire considerations, but on wholly pragmatic ones. . .' (Underlying added for emphasis.)

[29] I accept that a court is certainly not bound by the recommendations of the Referee, but it will in given circumstances give effect to it.[16] Here, the Referee concluded that:

'There is no evidence of Garanti having terminated the charter on account of breaches committed by Caliskan. To the contrary, Garanti denies that the demise charter was terminated. Furthermore, and having regard to Garanti's explanation in respect of the Debt Liquidation Agreement, we do not consider that this document affords any support for the argument that the charter was terminated.'

I cannot see how the reasoning of the Referee can be faulted. As I conceive the case of the appellant, the high-water mark, as stated in its founding affidavit, came to be:

[16] *The Stainless Kobe (No 2) 't Wapen Van Marion BV v The Fund Constituted by the Sale of the MV Stainless Kobe* SCOSA D69 (D) at D 77D.

'107. I respectfully submit that it is apparent from what has been set out above that the bareboat charter must in all probability have terminated by 5 January 2015 (at the very latest), and that as such this honourable Court ought not to accept the Referee's recommendation to find that the demise charter was still in existence at all material times.

108. I believe that it is incumbent upon me to point out in this regard that the Referee was not provided with the detailed analysis of the terms of the Leasing Agreement as set out above, and that the focus of the dispute before him was on the status of the Leasing Agreement in the light of the notice of 15 April, and subsequent developments in Durban following the arrest of the vessel and, in particular, the abandonment of the vessel by the crew and their repatriation by Caliskan.'

[30] The appellant was entitled to object to or make representations regarding the other claims (including those of the opposing suppliers) lodged against the Fund pursuant to paragraph 6.3[17] of the order for the sale of the vessel (the Order). It availed itself of that opportunity and the Referee gave due consideration to those objections. This was to ensure that the claims against the Fund were indeed 'proved in the ordinary manner'[18] and that the requirements of paragraph 6.7[19] of the Order and the provisions of Admiralty Rule 21(8)[20] were complied with. The opposing

[17] Paragraph 6.3 reads:
'Any person wishing to object to or make representations with regard to any claim shall, within 10 (ten) business days of the date of notification by the Referee referred to in paragraph 6.2 above:
6.3.1 deliver such objections or representations to the Referee;
6.3.2 deliver such objections or representations to the claimant or its legal representative.'

[18] As required by s 11(2) of the Act, which provides:
'The claims contemplated in subsection 1*(a)* are claims mentioned in subsection (4) and confirmed by a judgment of a court in the Republic or "proved in the ordinary manner".'

[19] Paragraph 6.7 reads: 'All claims, objections, representations, replies and rejoinders thereto, shall comply with Rule 21(8) of the Admiralty Rules'.

[20] Rule 21(8) of the Admiralty Rules provides:
'(a) Claims against the fund shall contain full details of the claim, when it arose and how it is made up and shall be signed by or on behalf of the party submitting the claim and shall have annexed thereto copies of all relevant documents relating to the claim.
(b) A claim shall contain full details of any interest claimed in respect thereof stipulating the rate of interest claimed, the period for which it is claimed, the basis on which it is claimed and whether it is compound, simple or any other form of interest.
(c) The court shall make such order as it deems fit with regard to parties, procedure and the payment of any fund,

suppliers proved their claims in the ordinary manner and the requisite 'evidence justifying'[21] their claims has been adduced, with the result that they had complied with the provisions of paragraph 6.7 of the Order.

[31] In particular, it is important to emphasise that the appellant is acting purely out of self-interest and that in wanting to challenge the continued existence of the agreement, which was not in issue as between all of the other relevant parties, it was for it to establish that the agreement had terminated and in that it attracted to itself the onus on that score.[22] In this regard, the approach in *Cotler v Variety Travel Goods (Pty) Ltd*, is instructive.[23] In that matter, the appellant had instituted an action against the respondent for damages for wrongful dismissal. The appellant alleged that in terms of a written agreement subsisting between him and the respondent, his employment could only be terminated upon three months' notice. In the plea, the respondent admitted that the written agreement was binding on it and that the appellant's employment could only be terminated by the giving of three months' notice. Reliance was then sought to be placed on a subsequent oral agreement to the effect that only one month's notice of termination had to be given. Wessels JA stated:

'The averment that [appellant] had contracted out of his right to three months' notice of termination of his employment, forms an essential part of [respondent's] case that [appellant's] employment was lawfully terminated. No other form of lawful termination is relied upon. In my opinion, therefore, the incidence of *onus* in relation to the defence pleaded by [respondent] is governed by

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proceeds or amount: Provided that any such payment shall be made in accordance with section 11 of the Act.'

