IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: AC53/02

In the matter between:

JEAN DANO ZANDRY Plaintiff

and

RANDLE YACHTS CC Defendant

JUDGMENT: 25 AUGUST 2003

VAN REENEN, J:

1] The Plaintiff (Zandry) sued the defendant (Randle

Yachts) in admiralty for the payment of damages in an amount of R140 314,67 as well as interest thereon.

2] Zandy's claim is based on an alleged breach by Randall Yachts of the terms of a number of written and oral contracts entered into during the period 10 March 2000 to 29 March 2001 in terms whereof Randle Yachts undertook to build a "Vickers 45" pilot house yacht called the "Modia" for Zandry.

3] Zandry in his particulars of claim alleges that Randle Yachts failed to perform its contractual obligations in the following respects -

a) it failed to render the "Modia" watertight including failing to install the keel properly;

b) it failed to supply and install the inside bilge pump;
c) it failed to complete the drain fittings;
d) it failed to properly install the windows; and
e) it failed to comply with the instructions of the marine surveyor one Cox.

4] Randle Yachts gave notice of its intention of opposing Zandry's claim; filed a plea amounting to a denial of the material averments on which the claim is based; and filed a counterclaim for the payment of an amount of R22 979,72 (inclusive of value-added tax), payable by 30 March 2001, in respect of material purchased by Randle Yachts to be used in the building of the "Modia" and reflected in invoices that had to be provided.

5] Zandry filed a plea to the counterclaim in which he pleaded that payment was dependent upon invoices

being provided and the satisfactory completion of the work in which the materials had to be used and averred that he is excused from making payment because no invoices had been provided to him and that the work has not been completed satisfactorily.

6] A trial date has not been allocated as yet.

7] It is not in dispute that the “Modia” is presently at anchor in Analalava, Madagascar and that Zandry is presently either in Antanarivo, Madagascar or in France.

8] On 25 April 2003, Randle Yachts’ attorneys delivered a notice in terms of Rule 36(6) to Zandry’s attorneys in the following terms: -

> "Kindly take notice that Defendant requires the Plaintiff within 10 (ten) days of receipt of this notice, to make available the Yacht "Modia", the subject of the above action, for an inspection or examination at a mutually convenient time and place to be arranged"

They also requested a copy of the plans of the "Modia". That part of the notice has been complied with.

9] Zandry's attorneys in a facsimile letter dated 22 May 2003, advised the attorneys of Randle Yachts that the "Modia" was available for examination and inspection in Madagascar.

10] Randle Yachts' attorneys found the attitude adopted by Zandry and his attorneys, namely that rule 36(6) did not oblige Zandry to submit the "Modia" for inspection in South Africa unacceptable. They on 30 May 2003, delivered a notice in terms of rule 30A in which it was

recorded that Zandry had failed to comply with the rule 36(6) notice and notified him that should he fail to comply therewith within 10 (ten) days, an application would be made to this court for an order that it be complied with, alternatively, that his claim be struck out, alternatively, for such an order as this court may deem fit.

11] In response to the rule 30A notice, Zandry's attorneys in a facsimile letter dated 3 June 2003, advised Randle Yachts' attorneys, inter alia, as follows –

> "It has previously been conveyed to your offices that the yacht "Modia" has been available for inspection by the defendant at her anchorage in Analalava, Madagascar.

As such, the Plaintiff has not failed and/or refused and/or neglected to comply with the Rule 36(6) Notice and as such is not in default"

12] Randle Yachts' attorneys, on 28 July 2003, brought an

application in terms of rule 30A(2) for an order in the following terms:

> "i. Defenant's Rule 36(6) and Rule 30A notices served and filed during 25 April 2003 and 30 May 2003 respectively be complied with within 4 (four) weeks of the date of this order failing which;
>
> ii. Application may be made on the same papers duly supplemented without further notice for plaintiff's claim to be struck out."

13] Zandry opposes that application and filed an answering affidavit the gist whereof is that he has not failed and/or refused and/or neglected to comply with the rule 36(6) notice as he has at all times been prepared to allow Randle Yachts examination and inspection of the "Modia" but that it had to take place in Madagascar. Zandry also contended that because of Randle Yachts' breach of contract the "Modia" is not sufficiently sea-worthy to be sailed to South Africa and provided details

of the expenses that would have to be incurred if it had to be sailed to South Africa.

