IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]
Exercising its Admiralty Jurisdiction

Case no. AC5/19

Name of ship: **mv 'FALCON CONFIDENCE'**

In the matter between:

NADELLA CORPORATION Applicant

and

THE MOTOR VESSEL 'FALCON CONFIDENCE' First Respondent

FALCON CONFIDENCE SHIPPING LTD Second Respondent

Heard on: 8 December 2020, 21 January 2021, 14 April 2021

JUDGMENT DELIVERED (VIA EMAIL) ON 28 APRIL 2021

SHER, J:

1. I am required to rule on 2 interlocutory applications in this long-running matter, which concerns an application for the arrest of a ship known as the MV *Falcon Confidence,* which was effected at the instance of the applicant corporation ('Nadella') on 17 January 2019 by means of an *ex parte* Order of this Court in the exercise of its admiralty jurisdiction, and a counter-application by the

respondents for an Order setting aside the arrest and directing Nadella to furnish security for costs and for a damages claim, and certain relief ancillary thereto.

2. The interlocutory applications are 1) for an Order compelling the respondents, in terms of (Uniform) Rule 35(7), to make further and better discovery and 2) for the broadening of the scope and terms of an Order which I made on 19 June 2019, whereby I referred an issue in the main application for the hearing of oral evidence, in terms of (Uniform) Rule 6(5)(g). I am also required to determine who is to be liable for 1) the costs of an application which Nadella launched in terms of Admiralty Rule 20 to set aside a notice which the respondents filed in terms of (Uniform) Rule 7, whereby they challenged the authority of Nadella's attorneys to act for it, which notice was withdrawn on 19 June 2020 and 2) the costs of an application which the respondents brought for an interdict, which Nadella opposed and which the respondents did not proceed with.

3. There have been numerous skirmishes between the parties in relation to this litigation, both in this Court and in the High Court in Durban. It is not feasible to set out a comprehensive account of what has transpired and I will endeavour to confine myself to dealing only with the facts which are relevant to a determination of the applications and issues which are before me. What follows is simply a truncated account of some of the background facts which I consider to be relevant to the aspects I am required to decide.

The background

4. The stated purpose of the arrest of the MV *Falcon Confidence* was to obtain security for a claim which Nadella intended to advance against Falcon Carrier Shipping Ltd in arbitration proceedings in Singapore, for payment of the sum of USD 3.947 million. This amount represents the damages which were allegedly suffered by Nadella as a result of the breach of a warranty provision in an agreement of sale in terms of which another ship, the MV *Falcon Carrier,* was sold to it by Falcon Carrier Shipping Ltd, in November 2013.

5. The basis for the arrest of the MV *Falcon Confidence* was that it was an 'associated ship' within the meaning of ss 3(6) and (7) of the Admiralty

Jurisdiction Regulation Act[1] in that it was beneficially owned by, or fell under the control of, the same person which owned the MV *Falcon Carrier,* one Nico Poons, via a complex web of off-shore companies and trusts. Whether the MV *Falcon Confidence* did fall under Poons' ultimate control at the relevant time is an aspect which is heavily contested in the principal application and the counter-application.

6. These applications came before me on 5 June 2019. After lengthy argument I indicated that inasmuch as I was *prima facie* of the view that they could not be determined on the papers given the disputes of fact in relation to the question of control, the issue of whether or not the MV *Falcon Confidence* was an associated ship should be referred for oral evidence. The matter accordingly stood down and on 19 June 2019 the parties presented me with a draft Order which set out the agreed terms of a referral to evidence to be heard between 7 and 18 October 2019, to which I acceded.

7. Paragraph 1(d) thereof provided that the parties were to make discovery in terms of (Uniform) Rule 35 of all documents relating to the issue which was the subject of oral evidence ie the issue of whether or not the MV *Falcon Confidence* was an associated ship, by 15 August 2019. Paragraph 1(e) provided that it would not be necessary to discover documents which had been annexed to the affidavits which were filed of record in the application for the arrest of the vessel and the counter-application to set such arrest aside, and paragraph 1(f) provided that the provisions of rule 35 would 'otherwise apply' to the proceedings.

8. A discovery affidavit was deposed to on behalf of the respondents on 16 August 2019 by one Roland Golterman, a director of 3 related entities which feature in this matter to wit Falcon Confidence Shipping Ltd, its sole shareholder the Newbrook Shipping Corporation Ltd ('Newbrook'), and J Bekkers Co. BV the commercial operator of the MV *Falcon Confidence.* However, apart from discovering documents which formed part of the papers in a number of other, related applications in the Durban High Court (under case no. A74/2015), and documents which had already been annexed to the papers in the applications in

[1] No. 105 of 1983.

this Court, as well as the correspondence that was exchanged between the parties in relation thereto, the respondents did not make discovery of any other documents pertaining to the issue which has been referred to evidence.