[21] See s 10A(3)*(a)* of the Act, which reads:

'Notwithstanding the provisions of section 11(2) and (9), any claimant submitting as proof of a claim a default judgment may be required by the referee or other person to whom the claim is submitted or by any person having an interest in the fund, to furnish evidence justifying the said judgment.'

[22] It has been observed: 'However, where parties have concluded an otherwise valid agreement, the most likely inference to be drawn from a resort to a defence of formal non-compliance is that a party is seeking to escape the agreement for opportunistic reasons and not due to evidentiary or other concerns.' (F Myburg 'On Constitutive Formalities, Estoppel and Breaking the Rules' 2016 (2) *StellLR* 254 at 269)

[23] *Cotler v Variety Travel Goods (Pty) Ltd* 1974 (3) SA 621 (A).

the second principle referred to by DAVIS, A.J.A., in *Pillay v Krishna and Another, supra* at p 951. The oral agreement relied upon is in effect a special plea, and the *onus of proof quoad that defence would rest on [respondent]. The third rule referred to by DAVIS, A.J.A., at p 952 of the judgment also lends support to this conclusion. If the onus* in regard to the oral agreement were to rest on plaintiff, he would be required to prove a negative, namely, that he did not conclude the oral agreement in question. This test is, of course, not an absolute one, but in the circumstances of this case it would seem to be appropriate. It was not essential to [appellant's] case to prove that he did not enter into any agreement affecting his rights in terms of the written agreement with [respondent]. On the contrary, the alleged oral agreement is an essential part of [respondent's] case.'[24]

[32] Whilst the appellant contends, in the first instance, that the charterparty was terminated as a matter of law with effect from 15 June 2014, by virtue of the notice of termination of that date, it advances an alternate argument, which is based on a number of inferences that is sought to be drawn from certain selected facts that the charterparty must, in any event, have terminated by some unknown mechanism on some other unknown date, before the judicial sale of the vessel in February 2015. It is telling that the appellant appears unable to rely on a single clear date of termination, but rather raises several alternate arguments in support of the possibility that the charterparty must have terminated at any one of several alternate times.

[33] Moreover, the appellant has also been unable to commit to a single alleged cause or mechanism by which the charterparty allegedly terminated. In this regard, reliance is sought to be placed on: (i) The existence of an unsigned draft document styled a Debt Liquidation Agreement, and the fact that the outstanding indebtedness

[24] *Cotler v Variety Travel Goods (Pty) Ltd &* Others 1974 (3) SA 621 (A) at 629A-G. See also *Schloemann v Goldstone Resources Ltd* [2019] JOL 42240 (LC) para 59.

of Caliskan to Garanti was reflected therein as having been reduced to $ 500,988 by 5 January 2015 (from $ 11,763,010 as of 15 April 2014) indicates that the charterparty had terminated by some means other than the notice of termination. (ii) The language used by Mr Clark in his answering affidavit filed in opposition to the sale application, indicates that the charterparty must already have terminated by the time that he deposed to that affidavit on 21 October 2014. (iii) Caliskan effectively abandoned the vessel in October 2014, which is 'inconsistent with' a continuation of the charterparty. In the result, the appellant's case that the charterparty terminated is pieced together from selected circumstantial events. In doing so, it seeks to disregard the direct evidence of Garanti, the owner, that there was no termination, the statements to the contrary by Caliskan, the other party to the charterparty, as well as Caliskan's conduct as charterer subsequent to 15 June 2014 and the public record of the continuation of the charterparty in the Turkish International Ship Registry. There can thus simply be no reasonable grounds for doubting the correctness of the opposing suppliers' factual allegations.[25]

[34] If, as it seems to me, it was for the appellant, as the applicant who did not accept the Referee's report on the basis that the agreement had terminated, to establish that fact and not for the opposing suppliers to prove the negative, namely that the agreement had not terminated (which is consistent with the view expressed by Davis AJA in *Pillay v Krishna*[26]), then on that score it must be taken to have

[25] Contra *The Stainless Kobe (No 2) 't Wapen Van Marion BV v The Fund Constituted by the Sale of the MV Stainless Kobe* SCOSA D69 (D).