14] The issue for decision is whether in terms of Rule 36(6) a party when he/she/it is called upon to make available for inspection or examination movable property, the state or condition whereof may be relevant with regard to the decision of any matter at issue in any action, is under an obligation to make it available for inspection or examination at a place required by the party demanding such inspection or examination or whether the obligation is merely to make it available at the place where such property is.

15] I have, in the limited time at my disposal, not been able to find decided cases in our own or other jurisdictions

that could serve as an aid to the resolution of that issue.

16] Although Randle Yachts' attorneys could have applied in terms of Section 5(5)(i) of the Admiralty Jurisdiction Regulation Act, No 105 of 1983 for the examination, testing or inspection of the "Modia" it chose to invoke the provisions of rule 36(6) of the Uniform Rules of Court which, in terms of Admiralty Rule 24, finds application.

17] Rule 36(6) provides as follows:

> "If it appears that the state or condition of any property of any nature whatsoever whether movable or immovable, may be relevant with regard to the decision of any matter at issue in any action, any party may at any stage give notice requiring the party relying upon the existence of such state or condition of such property or having such property in his possession or under his control to make it available for inspection or examination in terms of this sub-rule, and may in such notice require that such property or a

> fair sample thereof remain available for inspection or examination for a period of not more than ten days from the date of receipt of the notice."

18] The everyday dictionary meaning of the words "make available" in the context, is to cause the property in question to be placed at the disposal of or to be accessible to the litigant requiring its inspection or examination (See: **The Shorter Oxford English Dictionary; The Random House Dictionary of the English Language;** and **Webster's Third International Dictionary** sv "make" and "available"). If rule 36(6) is so interpreted, as in my view it should, the contentions of Zandry's attorneys have to be upheld and those of Randle Yachs' attorneys rejected. On that construction Zandry, by having offered to make the "Modia" available for inspection in Madagascar has not refused or failed to do what he is in terms of rule 36(6)

obliged to do. **H.J. Erasmus: Superior Court Practice,** 31 – 268 under the heading "to make it available for inspection or examination" states that "[t]he party merely has to keep the article available for inspection".

19] In my view the drafters of rule 36(6) could not have intended that the person who is required to make an article available for inspection has to do more than to place it at the disposal of or make it accessible. I say so for the following reasons. First, in terms of the sub-rule the party that has to make an article available for inspection is the party who relies upon the existence of a state or condition therein that may be relevant with regard to the decision of any matter in issue or the party having such property in his/her/its possession or under

his/her/its control. The framers of the rule could not have been oblivious thereof that possession and control may exist apart of ownership and that, depending on the legal basis upon which it is exercised, such possessor's or controller's powers may exclude any entitlement to deal therewith other than the exercising of possession and control. Second, our courts appear to recognize that the inspection or examination envisaged by rule 36(6) should take place with as little inconvenience and disruption as reasonably possible (Cf: **Mgudlwa v AA Mutual** 1967(4) SA 721 (E) at 723 C, 723 F). To require a party to do more than merely placing the article at the disposal of the party requiring inspection or examination in my view could in circumstances such as the present, be irreconcilable with that approach. Thirdly, some indication that the

framers of the rule envisaged that the party requiring inspection or examination is to take the steps required to achieve it, is to be found in rule 36(6)(c) which provides that such a party should bear the expense thereof and that it shall form part of such party's costs.

20] Rule 36(6), prior to the amendment of the English text on 15 December 1967, provided that the party requiring inspection or examination could require the party to which the notice is directed:

> "… to submit the thing or a fair sample thereof for inspection or examination within a period of not more than ten days from the date of the receipt of the notice."
>
> (underlining provided)

21] To the extent that the use of the word "submit" was capable of supporting an argument that the thing required for inspection or examination had to be

presented for that purpose, that basis disappeared as a result of the amendment because a deliberate change of language in a statutory provision prima facie signifies a change of intention (See: **Port Elizabeth Municipal Council Port Elizabeth Electric Tramway Co Ltd** 1947(2) SA 1269 (A) at 1279).

22] In the premises the application in terms of Rule 30A(2) is dismissed with costs.

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D. VAN REENEN