9. On 28 August 2019 the applicant's attorneys accordingly served a notice in terms of (Uniform) Rules 35(3) and 35(6) on the respondents, requiring them to make available for inspection an extensive list of documents which the applicant believed were in their possession and which were relevant to the issue in question, and in the event that any of such documents were not in their possession, to state their whereabouts under oath within 10 days, if known to them.

10. The respondents did not comply with the notice. They adopted the position that the applicant's attorneys did not have the authority to issue it, and it could be disregarded. In this regard they pointed out that they had caused the Sheriff to attach Nadella's right, title and interest in the main application ie the proceedings for the arrest of the MV *Falcon Confidence,* as well as to the security which was held by it in the form of a letter of undertaking which had been furnished by the respondents in January 2019, in order to obtain the vessel's release.

11. The attachments were effected on the strength of writs which had been issued in respect of two as yet unsatisfied costs orders which were obtained by Newbrook in the Durban High Court pursuant to a previous, unsuccessful arrest by Nadella of a vessel known as the MV *Falcon Traveller*, which arrest had been set aside. Inasmuch as the judgments granting these orders were obtained by Newbrook (in whose name the MV *Falcon Traveller* was registered) and not by Falcon Confidence Shipping Ltd (the second respondent), the purpose of the attachments was clearly to prevent the main application in this matter from proceeding to trial pursuant to the Order of 15 June 2019, and not to execute on the judgments to satisfy the costs orders, which were in favour of Newbrook, a party which is not before this Court.

12. Pursuant to the attachments the respondents served a Rule 7 notice in terms of which they challenged the applicant's attorneys' authority. They contended that by virtue of the attachments Nadella no longer had any rights in respect of the

pending main application, which now vested in the Sheriff, and its attorneys consequently no longer had any right to act on its behalf.

13. This prompted the applicant to launch proceedings in the High Court in Durban to have the writs set aside, which succeeded, on 17 September 2019. An application for leave to appeal was dismissed. The respondents then launched interdict proceedings in this court in which they sought an order restraining the applicant from proceeding with the hearing of oral evidence in terms of the Order which was made on 15 June 2019, pending the outcome of a petition for leave to appeal to the SCA. The petition was unsuccessful and the respondents subsequently withdrew their Rule 7 notice and indicated that they were no longer proceeding with the interdict they sought.

The application to compel

14. In the absence of any response to its further request that the Rule 35(3) notice be complied with, the applicant launched an application to compel on 25 September 2019. In its founding affidavit it averred that the documents which had been listed in the notice were all relevant and material to a determination of the issue which had been referred to evidence ie the question of who controlled the MV *Falcon Confidence* at the time of its arrest, as they contained information pertaining to the management and the operational and financial control of the ship and the second respondent, in whose name it was registered.

15. In response, the respondents' attorney contended that the application was fatally defective and frivolous and vexatious. It was defective because the applicant had failed to allege that the documents it sought in fact existed and were in Nadella's possession, nor had it indicated how they were relevant, and the application constituted little more than a 'fishing expedition' which was aimed at trawling for a wide range of documents which had been described in general and 'vague' terms; and Nadella had not provided any explanation as to why this wide range of documentation was required.

16. The respondents' attorney pointed out that courts were generally reluctant to go behind a discovery affidavit, which was ordinarily regarded as conclusive. He

declared that the documents which were sought were either not in the possession of the respondents, or they were not relevant, 'or both' (sic), and as such they did not fall to be discovered.

17. During the hearing of the application on 8 December 2020 I debated the terms of the proposed Order which the applicant sought, with its counsel. I pointed out that in some instances these appeared *prima facie* to be slightly over-broad, in that what was sought exceeded what could reasonably be requested in terms of their relevance to the issue which had been referred to evidence, and I made tentative proposals as to how some of these requests could be pruned down to what would be permissible. Applicant's counsel fairly conceded that in certain instances the terms of the Rule 35(3) notice and the proposed draft Order which had been handed up on the basis thereof were broader than was necessary, and sought, helpfully, to assist the court in arriving at an acceptable re-formulation of what could permissibly be sought in terms of the draft Order.

18. When it was time for the respondents to present argument their counsel adopted the stance that inasmuch as the applicant was now seeking to make application for an amended Order, the application should be dismissed, as the respondents had not been brought to Court on that basis. Despite repeated attempts on my part to point out that the proposed amendments to the draft Order had originated at the Court's instance (in the exercise of its constitutional and common-law powers to regulate its own process), the respondents' counsel continued to persist with this line of argument and insisted that, at the very least, were the Court not to be inclined to dismiss the application out of hand it should afford the respondents an opportunity to file a supplementary affidavit in response thereto and an opportunity to supplement their submissions orally, at a further hearing in due course. In order that the respondents should have every opportunity to put their case before the Court I acceded to the request, albeit somewhat reluctantly. The matter was accordingly postponed for further argument to 21 January 2021 and the respondents duly filed a supplementary affidavit. I note that although they were granted leave to do so only in order to respond to the changes which

were proposed by the Court to the original Order which was sought, they utilized this as an opportunity to reargue the matter, as a whole.