[26] Davis AJA observed at 952 – 3:

'But I must make three further observations. The first is that, in my opinion, the only correct use of the word "onus" is that which I believe to be its true and original sense (cf. D. 31.22), namely, the duty which is cast on the particular litigant, in order to be successful of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to, combat a prima facie case made by his opponent. The second is that, where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof, which have nothing to do with each other, save of course that the

failed. This, because the appellant was obliged, in the first instance, to put up facts to prove the allegations upon which it relied, which it failed to do. And, in the light of the competing opinions of the experts, in the second, I do not believe that a Court can determine, as a matter of fact, the relevant Turkish Law on the papers as they stand. Absent a referral to oral evidence (and there has been no request for such from the appellant), the first point must be answered against the appellant.

As to the second

[35] The question that arises for consideration is whether a claimant is entitled to lodge a claim against a Fund in reliance on the deeming provision, without having arrested the vessel *in rem* whilst the bareboat charter remained extant. The appellant contends that the claim of Monjasa (as well as other similar claims accepted by the Referee), should have been rejected because they had not arrested the vessel and that, before its sale, the vessel had to have been arrested before the deeming provision could be relied on.

[36] As with the appellant's claim, the claims of the opposing suppliers against the Fund are based on the underlying *in personam* liability of Caliskan, read together with the deeming provision. When the vessel was first arrested by the appellant pursuant to an action *in rem* on 26 May 2014, that action was based on the alleged

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second will not arise until the first has been discharged. The third point is that the onus, in the sense in which I use the word, can never shift from the party upon whom it originally rested. It may have been completely discharged once and for all not by any evidence which he has led, but by some admission made by his opponent on the pleadings (or even during the course of the case, so that he can never be asked to do anything more in regard thereto, but the onus which then rests upon his opponent is not one which has been transferred to him: it is an entirely different onus, namely the onus of establishing any special defence which he may have. Any confusion that there may be has arisen, as I think, because the word onus has often been used in one and the same judgment in different senses, as meaning (1) the full onus which lies initially on one of the parties to prove his case, (2) the quite different full onus which lies on the other party to prove his case on a quite different issue, and (3) the duty on both parties in turn to combat by evidence any prima facie case so far made by his opponent: this duty alone, unlike a true onus, shifts or is transferred.'

in personam liability of Caliskan, the demise charterer, not Garanti. The vessel was then sold at the instance of the appellant in terms of s 9 of the Act. Section 9(1) provides: 'A court may in the exercise of its admiralty jurisdiction at any time order that any property which has been arrested in terms of this Act be sold.'

[37] In terms of s 9(2) of the Act, the proceeds of that sale constituted 'a Fund to be held in court' to be dealt with in accordance with the Rules or 'any order of court'. Once the vessel had been sold in accordance with the order, the proceeds of that sale then constituted a 'Fund' pursuant to the provisions of s 3(11)*(a)*(ii) of the Act.[27] Consistent with the provisions of ss 3(11)*(a)*(ii) and 9(2), the order directed: 'THAT a Fund be established from the proceeds of the Sale which shall be dealt with as follows'. Section 3(11)*(b)* of the Act stipulates that 'A fund shall, for all purposes, be deemed to be the property sold . . .'

[38] Accordingly, when a ship is sold in terms of s 9(1), based on an arrest founded on the deemed ownership of the demise charterer, the Fund that is created in terms of ss 9(2) and 3(11)*(a)*(ii), is a Fund that is deemed to be the property of the demise charterer in terms of s 3(11)*(b)*, read with the deeming provision, in respect of claims that are capable of proof based upon the liability of the demise charterer.

[39] The provision in s 3(11)*(a)*(ii) that deems the Fund to be the property that was sold, constitutes an important link in the process that ultimately allows claimants to obtain payment in satisfaction of their claims from that Fund. Absent the Fund being

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[27] Section 3(11)*(a)*(ii) of the Act provides:
'*(a)* There shall in any particular case be a fund consisting of-
(ii) the proceeds of the sale of any property mentioned in subsection (5)*(a)* to *(e)*, either in terms of any order made in terms of section 9, or in execution or otherwise.'

deemed to be owned by the charterer by demise, there would be no basis for parties with claims based on the *in personam* liability of the demise charterer to receive payment from the Fund.

[40] The Fund's ability to satisfy claims for payment founded on the *in personam* liability of the charterer by demise, goes to the very heart of the purpose of the order in this matter. As recognised by Van Amstel J in *CH Offshore Ltd v PDV Marina*, s 1(3) of the Act allows 'the ship may be sold in execution to satisfy a debt for which the shipowner was not liable'.[28]

[41] When ordering the sale of the vessel, the court also made an order in accordance with s 10A(1)[29] of the Act with regard to 'the distribution of a Fund or proof of claims against a Fund, including the referring of any of or all such claims to a referee in terms of section 5(2)(e)'. It also ordered that all claims against the Fund be referred to a referee, with the result that in terms of s 10A(2)*(a)* 'all proceedings in respect of claims which are capable of proof shall be stayed and any such claim shall be proved only in accordance with such order'. Consequently, all proceedings 'in respect of claims which are capable of proof for participation in the distribution of the Fund', were stayed with effect from 5 December 2014. Further, 'any such claim' had to 'be proved only in accordance with such order'.

