

IN THE SEYCHELLES COURT OF APPEAL

TEXTIL BAQUIT

PLAINTIFF/APPELLANT

Versus

THE OWNERS AND CHARTERERS OF  
VESSEL "GLOBAL NATALIE"

DEFENDANT

ELPIDA MARINE COMPANY LTD

APPLICANT/RESPONDENT

Civil Appeal No:25 of 1997

*[Before: Goburdhun, P., Ayoola & Adam, J.J.A]*

.....  
Mr. R. Valabhji for the Appellant

Mr. P. Boulle for the Respondent



JUDGMENT OF THE COURT

(Delivered by Ayoola J. A. )

This appeal is from the decision of the Supreme Court (Perera, J) in respect of two applications before him. One of the applications was by the present appellant, then plaintiff, "Textil" whereby it applied that judgment in default be entered in an action arising from carriage of goods against the ship "Global Natali" in the sum of US dollars 775,078.26 plus consequential losses, expenses and interest. The other was by the respondent ("Elpida") whereby an order was sought for leave to file a statement of defence out of time on the grounds set out in the affidavit.

The grounds of Textil's application were that time for acknowledgement of service expired on the 14<sup>th</sup> March 1997 and time to file the defence expired on the 28<sup>th</sup> March 1987, the writ having been duly served on the ship on 28<sup>th</sup> February 1997. The affidavit in support also contained deposition to the facts that Global Containers Lines (Bahamas) Ltd ("Global Containers") were the charterers of the vessel "Global Natali" while West Coast Marine Company Ltd ("West Coast") were the owners of the vessel. The affidavit contained the following in paragraph 5:-

*"(d) West Coast Marine Company Limited was at the time when this action was commenced and continues to be the beneficial owner of all the shares in the vessel "Global Natali."*

*"(e) Elpida Marine Company Limited now claims to be present owners of the vessel "Global Natali" and have filed an acknowledgment of service of the Writ on the 17<sup>th</sup> March 1997."*

Neither Global Containers nor West Coast acknowledged service, but Elpida did three days after the 14 days limited for acknowledgment of service. None of them filed a defence within the time limit for doing the same.

The grounds of Elpida's application for leave to file a statement of defence out of time were:

*(1) That the statement of claim endorsed on the writ of summons issued by the plaintiff being only partly liquidated and "was not taken to be the final statement" led the "defendant" to believe that a further statement of defence would be filed in accordance with the law.*

*(2) That there being a contrariety in the plaintiff's motion which contained an allegation that "the action is based on damages caused to cargo ..." and the statement of claim endorsed on the writ which referred to "loss of cargo" the defendant was entitled to be served with a fresh statement of claim before filing its defence and the plaintiff had no right to seek a default judgment on that basis.*

*(3) The acknowledgment of service was filed within 14 days after the writ of summons came to the knowledge of the defendant.*

Perera, J rightly observed that the motion in rem before him originated under Order 75 Rule 3 of the Rules of the Supreme Court (UK) by writ of summons with a statement of claim endorsed thereon. In the affidavit accompanying the praecipe for a warrant of arrest sworn to by Mr. Valabhji "Global Containers" was stated to be the charterers while "West Coast" was described as owners. There was a statement in the affidavit that:

*"West Coast Marine Company Ltd was at the time when this action was commenced and continuing to be the beneficial owner of all the shares in the vessel "GLOBAL NATALI".*

The ship was arrested.

In his ruling from which this appeal arose, the learned judge discussed at some length the propriety of service of the writ of summons by posting it on the mast of the ship which he found was at the time of such posting to have been unmanned. He held that:

*" ..... when the process officer of this court served the warrant and the writ of summons on 28<sup>th</sup> February 1997 by affixing them on the ship, it was 'unmanned', and hence although consistent with the rules, was a meaningless exercise."*

Having held thus he was of the view that the service being a meaningless exercise "any default in acknowledgment" was to be considered with circumspection. At the end of the day, Textil's application for judgment in default was struck out. It was manifest that the judge was prevailed upon to do so by the view he had held, but which he later rejected, that the service of the writ of summons was a "meaningless exercise."

In response to Elpida's application for leave to file a defence out of time Textil had filed an affidavit wherein it was deposed to that there was no proof that Elpida Marine Company Ltd were the owners of the ship and



that there had been no proof of sale of the ship to that company. It was further deposed that Elpida was not a party to the case and had not applied for leave to intervene. Textile asked in the alternative that should Elpida be granted leave to defend, it should be on terms as would do justice.