19. Much of what is contained in this affidavit is a repetition of the arguments that were previously advanced in the initial answering affidavit and again at the hearings, albeit in the form of a detailed tabular response to each of the listed categories of documents which are set out in the proposed revised draft Order. In summary, the grounds of objection which are raised therein are that the applicant failed to say why the documents sought were relevant and did not state that they in fact existed, or there was 'nothing to show' (sic) that they existed or that they were relevant, or that they would be in the possession of the respondents, particularly where they appeared to originate from 3rd parties. In addition, the respondents contended that insofar as certain of the documents which were sought related to admitted or common cause facts there was no reason why they should be discovered.

20. In my view the grounds on which the respondents contend that they are not to be compelled to make further and better discovery are spurious and fall to be rejected.

21. It is important to remember, by way of a restatement of trite principles, that a party is required to discover <u>any</u> documents in its possession which *may* (not must) contain information which will either directly or indirectly enable it to advance its case or damage that of its opponent. It is accepted that such a document includes one which may 'fairly lead to a train of enquiry which may have either of these consequences' [2] and thus the proposition that documents which pertain to facts which are common cause need not be discovered is startling, to say the least. Parties are required to discover all documents which may be relevant to the dispute at hand.

22. Secondly, whilst it is so that a court will generally not go behind a party's discovery affidavit, the contents thereof are not conclusive. A court may well decide, upon a consideration of the pleadings and papers which are before it and

[2] *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, cited with approval in *Rellams (Pty) Ltd v James Brown & Hamer* 1983 (1) SA 556 (NPD) at 564A-B.

the nature of the dispute it has to adjudicate, that the party who has made discovery in all probability has other relevant and disclosable documents in its possession or control which it has failed to produce, and may order it to do so.[3]

23. In my view, this is precisely such a case. In this regard, what sticks out like the proverbial sore thumb in this matter is the abject failure on the part of the respondents to produce *any* documents of real substance pertaining to the management and control of the MV *Falcon Confidence*, via Falcon Confidence Shipping Ltd, the company in whose name it is registered, not even documents which support their contention that the vessel was not one controlled by anyone other than the company itself. It beggars belief that documents pertaining to the operational control and management of the vessel via the company and those who in turn control it, many of which feature amongst the documents which the applicant has sought to have the respondents discover in terms of its notice and proposed draft order, do not exist, or that the applicant should be required to show that they exist or that they are in fact in the respondents' possession, before it is entitled to issue or to seek to rely on a notice in terms of the rule.

24. In this regard, it is not, and has never been necessary for a party who invokes the provisions of Rule 35(3), in terms of which it calls upon its opponent to make further and better discovery, to prove (or even state) that the documents which it seeks in terms of the notice actually exist, or that they are in fact in the possession of its opponent, nor is there an 'onus' (in the sense of a burden of proof) on it to explain how and why such documents are relevant, or that they in fact are relevant; *before* it can attempt to rely on the rule. The rule does not pertinently require any of this to be stated in any notice issued in terms thereof, and there are obvious reasons why these requirements were not included in the rule, when it was drafted. None of the cases to which I was referred by the respondents' counsel support such an interpretation.

25. All that the rule requires is that the notice should state that the party seeking further and better discovery 'believes' that there are documents which *may* be relevant to an issue in the proceedings, in the possession of its opponent. The

[3] *Rellams* at 560F-G; *Lenz Townships (Pty) Ltd v Munnick & Ors* 1959 (4) SA 567 (T).

ball then passes to the opponent, and it is then required either to produce the documents requested or to resist their production on permissible grounds, such as that they do not exist or are not relevant (in which case it will have to substantiate such an averment) or are not in its possession, in which event it is, understandably, required to confirm this and to disclose where they may be found, under oath. The rationale for the rule as it is formulated is easy to discern.

26. A party requiring further and better discovery from its opponent will in many/most instances only suspect that it is in possession of the documents it seeks, and will in many/most instances not be able to positively state that as a fact the documents exist and that they are in its opponent's possession. To my mind, it would defeat the underlying purpose of the rule and the remedy it provides were such requirements to be read into it and it would neuter most, if not all, litigants from ever obtaining the relief which the rule seeks to provide, given its wide ambit in relation to the purpose of discovery ie to provide a remedy whereby a litigant may succeed either in compelling its opponent to produce a wide range of documents, which may advance its case or damage that of its opponent or, in the event that such documents are not in its opponent's possession, to disclose in whose possession they may be found, thereby enabling the applicant to pursue its 'line of enquiry' elsewhere..

27. It is important, when considering the documents which are sought and their relevance in relation to the issue which has been referred to evidence ie the issue of the control of the MV *Falcon Confidence* at the time of its arrest, to do so in the context of the averments which are made in the papers in the main application and the counter-application, in this regard.