[42] The necessary implication must therefore be that any proceedings still to be instituted to prove such claims, could no longer be instituted by way of an arrest of

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[28] *CH Offshore Ltd v PDV Marina* [2013] ZAKZDHC 62; 2013 JDR 2513 (KZD) para 18.
[29] Section 10A(1) provides:
'The court may make an order with regard to the distribution of a fund or payment out of any portion of a fund or proof of claims against a fund, including the referring of any of or all such claims to a referee in terms of section 5(2)*(e)*.'

the vessel, but by way of the procedure set out in the order. In the circumstances, as stated by Hofmeyr: 'It is not necessary for a claimant to have instituted an action or, where property has been sold, to proceed against the Fund or to proceed to judgment before being entitled to have its claim taken into account in the distribution of a fund.'[30]

[43] In *Continental Illinois National Bank and Trust Co of Chicago v Greek Seaman's Pension Fund*, the Court rejected the argument that s 3(5) of the Act had the effect of requiring a claimant against a Fund to have effected an arrest of the property and to have instituted action in respect of its claim. Thirion J stated:

'I can see no reason why, if a ship is already under arrest within the Court's jurisdiction in an action instituted in that Court, a further arrest would be required by another claimant before the Court can exercise jurisdiction in respect of his claim. While the ship is under arrest in the Court's jurisdiction the Court has control over it and exercises jurisdiction over it.[31]

. . .

Be that as it may, once the stage has been reached that the arrested res has been sold in terms of s 9 and the proceeds are being held as a Fund in Court, there can surely be no need for a further arrest. The court then has full control over the proceeds and the proceeds can only be paid out on an order of the Court. Furthermore, a requirement that a claimant in order to be entitled to share in the distribution of a Fund in respect of his claim, would have to have instituted an action, when he is not required to obtain a judgment on it, would be a purposeless formality in a statute which eschews formalism and technicality and which aims at the expeditious and efficacious determination of claims.'[32]

[44] Later, Thirion J added:

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[30] Hofmeyr G *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012) 287.
[31] *Continental Illinois National Bank and Trust Co of Chicago v Greek Seaman's Pension Fund* 1989 (2) SA 515 (D) at 526I – 527A.
[32] At 527A-B.

'. . . The purpose of an arrest of the property in an action *in rem* is to give the plaintiff security in respect of his claim and to establish the Court's jurisdiction in respect of the property. Where as happened in this case there had been an arrest of property, albeit by another claimant, and the property has, pursuant to such arrest, been sold in terms of s 9 of the Act and the proceeds are being held in terms of s 11 as a fund in Court, then the Court's control over the proceeds is complete. The proceeds can only be paid out on an order of Court and the Court would only authorise a payment out of the fund when it is satisfied that all persons who have claims with regard to the fund have had an opportunity to lodge their claims and when it is satisfied that the order of priority laid down in s 11 has been observed.

When the stage has been reached that the proceeds of the sale are being held as a fund, any need for an arrest as a prerequisite to a further party's introduction to the proceedings must surely have fallen away in respect of proceedings for the distribution of the fund.

. . . It was therefore competent for the Court to refer the matter of the distribution of the fund to a referee under the provisions of s 5(2)*(e)*. The Act does not contemplate that in those circumstances only claims in respect of which an arrest had been effected would qualify for participation in the distribution of the fund. In terms of s 5(2)*(a)* the Court may in the exercise of its Admiralty jurisdiction consider and decide any matter arising in connection with any maritime claim, notwithstanding that such matter may not be one giving rise to a maritime claim. The applicant's claim was a maritime claim and the question of the amount which applicant should be paid from the fund and what other claimants were entitled to have their claims paid from the fund were matters which arose in connection with applicant's claim and therefore matters which the Court could consider and decide and were therefore also matters which the Court could refer to a referee in terms of s 5(2)*(e)*.'[33]

[45] I daresay, it would be an equally 'purposeless technicality' to insist that a vessel be arrested, as here, after its sale has been ordered. The legislature appears to

[33] At 537 H-538G.

have specifically recognised this when in 1992 it introduced s 10A.[34] Once the order had been made for the sale of the vessel, with all claims being stayed as at that date and the procedure prescribed as set out in the order for the proof of all claims against the vessel, the legislature could not have intended that after that point in time, the vessel still had to be arrested to prosecute a claim, let alone to bring the deeming provision into operation.