The learned judge dismissed the submission made by Counsel on behalf of Textil in regard to the need for Elpida to prove its ownership or apply for leave to intervene saying that there was no necessity for a defendant who had claimed to be owner, to apply for intervention; and, that the issues as to whether there had been a subsequent sale of the vessel and who the owners were at the time of service of the writ are all matters to be canvassed at the hearing, orally or by affidavit. In considering Elpida's application the learned judge was of the view that the 3 days delay in filing the acknowledgment of service was excusable. He rightly noted, however, that Elpida should have filed a defence within 14 days thereafter. Turning to the main ground on which Elpida had relied for its application he said:

*"The reason adduced that the defendant was led to believe that a further statement of claim would be lodged is however untenable as there was ample opportunity for them to file a defence raising those objections in time."*

The main reasons why the learned judge granted Elpida's application seem contained in the following passage in the judgment:

*"The plaintiffs have filed a motion for judgment by default on the basis that among other, West Coast Marine Company Ltd whom they aver are the owners had defaulted appearance. But Elpida Marine Company Ltd have come forward as owners and have raised objections as to the plaintiffs' right to maintain an action in rem. Further the plaintiffs also delayed in filing the motion for judgment by default for almost the same period of the defendants to file a defence. Hence they cannot complain that such motion was dilatory, vexatious and an abuse of the process of court. In the circumstances, the plaintiffs have not*

*been materially prejudiced to such an extent that leave should not be granted."*

In the event, he granted leave to the defendant to file its statement of defence out of time.

The threshold, and, indeed, the main question on this appeal is whether Elpida not having been shown or, mentioned or admitted by Textil to be the owner of the ship should have been permitted to make application in the proceedings as a party thereto without first establishing its standing. Mr. Valabhji, learned counsel for Textil, complained that although in none of the documents filed by Textil had Elpida been mentioned, Elpida without proof of its interest or locus standi was allowed to intervene in the matter. Mr. Boulle, learned counsel for Elpida, argued that any person who claims to be the owner of the ships was entitled to file an acknowledgment of service and make an application as a party in the proceedings without first seeking leave to intervene. Mr. Boulle has supported his argument with a passage from Halsbury's Law of England (Vol. ) 4<sup>th</sup> Edition paragraph 384 as follows:-

*"The owners of the property proceeded against and all persons directly interested therein may acknowledge service without filing an affidavit and showing their interest at any time before judgment."*

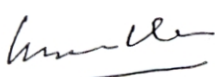
If the "owners of the property" is understood as meaning any person who claims "to be owner", there is no doubt that the passage from Halsbury's referred to is apposite. However, there are provisions of the applicable Rules (the UK Rules of the Supreme Court) which tend to show that before a warrant of arrest is issued in circumstances as in this case, an affidavit filed pursuant to Order 75 Rule 5(4) must show that at the time of the issue of the writ "the relevant person was either the beneficial owner of all the shares in the ships in respect of which a warrant is required or (where appropriate) the charterer of it under a charter by demise:" (see Order 75 Rule 75(5)(4) and (9) of the Rules)

By virtue of Order 75 rule 17(1) of the Rules "a person who has an interest in the ship but who is not a defendant to the action, may with

the leave of the court, intervene in the action." Upon being granted such leave he becomes a party to the action (Order 75 rule 17(3)). Elpida, it is argued by Mr. Boulle, was an owner and not "a person who has an interest" and did not need leave to become a party as an intervener. The primary question in this appeal, however, is not whether Elpida needed leave to become a party as an intervener.

When the question has arisen in a case of the standing of a party not mentioned as a party in the case, to bring an application in the case, such a question is a threshold question which should be settled before the case proceeds further. In this case, the question of the standing of Elpida to bring an application in the face of an objection by Textil to its standing, should have been settled first. Had the necessary materials been before the trial court, we would have been in a position to determine whether or not Elpida had standing. However, since such materials were not placed before that court, we are unable to do so.

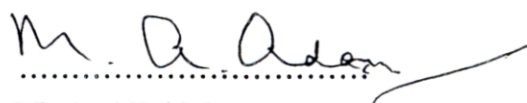
For these reasons Perera J's ruling must be set aside. The order granting leave to Elpida to file a statement of defence out of time is set aside as also is the order striking out the plaintiff's application for judgment by default. The matter is remitted to the Supreme Court to determine the question of Elpida's standing to apply for leave to file a defence out of time and, depending on the outcome of such determination, for the application for judgment in default to be considered and determined on its merits.



H. GOBURDHUN  
PRESIDENT



E.O. AYoola  
JUSTICE OF APPEAL



M. A. ADAM  
JUSTICE OF APPEAL

Dated at Victoria, Mahe, this .....<sup>1st</sup> day of *April* 1998.