28. The respondents deny that the vessel was ever controlled by Nico Poons. They aver that it was controlled by his father Ronald via Falcon Confidence Shipping Ltd ('FCS') until he passed away, after which messrs Volbeda and Overklift, as directors of an entity known as Delta Carrier Management (Private Trust Company), controlled it via FCS. According to the applicant's enquiries Delta Carrier Management in turn controls the trust property of the Atlantic Ocean Trust, which in turn holds all the shares in Newbrook, which it is common cause,

is the sole shareholder in FCS. However, as the applicant points out, despite the respondents' averments in relation to the control of the MV *Falcon Confidence* they have not discovered a single document which demonstrates that messrs Volbeda and Overklift were responsible for the management or administration of either Delta Carrier Management or the vessel, via FCS, at the time of its arrest.

29. In support of its contention that real control over the MV *Falcon Confidence* lay with Nico Poons and not with FCS (in whose name it was registered), the applicant pointed out that the vessel was subject to a 'cross' marine mortgage, which constituted security for a loan facility of USD 125 million which had been extended by an entity known as Condor Financial Services (which it avers was similarly controlled or beneficially owned by Nico Poons), to a related group of other companies in whose names a number of other vessels were registered ie Delta Carriers, Falcon Carrier Shipping Ltd (a company also controlled by Nico Poons), Falcon Cape Shipping, Newbrook and World Reach Shipping. The applicant contends that a ship owner would hardly mortgage a ship as security for debts owed by other ship-owning entities unless he had a common beneficial interest in all of them, and controlled all of them.

30. The documents which the applicant seeks in terms of its Rule 35 (3) notice pertain to 1) the incorporation and business of FCS and the purchase, financing and mortgaging of the MV *Falcon Confidence,* and its management, operation and alleged control by the company and/or by Ronald and/or Nico Poons; and 2) various corporate entities or trusts such as those referred to in the preceding paragraph, which the applicant alleges form the structure in terms of which control of the vessel ultimately vested in Nico Poons. In my view, subject to some pruning, all of the documents sought are clearly relevant and material to the issue which has been referred to evidence, and one would expect not only that they exist, but that they would, or could, be in the possession of the respondents.

31. To my mind the requirements which are postulated in and envisaged by the Rule have therefore been met and the applicant is accordingly entitled to an Order in terms of the draft which is annexed hereto marked 'X', together with an Order for costs. In this regard, in my view, and for the reasons that follow a special costs

order is warranted as a mark of the Court's displeasure, even though the applicant has only asked for costs on the party-party scale.

32. In the first place, in defiance of the peremptory requirement in subrule (3) that, in the event they had reason not to comply with the Rule 35 notice the respondents were required to justify this by setting out their grounds for doing so, under oath, within 10 days, they failed to do so, even after the attachments on which they sought to rely in order to issue their notice in terms of Rule 7 challenging the applicant's attorneys authority to issue the Rule 35(3) notice were set aside in September 2019 and all attempts to appeal had been unsuccessful, and notwithstanding numerous requests that they should comply with the rule. No acceptable explanation for adopting such an attitude, in contempt of the requirements of the rule, was ever provided.

33. When they finally did respond it was in the form of a perfunctory answering affidavit in the application to compel which was deposed to by their attorney, and not by someone such as Golterman, who as a director of the second respondent and of some of the other entities which feature prominently in the papers and who deposed to the respondents' discovery affidavit, was the appropriate person to respond under oath.

34. Already in 1983 the Natal Provincial Division pointed out [4] that it has 'long been held' that, as in the case of a discovery affidavit, an affidavit made in response to a notice in terms of Rule 35(3) should be deposed to by a party and not by its attorney, save in special circumstances and then only if the attorney was in a position of his own to depose to the facts contained therein.

35. To my mind these remarks are equally apposite to an affidavit which is made in answer to an application to compel in terms of Rule 35(7), which is launched pursuant to an alleged failure to comply with a notice in terms of Rule 35(3). The rationale for the requirement that a party should depose to discovery affidavits or to affidavits in terms of which it is sought to resist discovery, is self-evident. Not only would its attorney ordinarily not have the necessary personal knowledge to depose to such affidavits and whatever he/she said in this regard would almost

[4] *Id*, at 558C-H.

inevitably amount to hearsay, but the duty to make discovery by way of the necessary affidavits falls on the parties in order to ensure that they can be held responsible for the process, so that the dispute in which they are embroiled can be properly brought to trial and the court has before it the evidence which is necessary for it to arrive at the correct result, and justice can accordingly be done.

36. On what basis the respondents' attorney deposed to the facts and contentions which are set out in the answering affidavits which he deposed to on behalf of the respondents in this matter, was not explained. In the introductory paragraph of each of his affidavits he simply alleged that the facts which were contained therein were 'save where the context indicated the contrary', within his personal knowledge and true and correct. How he could have any personal knowledge of the essential facts to which the respondents were required to respond ie what documents were or were not in their possession is not apparent. Perhaps because of this difficulty he proceeded immediately thereafter to state that where 'such' facts were not within his personal knowledge and belief, they were based on information which had been provided to him by Golterman as a director of the second respondent and J Bekkers Co. BV, the technical and operational manager of the vessel. At this juncture one would have expected some explanation to have been proffered as to why Golterman had not deposed to the affidavit, but none was forthcoming.