[46] It is instructive to note that when the order of 5 December 2015 was made directing that all claims be delivered to the referee, there was no suggestion by anyone, and certainly not the appellant, that: (a) any such claims should first be preceded by the arrest of the vessel or (b) the claimants who had not yet arrested the vessel were still obliged to do so or (c) on the sale of the vessel they would have lost their entitlement to proceed in *rem* to enforce their claims in the absence of an arrest.

[47] The high court accordingly cannot be faulted for the approach which it took in relation to the application of s 1(3) of the Act, notwithstanding the fact that certain claimants had not arrested the vessel prior to its sale. It follows that the second issue must also be answered against the appellant.

[48] In the result, the appeal must fail and it is accordingly dismissed with costs, including those of two counsel.

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[34] See in that regard *MV 'DA QING XIA' LBH Mozambique Limitada v Fund Consisting of the Proceeds of the Sale of the Cargo of 4, 904.78 Tons of Chromite Ore Concentrates Lately Laden on Board & Another* [2015] ZAKZDHC 32.

V M Ponnan
Judge of Appeal

Gorven JA (dissenting)

[49] Having read the judgment of my colleague Ponnan JA, I am constrained to respectfully disagree with the proposed outcome of the appeal. I do so because we part ways on the first issue dealt with by him. I agree with his approach to the second issue. In the view I take of the matter, however, we do not reach that issue. In this dissent, I shall adopt his nomenclature. As I see it, we differ on the application of the onus of proof regarding the claims of the opposing suppliers. Although the factual background is mostly common cause and has been clearly set out in the judgment of Ponnan JA, I feel it necessary to give some background to what I regard as the essential enquiry in this matter.

[50] There is no dispute that the appellant has a claim against the Fund. It qualifies as one against the Fund under the deeming provision of s 1(3) of the Act. The order proposed by the referee included a recommendation that the claims of the opposing suppliers be paid from the Fund. In support of Part B of the application before the high court, which forms the basis of this appeal, the appellant disputed this. As is customary in matters of this nature, the basis on which this was done was to apply for the acceptance of the referee's recommendations with some modifications. Those modifications excluded payment to the opposing suppliers.

[51] The appellant does not dispute that the opposing suppliers have claims against Caliskan. The issue is whether those claims fall within the deeming provision of s 1(3) of the Act. For this purpose, the charterer by demise is only deemed to be, or to have been, the owner of the ship for the period of the charter. As a result, for an action *in rem* to lie under the deeming provision, at the very least a claim against the bareboat charterer must be lodged during the period of the charter.[35] It is the appellant's contention that the bareboat charter had terminated by the time the opposing suppliers lodged their claims. There is no dispute that, if it terminated on 15 June 2014 as the appellant contended, the claims of the opposing suppliers do not lie against the Fund. None of them had lodged their claims by that date. They would have to look to Caliskan, rather than the Fund, to satisfy their claims.

[52] The facts below are accepted by all the parties. Caliskan had breached the bareboat charter agreement by non-payment. Garanti directed a letter dated 15 April 2014 to Caliskan demanding payment, failing which the bareboat charter would terminate automatically 60 days later (the notice of termination). That agreement made provision for such a demand and such a consequence. Caliskan did not settle the outstanding indebtedness by that date. A document agreeing to revise the payment schedule was signed by Garanti and Caliskan on 24 April 2014 (the revised payment plan). The administrators of Caliskan did not give their consent to the revised payment plan. It is the legal effect of these two documents: the notice of termination and the revised payment plan, on which the appeal turns as I see it.

[35] Ponnan JA explains in relation to the second point that the appellant contended that an arrest of the vessel had to be made during the period of the bareboat charter for an action *in rem* to lie under the deeming provision of s 1(3) of the Act.

[53] The notice of termination was introduced into evidence by Mr Andrew Clark, the South African attorney representing Garanti. He had been given the document by Mr Senol, the Turkish lawyer of Garanti, who explained the effect of it in Turkish law. From it, Mr Senol had drawn the conclusion that the bareboat charter had terminated on 15 June 2014. This was later retracted on the basis that he had not been aware of the revised payment plan. It is worth repeating here aspects of what persons representing Garanti said about this. Mr Ilker Tasliyurt, the head of the risk monitoring department of Garanti, explained:

'7. I confirm that annexure "AC36.1" to Mr Clark's affidavit is a valid notice that was given by Garanti to Caliskan and the individual guarantors mentioned in the notice. The notice is dated 15 April 2014 and I confirm that it was served on Caliskan on 17 April 2014.