37. If one then proceeds to consider the contents of the affidavits it is nowhere indicated which of the facts or contentions which are set out in them emanated from Golterman and which emanated from the respondents' attorney's own font of personal knowledge. In the circumstances, how the respondents' attorney was in a position to state[5] that 'as far as the respondents understand' the documents sought were 'either not in their possession or not relevant or both' (sic) is not apparent, and was also not explained. The statement was in any event not a proper or acceptable response to the allegation by the applicant that the extensive list of documents which it sought in terms of the notice, were in the

[5] In para [17] of the answering affidavit.

respondents' possession. Only in the supplementary affidavit was an attempt made to deal with each individual category of documents which had been listed.

38. But, even if one were to overlook all of this and to accept the affidavits as they stand one cannot get away from the fact that the respondents' attitude both to the notice and to the application to compel amounts, in essence, to a blanket refusal to discover any documents other than those it has already discovered, in circumstances where even the documents which it has discovered clearly fall short. In this regard I have already pointed out that the respondents failed even to produce a single document which they must have in their possession, which would support their averment that the MV *Falcon Confidence* was controlled by the second respondent and not by anyone else. The respondents did not at any stage even tender to produce any of the apparently innocuous documents which were sought in terms of the Rule 35(3) notice, such as the certificate of incorporation and share register of the second respondent. Instead, they forced the applicant to engage in an unnecessary and expensive application to obtain an Order for the production of crucial documents which it needed for the hearing which was to have taken place in October 2019, and which had to be postponed.

39. The net result of all of this is that almost two years after I made the Order directing that the matter should proceed to evidence on the issue concerned, the hearing has yet to take place. In the circumstances, and seen against the backdrop of the other tactics which were adopted to delay the proceedings (I refer in this regard to the attachments which were effected) one is constrained to come to the conclusion that the respondents' initial failure to make proper discovery and their refusal to comply with the notice and not to produce any of the documents which have been sought in terms thereof, is part of their overall strategy of obstruction and delay. I point out that in setting aside the attachments in the Durban High Court, Olsen J found that the process of that Court had been misused and had been employed in a manner which was aimed at obstructing the conduct of the proceedings in this Court, where oral evidence was due to be heard in October 2019.

40. In the result, I believe it is necessary to make a punitive costs order, directing that the respondents are to be held liable jointly and severally for the costs of the application on the attorney-client scale, and that such costs should include the costs of two counsel, where so employed.

The application for an Order referring the 'dirty hands' issue for oral evidence

41. On 2 December 2020, shortly before the application to compel was due to be heard, the respondents filed an application in which they sought an Order that the issue of whether Nadella had 'dirty hands', thereby breaching the 'clean hands doctrine' (sic), be referred for oral evidence to be heard at the same time as the oral evidence which was to be heard in terms of the Order dated 19 June 2019, and that the applicant be directed to make discovery in respect of the aforesaid issue within 20 days of the Order for such referral being granted.

42. The 'dirty hands' issue is a reference to the respondents' recurrent refrain (in the main application and the counter application as well as in the application to compel) that the applicant's applications for relief should not be entertained, as it has 'dirty hands', in that it has approached the court for relief at the time when there are unsatisfied judgments against it in the KwaZulu-Natal High Court.

43. These are the judgments to which I have already referred, which were granted in respect of the previous, unsuccessful arrest by the applicant of the MV *Falcon Traveller*, a ship which was registered at the time in the name of Newbrook, and which the applicant had also claimed was an associated ship. Pursuant to the arrest of the MV *Falcon Traveller,* Newbrook obtained an order that Nadella provide security for a claim which Newbrook intended to institute against it for wrongful arrest. Following the setting aside of the arrest in April 2016, Newbrook duly instituted a claim for damages in the KwaZulu-Natal High Court, which is pending. It is common cause that Nadella has as yet not satisfied the order for security and the various costs orders which were obtained by Newbrook, pursuant to this round of litigation in Durban, some 5 years ago. Its explanation for not doing so is that it is not in possession of the necessary funds and has to rely on the largesse of its shareholders in order to conduct its business.

44. As the papers stood at the time when the matter was heard in May 2019 there was accordingly no dispute of fact in relation to the factual basis upon which the respondents had put up their reliance on the so-called doctrine of 'dirty hands', and no reason why this aspect could not be determined on the papers. There was accordingly in my view no basis for a referral of this aspect to oral evidence and the matter fell to be decided on the papers.

45. In this regard Rule 6(5)(g) pertinently provides that only where an application cannot be decided on affidavit does the court have the power, if it does not dismiss the application, to make such order in regard to it as to it 'seems meet', with a view to ensuring a just and expeditious decision. To this end it may direct that oral evidence be heard on a specific issue *with a view to resolving any dispute of fact which may exist*, and may order any deponent to appear personally or may grant leave for him or her to be subpoenaed in order to be examined as a witness, or it may refer the matter as a whole to trial, with appropriate directions as to pleadings and the definition of issues.

46. The rule therefore does not purport to grant a court a general and unfettered power to refer a matter which has come before it in the form of an application ie. by way of affidavits, and which can be decided on the affidavits, to oral evidence, simply because one or other of the parties directs a request to it in this regard. Interpreting the Rule in such a manner would be antithetical to the very purpose of determining applications on the basis of the affidavits in terms of which they are presented, and would do violence to the distinction between applications and actions. On this ground alone the application must fail.

47. The basis on which the application was brought was that FCS had not previously realized the relevance of the contents of an investigative report by an entity known as Crossroads Investigation Services, which it had obtained in 2016, from Wanchoo Law Offices LLP, an American firm of attorneys. The report was produced pursuant to a request for an investigation into the relationship between a company located in Cumberland USA, known as Global Marketing Systems and Nadella, which was apparently registered in St Kitts-Nevis, West Indies in September 2011. The unidentified authors of the report were of the view that

Nadella had been set up as a nominee company by GMS, for the purpose of acting as a 'straw buyer' (sic) in order to purchase ships for recycling. Nadella did not have a physical address or office presence in any location in the world and was controlled by Morningstar Holdings of Nevis, an entity which acted as a discreet registrar for offshore companies and trusts which were desirous of concealing the identity of their corporate officers and their ownership.

48. On the strength of this report the respondents contend that Nadella is merely a shelf company with no discernible assets, which is used for commercial dealings, with no potential loss to it should such dealings go awry. As a result, they suspect that Nadella's purchase of the MV *Falcon Carrier* was 'speculative' and that any losses which had been sustained by it have been considerably exaggerated, if they have been suffered at all. In the circumstances the respondents contend that the additional information in the Wanchoo report adds impetus and weight to their 'dirty hands defence' (sic) and opens up potential lines of discovery which they could fruitfully follow up.

49. In response, the applicant points out that the setting up and use of nominee companies for commercial purposes in the shipping industry, is a perfectly acceptable and legitimate practice, world-wide,[6] and nothing in the Wanchoo report, even were it to be accepted as it stands, some 5 years after it was commissioned, serves in any way to justify a referral to evidence and an Order that discovery should be made in respect thereto. The applicant emphasized that it was not in dispute that it had not as yet satisfied the costs orders and the order for security which Newbrook had obtained against it some 5 years ago, in the Kwazulu-Natal division, and even if it were to be accepted that it was a nominee company with little or no assets, this did not in any way serve to disqualify it from pursuing a legitimate claim for damages in Singapore against another company and arresting an associated ship as security for such claim. It also did not entitle the respondents to obtain the Order which they sought, broadening the scope and ambit of the referral to evidence.

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[6] *Vide* DJ Shaw QC *Admiralty Jurisdiction and Practice in SA* (1987) p 36; The Maritime Trader [1981] 2 Lloyd's Rep 153 (QB) p 157.

50. Whether the respondents' reliance on the so-called doctrine of 'dirty hands' can serve as a bar to the applicant obtaining any relief in the main proceedings is a question which will have to be determined in due course, once oral evidence on the issue of whether or not the MV *Falcon Confidence* was an associated ship has been heard and the matter has been fully argued, and in the circumstances I refrain from expressing any view thereon, other than to point out that the cases[7] on which the respondents seek to rely in this regard predate the enactment of the Constitution which, in terms of s 34 thereof, guarantees a right of access to our courts and to justice as a fundamental right. In a number of cases[8] the Constitutional Court has held that the rights in the bill of rights are not only available to citizens and *peregrini* are thus equally entitled to the protection afforded by them, in appropriate instances.

51. In my view the respondents have failed to make out a factual or legal basis for an Order broadening the referral to evidence, which was previously made. Although it was recognized in *Wevell,* [9] a decision on which they seek to rely, that not only an applicant but a respondent too might in certain instances be entitled to obtain an order referring an issue to evidence, the Supreme Court of Appeal warned[10] that this will only occur in rare instances, and courts should be astute to prevent an abuse of process by litigants who seek such an order for the purpose of delaying the resolution of a matter, or so that they might engage in a 'fishing expedition' with a view to ascertaining whether there might be a possible defence available to them. In my view, this is such an instance.

52. As I have previously pointed out, the respondents' contention that the applicant has 'dirty hands' and should as a result not be permitted to obtain any relief from the Court is an aspect which has been squarely raised on the papers and is before the Court for determination. The fact that the respondents neglected to

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[7] *Mulligan v Mulligan* 1925 WLD 164; *Chetty v Law Society, Transvaal* 1983 (1) SA 777; *Eskom v Rademeyer* 1985 (2) SA 654 (T).

[8] *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC); *Minister of Home Affairs and Ors v Watchenuka and Ano* 2004 (4) SA 326 (SCA); *Minister of Home Affairs & Ors v Emmanuel Tsebe & Ors; Minister of Justice & Constitutional Development & Ano v Emmanuel Tsebe & Ors* 2012 (5) SA 467 (CC).