8. On 24 April 2014, however, Garanti and Caliskan agreed to extend the Financial Leasing Agreement with an amended payment plan. I annex hereto marked "IT1" a copy of the signed amended payment plan dated 24 April 2014 and marked "IT2" a sworn translation thereof.

9. The effect of signing the payment plan referred to above was, by agreement between Garanti and Caliskan, to suspend the operation of the notice dated 15 April 2014. In the circumstances, I can confirm that the bareboat charter between Garanti and Caliskan was not terminated on 15 June 2014, or at all.'

The clear implication is that, but for the revised payment plan, the bareboat charter would have terminated on 15 June 2014.

[54] This is stated even more clearly by Mr Senol:

'9. I had not previously been provided with a copy of this notice and when I read the notice and considered the fact that the outstanding hire had not been paid within sixty days, I came to the conclusion that, as a matter of Turkish law, the charterparty had terminated on 15 June 2014.

. . .

12. In the course of preparing a reply on behalf of Garanti to the Referee's request for further information and representations, my attention has been drawn to the agreement reached between

Garanti and Caliskan on 24 April 2014, extending the payment period under the Financial Leasing Agreement. The relevant document is annexure "IT1" to the affidavit of Mr Tasliyurt.

13. Upon further consideration, it is my view that as a matter of Turkish law the payment plan agreement between Garanti and Caliskan had the effect of suspending the notice dated 15 April 2014 with the effect that the bareboat charter was not terminated on 15 June 2014. I confirm that this accords with Garanti's instructions to me and the instructions that I was given in regard to this issue in 2014.'

Once again, there is a clear acknowledgment on his part that, if the revised payment plan did not suspend the notice, the bareboat charter would have terminated on 15 June 2014. In other words, although the notice of termination had legal effect, the revised payment plan served to keep the bareboat charter in place.

[55] It was only when Professor Doctor Akkanat, utilised as an expert on Turkish law by the appellant, gave his opinion that the revised payment plan had no legal effect because it had not been acceded to by the administrators of Caliskan, that the legal efficacy of the notice of termination was questioned by Professor Doctor Yavuz, the expert on Turkish law relied upon by KPI Bridge Oil Ltd.

[56] Be that as it may, there is, as mentioned by Ponnan JA, a sharp difference of opinion between the experts in Turkish law. Professor Doctor Akkanat, utilised by the appellant, was of the opinion that the notice of termination was valid even though the right to cancel was bound to what he termed a 'voluntary condition'. Failure to pay within the 60 days would thus automatically terminate the bareboat charter. Professor Doctor Yavuz was of the opposite view. He said that the notice of termination was conditional. This, as he put it 'voided the termination . . . due to the fact that such written warning had been sent after the interlocutory injunction given with the suspension of bankruptcy decision . . .'. In addition, because payments

were no longer dependent on only the will of Caliskan, but on the administrators who function as public authorities, non-payment could not bring about termination. He stated that this was because the administrators 'may not approve all the payment orders due to their obligation to create an equilibrium among the creditors and be objective.'

[57] There were similar differences of opinion on the legal effect of the revised payment plan without the approval of the administrators. Professor Akkanat testified that it was invalid and did not suspend the operation of the notice of termination. He further stated that it was not legally possible for Garanti to unilaterally withdraw or suspend the operation of the notice of termination. A binding agreement between Garanti and Caliskan was necessary for this purpose. Professor Yavuz appears to have agreed that the consent of the administrators was needed for the revised payment plan to have legal effect. However, he seems to have disagreed that Garanti could not unilaterally withdraw or suspend the operation of the notice of termination. His explanation was:

'If the supplemental agreement dated 24.04.2014 had really not been submitted to the approval of the administrators, it would be invalid as stated by Mr. Akkanat.

. . .

Subsequent to the warning and prior to the expiration of the time period stated in the written warning, Garanti had stipulated a new payment plan with the payment dates set forth in the supplemental agreement; withdrawn the termination transaction subsequent to the written warning and prior to the expiration of the time period stated in the written warning and backed out of its termination intention.'

This clearly takes the view that Garanti could unilaterally 'back out of its termination intention.'