[9] *Minister of Land Affairs & Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) para 56.

[10] *Id.*

substantiate their contentions in regard to this aspect, by making reference to the Wanchoo report in their affidavits in the main and the counter application, cannot serve as a basis for the Court to now make an Order referring the 'dirty hands' aspect to oral evidence. The applicant will surely be entitled to ventilate this aspect in argument, in due course. It might even possibly be able to request the admission of the Wanchoo report in the main or counter application (by way of a supplementary affidavit to which the applicant will have the right to respond), and its inclusion thereby as part of the evidence which the Court will ultimately have to consider when the applications are finally heard and decided, but in my view a referral to oral evidence in this regard is not permissible.

53. In the circumstances the application falls to be dismissed. As far as costs are concerned, I do not believe that a punitive attorney-client order is warranted. In my view the application was certainly ill-conceived but I am unable to find, on a balance of probabilities, that it constituted a deliberate attempt to abuse the process of this court or to obstruct or delay the hearing of oral evidence on the referral. It may well have simply been a misguided attempt to obtain evidence in order to bolster the respondents' reliance on the 'dirty hands' argument.

Ad the (Admiralty) Rule 20 application and the interdict

54. All that remains is the question of who should be liable for the costs of the application by the applicant in terms of Admiralty Rule 20, and the interdict application which was launched by the respondents.

55. Given the unequivocal finding by the Durban High Court that the process of that Court was deliberately employed, by way of judicial attachments, to obstruct the hearing of oral evidence in this Court, a finding with which I must respectfully concur in the light of the comments which I previously made in regard to the application to compel, it is in my view inevitable and fair and just that the respondents should be held liable for the costs of both the application which the applicant launched in terms of Admiralty Rule 20, which was directed at setting aside the notice in terms of Rule 7, and the costs which were incurred by the

applicant in opposing the interdict application, which was aimed at preventing the applicant from proceeding to trial in respect of the referral to oral evidence.

56. I am also of the view that in respect of these applications a punitive costs order is warranted, as the issuing of the Rule 7 notice and the interdict application formed an integral part of the strategy of obstruction and delay which the respondents adopted in order to prevent the hearing of oral evidence on the referral.

Conclusion:

57. In the result, I make the following Order:

A) Ad the application to compel

57.1 The application to compel compliance with the applicant's Rule 35(3) notice dated 28 August 2019, is upheld.

57.2 The respondents shall make the documents which are listed in the schedule which is annexed hereto marked annexure 'X', available for inspection in terms of Uniform Rule 35(6), save that in the event that any of such documents are not in their possession they shall state under oath, within 10 days from date hereof, their whereabouts ie where such documents may be found, if known to them.

57.2 The respondents shall be liable jointly and severally, the one paying the other to be absolved, for the costs of the application (including the costs of two counsel where so employed), on the attorney-client scale.

B) Ad the application by the respondents to refer the 'dirty hands issue' to evidence

57.3 The application is dismissed.

57.4 The respondents shall be liable jointly and severally, the one paying the other to be absolved, for the costs of the application (including the costs of two counsel where so employed).

C) Ad the costs in respect of the applicant's application in terms of (Admiralty) Rule 20 and the respondents' interdict application

57.4 The respondents shall be liable jointly and severally, the one paying the other to be absolved, for the costs of these applications (including the costs of two counsel where so employed), on the attorney-client scale.

M SHER

Judge of the High Court

ANNEXURE 'X': LIST OF DOCUMENTS

1. The certificate of incorporation and share register of Falcon Confidence Shipping Ltd.
2. Copies of the minutes of all meetings of the shareholders of Falcon Confidence Shipping Ltd, or their proxies.
3. Copies of all resolutions passed by the directors of Falcon Confidence Shipping Ltd, in connection with or pertaining to the MV *Falcon Confidence.*
4. Copies of all returns pertaining to the MV *Falcon Confidence* submitted by Falcon Confidence Shipping Ltd to the Liberian (company and revenue) authorities.
5. Copies of all communications in connection with or pertaining to the MV *Falcon Confidence,* between Falcon Confidence Shipping Ltd and the entity/entities responsible for the registration and taxation affairs of Falcon Confidence Shipping Ltd, from its incorporation to date.
6. The bank statements of Falcon Confidence Shipping Ltd from the date of its incorporation to date.
7. The declarations in respect of Beneficial Ownership forms (pertaining to the MV *Falcon Confidence* and any other ships), as deposited with Hollandsche Bank-Unie N.V. and HSH Nordbank A.G.
8. The contract(s) pursuant to which Falcon Confidence Shipping Ltd purchased the MV *Falcon Confidence*.

9. Resolutions of the board of directors of Falcon Confidence Shipping Ltd and its shareholders, pertaining to the purchase of the MV *Falcon Confidence.*
10. Copies of documents evidencing payment of the purchase price of the MV *Falcon Confidence*.
11. Copies of all correspondence exchanged between Falcon Confidence Shipping Ltd and its shareholder Newbrook, and its representatives, and the erstwhile owners of the MV *Falcon Confidence*, being Harmonious Navigation Incorporated, alternatively Teh-hu Cargocean Management Company Limited, regarding the purchase of the MV *Falcon Confidence* IMO 9308871 (formerly known as mv Fortune Confidence and previously known as Harmonious).
12. All contracts concluded between J Bekkers Co BV and any other company, person or entity relating to the commercial management, technical management, manning and operation of the MV *Falcon Confidence* from the date that Falcon Confidence Shipping Ltd became the owner of the vessel, to date.
13. All invoices rendered by companies, entities or persons pertaining to the commercial management, technical management, manning and operation of the MV *Falcon Confidence;* and documentation evidencing payment of the invoiced amounts, from the date that Falcon Confidence Shipping Ltd became the owner of the MV *Falcon Confidence*, to date.
14. All correspondence, memoranda and documents in the possession of Falcon Confidence Shipping Ltd and its agents, sent or received by Ronald Poons.
15. All correspondence, memoranda and documents in the possession of Falcon Confidence Shipping Ltd and its agents, sent or received by Nico Poons.
16. All contracts concluded between Falcon Confidence Shipping Ltd and its agents and Bert-Jan Volbeda relating to Mr Volbeda’s appointment and employment as a director of Falcon Confidence Shipping Ltd.

17. All contracts concluded between Falcon Confidence Shipping Ltd and its agents and its sole shareholder, Newbrook Shipping Corporation Ltd, and Bert-Jan Volbeda relating to Mr Volbeda's appointment and employment as a director of Newbrook Shipping Corporation Ltd.
18. All contracts concluded between Falcon Confidence Shipping Ltd and its agents and Marnix van Overklift relating to Mr van Overklift's appointment and employment as a director, office holder or employee of Falcon Confidence Shipping Ltd.
19. All contracts concluded between Falcon Confidence Shipping Ltd's sole shareholder, Newbrook Shipping Corporation Ltd and/or its agents, and Marnix van Overklift relating to Mr van Overklift's appointment and employment as a director, office holder or employee of Newbrook Shipping Corporation Ltd.
20. All documents evidencing payments, directly or indirectly, of salaries, directors' fees or other remunerative payments by Falcon Confidence Shipping Ltd and/or its agents to Mr Volbeda and/or Mr van Overklift.
21. All correspondence, memoranda or agreements sent, received or concluded by Mr Volbeda and/or Mr van Overklift for or on behalf of the Falcon Confidence Shipping Ltd and/or its agents, pertaining to the management, operation and control of Falcon Confidence Shipping Ltd and the MV *Falcon Confidence*.
22. All documents pertaining to the purchase and financing of the MV *Falcon Confidence,* including senior credit lending facilities (with Hollandsche Bank-Unie N.V. and HSH Nordbank A.G.) concluded in relation to the financing of the vessel, and:
    22.1 All documents evidencing a loan agreement to which Falcon Confidence Shipping Ltd was or became a party and in respect of which a first preferred Liberian mortgage over the MV *Falcon Confidence* in favour of Condor Financial Services Limited was registered on or about 20 October 2011;

22.2 All correspondence and documents exchanged between Falcon Confidence Shipping Ltd and its agents and Condor Financial Services Limited relating to the registration of a first preferred Liberian mortgage over the MV *Falcon Confidence* in favour of Condor Financial Services Limited;

22.3 Records of any or all payments made by Falcon Confidence Shipping Ltd and its agents to Condor Financial Services Limited towards settlement of the loan secured by the first preferred Liberian mortgage registered over the MV *Falcon Confidence* in favour of Condor Financial Services Limited;

22.4 A copy of the Power of Attorney concluded or provided by Condor Financial Services Limited in respect of the First Preferred Liberian Mortgage agreement concluded between it and Falcon Confidence Shipping Ltd on or about 20 October 2011;

22.5 A copy of the duly signed Memorandum of Particulars of the Mortgage Registration over the MV *Falcon Confidence*.

23. The company registration documents of Condor Financial Services Limited, including but not limited to a register of its directors and shareholders from inception to date.

24. The company records of Delta Carriers Management Private Trust Company reflecting the names of its current and erstwhile directors, as well as the records reflecting the appointment and resignation dates of the said directors.

25. The deed of settlement and/or the trust deed and/or founding documentation of the Delta Carriers Private Trust Company.

26. The deed of settlement and/or trust deed of the Delta Carriers Purpose Trust.

27. The records of the Delta Carriers Purpose Trust reflecting the appointment of its current and erstwhile enforcers.

28. Subject to legal professional or litigation privilege, all correspondence between Roland Golterman, Ronald Poons and Nico Poons, in terms of

which Ronald Poons provided Roland Golterman with instructions and/or authority and/or information in order to depose to affidavits in the *Falcon Traveller* proceedings under Case number A74/2015 in the Durban High Court.