[58] Ponnan JA, with respect, correctly indicated that Garanti and Caliskan gave effect to the provisions of the revised payment plan. They did so in the, no doubt, genuine belief that it was legally binding between them. The fact that they both regarded the bareboat charter as remaining extant until the sale of the vessel is a further reflection of that belief. As is clear from the affidavits of Mr Tasliyurt and Mr Senol, Garanti regarded the notice of termination as constituting a proper legal demand which, if not complied with or suspended, would have resulted in the termination of the bareboat charter 60 days thereafter. However, the views of Garanti and Caliskan on the effect of the notice of termination and the revised payment plan do not assist in determining whether those documents were legally effective or not. Whether they were legally effective depends on Turkish law. This was a question of fact as has been explained in the judgment of Ponnan JA.

[59] In essence, the factual dispute as to the legal effect of these documents amounts to whether or not the bareboat charter terminated on 15 June 2014. There is doubt as to whether it survived beyond that date. That being so, the issue of the onus comes into sharp focus. I do not believe that, because the appellant and the opposing suppliers were not privy to the dealings between Garanti and Caliskan, the issue of the onus should be approached differently to any other matter.

[60] To my mind, the long-accepted approach in *The Kingston*[36] is decisive on the question of the onus. The facts in that matter bore some similarity to the present one. A fund had been constituted from the judicial sale of the vessel in question. A referee had been appointed ‘for the purposes of receiving, considering, and reporting to the

[36] Footnote 9.

court on any claims.' The proposed order by the referee included a recommendation that an order be granted that 'The claim of Pandora Maritime CC is authorised to be paid from the Fund on the basis that it is entitled to a preference in terms of Section 11(1)(a) of Act No. 105 of 1983 . . .'. One of the claimants, Creditcorp, had an uncontested claim against the fund. It applied for the acceptance of referee's recommendations with some modifications, as in the present matter. In particular, Creditcorp applied for an amended form of the proposed order to the effect that no amount would be awarded to Pandora Maritime CC (Pandora). It was in that context that Bristowe J held:

'I agree with Mr Wallis that a negative need not be proved. In other words, where a claim is disputed, I should, I believe, take the view that each such claim must be established by the claimant who has advanced it and adopt the normal approach that "he who asserts must prove".'[37]

I see no material distinction between that matter and the present one as regards the question of the onus. As in that matter, the appellant's claim is not challenged here. As in that matter, the appellant has applied for the acceptance of part of the referee's report. As in that matter, the appellant disputes the claims of the opposing suppliers whose acceptance was recommended by the referee. In *The Kingston*, Bristowe J required Pandora to prove its claim and then rejected a portion of that claim on the basis that it did not lie against the fund in that matter.

[61] The approach by Bristowe J as to the onus accords with legal principle. For this purpose, it is important to understand the function and powers of a referee and of the court. It is accepted law that a referee's recommendations are not binding on any of the interested parties or the court.[38] In *The Kingston,* the referee was referred

[37] *The Kingston* at D85 C-D.
[38] *Associated Marine Engineers (Pty) Ltd v Forouna Bank PF* 1994 (4) SA 676 (C) at 683H; *The Stainless Kobe (No. 2)* SCOSA D77D-E.

to as an 'initial sorting agent' for claims.[39] Paragraph 6.7 of the court order appointing the referee in the present matter, read with Rule 21(8)(a) and (b) of the Admiralty Rules referred to by Ponnan JA, provides no more than that the claimant must place before the referee all relevant material in support of its claim. Rule 21(8)(c) makes it clear that it is the court that makes orders concerning 'the payment of any fund, proceeds or amount . . .'.[40]

[62] The reason for this role of the referee is clear. In matters such as this there are often multiple claims. Along with this comes the need to sort and rank them for the purpose of payment out of a fund which cannot satisfy them all. That was the case in *The Kingston* and in the present matter as well. If this were done in a number of actions brought by the various claimants separately, it would be extremely difficult to ensure that the claims of the claimants ranked appropriately.

[63] A claim remains a claim and only a claim until it is pronounced on by a court of law. If claims are unchallenged, that operates as a kind of informal admission by the other claimants to the court of the provenance of those claims. In those circumstances, the report of a referee recommending an order for payment of those claims generally results in the court granting such an order.

[64] However, where a claim is disputed, it must be proved in the normal course.[41] That is what occurred in *The Kingston*. The acceptance or otherwise by the referee did not mean that the claim of Pandora had been proved. This is also why the court

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[39] *The Kingston* at D82.6.
[40] Rule 21(8)(c) provides:
'The court shall make such order as it deems fit with regard to parties, procedure and the payment of any fund, proceeds or amount: Provided that any such payment shall be made in accordance with section 11 of the Act.'
[41] *The Stainless Kobe* at D77F and D78F.

there held that a negative need not be proved.[42] This simply means that an applicant seeking an order which excludes the claim of a claimant bears no onus to disprove a claim which the applicant disputes. The claimant whose claim is disputed bears the onus to prove the claim as would be the case if it instituted its own action against the Fund.

[65] Applying those principles to the present matter, as we must, the appellant applied for an order the effect of which was to dispute the claims of the opposing suppliers. *The Kingston* makes it clear that this cast the onus onto the opposing suppliers to prove their claims. Unless they did so, they were not entitled to an order for payment to them from the Fund. Part and parcel of discharging that onus was proof that their claims lay against the Fund. Since they relied on the deeming provision in s 1(3) of the Act, they had to prove that, when they lodged their claims, Caliskan remained the bareboat charterer of the vessel. In other words, the bareboat charter had to be extant at the time. If they failed to discharge the onus, the claim would lie not against the Fund as an action *in rem* but against Caliskan as an action *in personam*.

[66] For that reason, I respectfully part ways with Ponnan JA where he says, in para 30:

'In particular, it is important to emphasise that the appellant is acting purely out of self-interest and that in wanting to challenge the continued existence of the agreement, which was not in issue as between all of the other relevant parties, it was for it to establish that the agreement had terminated and in that it attracted to itself the onus on that score.'

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[42] *The Kingston* at D85 C.

That was certainly not the approach taken in *The Kingston* where Creditcorp was likewise the only claimant disputing the claim of Pandora. The fact that the continued existence of the agreement was not in issue between all the other relevant parties does not determine the onus. The onus is clear in the light of *The Kingston*. Pandora was regarded as a claimant asserting a claim for payment and therefore Creditcorp was not obliged to disprove its claim or, as it was put in that matter, to prove a negative. On a parity of reasoning, the appellant is not obliged to disprove any element of the *facta probanda* which the opposing suppliers must prove in their claim to payment from the Fund, including the currency of the bareboat charter at the time they lodged their claims.

[67] I also respectfully disagree with Ponnan JA when he said:

'I remain far from persuaded that it is even open to the appellant, a stranger to the agreement, to raise the point, particularly where, as here, the parties thereto have performed in accordance with its terms.'

The point he refers to is whether the bareboat charter was extant when the opposing suppliers lodged their claims. The authority relied on by Ponnan JA concerns the transfer of the assets and liabilities of a bank and its subsequent deregistration under the relevant legislation. The agreement leading to this transaction was subject to a suspensive condition. The parties gave effect to the agreement and the bank was duly deregistered. The defendants in the action, who were not parties to the agreement, sought to 'cancel' it years later on the basis of non-fulfilment of the suspensive condition. The court there held that they had no greater right to cancel than did the parties to the agreement, who had given effect to it in full knowledge of the suspensive condition. That matter differs substantially from the present one where the opposing suppliers are obliged to prove the

currency of the bareboat charter at the relevant time. I see no reason why it is not open to the appellant to dispute that.

[68] The question is whether the opposing suppliers discharged the onus. In other words, did they prove that, at the time they lodged their claims, the charter party remained extant?

[69] As indicated above, there was a strong difference of opinion between the Turkish law experts and thus a factual dispute. The two documents mentioned above go to the heart of whether the bareboat charter terminated on 15 June 2014 or not. In my view, the opposing suppliers had to prove that the notice of termination did not have legal effect. If they failed to do so, the bareboat charter terminated on 15 June 2014. If they succeeded in doing so, the bareboat charter did not terminate on 15 June 2014. In those circumstances, the second question dealt with by Ponnan JA would arise. If the notice of termination did have legal effect, the opposing suppliers had to prove that the notice of termination was somehow withdrawn or its operation suspended within the 60 day period. If they failed to do so, the bareboat charter terminated on 15 June 2014 and they failed to prove that their claims lay against the Fund.

[70] It is clear there is no way of resolving those factual disputes on the papers. The opposing suppliers disavowed any intention of referring the matter to oral evidence. Without evidence resolving the effect of the notice of termination and the revised payment plan, in my view, the onus became decisive. This resulted in the opposing suppliers having failed to prove that their claims lay against the Fund pursuant to the deeming provision of s 1(3) of the Act. Since that was the case, the appeal must succeed.

[71] In the result, I would have upheld the appeal with costs of two counsel, set aside the order of the high court and substituted an order as prayed by the appellant disallowing the claims of the opposing suppliers.

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T R Gorven

Judge of Appeal

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