IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: AC05/2006

THE NYATI COMPANY LIMITED Applicant

and

ST FRANCIS MARINE CC Respondent

IN RE: THE SPIRIT OF INYATI

JUDGMENT: 2/06/006

VAN REENEN, J:

1] This is an application for an order setting aside the arrest of a catamaran "The Spirit of Inyati" (the vessel) by virtue of a warrant of arrest issued by the Registrar in the exercise of this court's admiralty jurisdiction, in an action **in rem** instituted by the respondent against the vessel under Case No AC5/2006 on 18 January 2006.

2] The applicant is a company incorporated in the British Virgin Islands with its registered office at Beoufort House, Road Town, Tortola, British Virgin Islands.

3] The respondent is a close corporation incorporated in accordance with the provisions of the Close Corporations Act of 1984 carrying on business as a builder of sailing vessels at St Francis Bay, South Africa.

4] On 6 December 2002 the applicant and the respondent entered into a written agreement (the Agreement) in terms whereof the respondent undertook to build and sell to the applicant a St Francis sailing catamaran in accordance with specifications set out in an annexure thereto, marked "A", at a purchase price of US Dollars 591 880 (all further references herein to Dollars are to the

currency of the United States of America) exclusive of taxes, duties and delivery charges F.O.B., St Francis Bay. The Agreement provided that the purchase price had to be paid as follows –

4.1 197 293 Dollars upon signature;

4.2 R1797343 on the bonding of the hull and deck; and

4.3 R1797 343 on delivery after completion of sea trials.

It in addition provided that payment in respect of any extras were to be made within 21 days of the presentation of invoices.

5] It is common cause that the vessel was launched on 2 September 2005 at St Francis Bay and sailed to Cape Town by a skipper and crew provided by the respondent for the purpose of its being exhibited and demonstrated at a boat show that was held in Cape Town from 30 September to 2 October 2005 and that

the applicant's **alter ego** Mr Hendrik Jacobus Greeff (Mr Greeff) utilised the vessel to undergo a course in sailing, after the crew had returned to St Francis Bay.

6] The vessel remained in Cape Town until its arrest by the sheriff in terms of section 3(5) of the Admiralty Jurisdiction Regulation Act, No 105 of 1983 (the Act) on 18 January 2006.

7] The respondent avers in the Writ of Summons that it is the owner of the vessel and that it has been dispossessed thereof by the applicant alternatively, Mr Greeff with full knowledge of its ownership, and that either the one or the other of them has remained in possession thereof. Those averments - which were reiterated in the respondent's Particulars of Claim - were denied by the applicant in its plea and the applicant, in turn, pleaded that it is the owner of the vessel, pursuant to the delivery thereof during

September 2005 in accordance with the terms of the Agreement.

8] The respondent opposes the relief sought in this application - which had been launched on 30 January 2006 - and has duly delivered and filed answering papers. The applicant, in turn, has delivered papers in reply.

9] The pivotal issue for determination herein is whether ownership in the vessel has remained vested in the respondent as the seller thereof, as contended by Mr Wragge SC (who with Mr Howie) appeared for the respondent, or whether ownership therein has passed to the applicant, as contended by Mr Coetzee SC who appeared for the applicant.

10] Mr Wragge accepted, in my view correctly, that the respondent bears the onus of showing that the arrest

for the vessel was justified. In order to discharge such onus the respondent has to show the existence of a **prima facie** case in respect of the merits of the cause of action as formulated in the action **in rem** by putting forward evidence which, if accepted, would establish that it is the owner of the vessel (See: **Cargo Laden and Lately Laden on Board the MV Thalassini Agvi v MV Dimitris** 1989(3) SA 820 A at 834 C; **Weissglass NO v Savonnerie Establishment** 1992(3) SA 928 (AD) at 936 F – H). Steyn J said the following in **Bradbury Greatorex Co (Colonial) Limited v Standard Trading Co (Pty) Ltd** 1953(3) SA 529 (W) at 533 C – E as regards proof of the existence of a **prima facie** cause of action: -

> "The authorities and considerations to which I have referred seems to justify the conclusion that the requirement of a **prima facie** cause of action, in relation to an attachment to found jurisdiction, is satisfied where there is evidence which, if accepted, will show a cause of action. The mere fact that such

> evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against him, the requirements would still be satisfied. It is only where it is quite clear that he has no action, or cannot succeed, that an attachment should be refused or discharged on the ground here in question.

That approach has received the imprimatur of the Supreme Court of Appeal in **MT Tigr: Owners of the MT Tigr v Transnet Ltd** 1998(3) SA 861 at 868 C – I.

11] It has been held that it is not proper to enter into the merits of a case and to attempt to adjudicate the credibility of deponents to affidavits and assess the probabilities or prospects of success in determining whether a **prima** facie cause of action has been established (See: **Intaltrafo Spa v Electricity Supply Commission** 1978(2) SA 705 (W) at 709 B – C; **Butler v Banimar Shipping Co SA** 1978(4)

SA 753 (SE) at 709 B – C; **Weissglass NO v Savonnerie Establishment** (supra) at 938 G – H). Accordingly, a vessel will be released from arrest only if it is quite clear that the party who is the respondent in an application for its release does not have a cause of action in the action that prompted the arrest therein or cannot succeed.

12] The subject-matter of the Agreement was a St Francis sailing catamaran which still had to be constructed and equipped in accordance with agreed specifications. Despite the fact that the respondent was in a number of the clauses therein referred to as "the builder" it is common cause that, in addition to being styled "Agreement of Sale", the Agreement in fact embodied the sale of a completed vessel in a sail-away condition.

13] The conclusion of an agreement of sale in respect of a movable does not **per se** pass ownership therein from the seller to a purchaser. Ownership only passes if delivery is accompanied by an intention on the part of the seller to transfer and an intention on the part of the purchaser to acquire ownership therein (See: **Weeks and Another v Amalgamated Agencies Ltd** 1920 AD 218 at 230). In the absence of an express or implied agreement to the contrary, ownership in the subject-matter of a sale passes only if, in addition to the delivery thereof to the purchaser, the price has been paid in full, in the event of a cash sale, or credit has been extended. A cash sale is one in which payment of the purchase price is required to be made against delivery of the purchased goods, whereas a credit sale is one in which the time for payment has been postponed for a non-negligible period after delivery. Whether a sale is of the one kind or the other is a

matter of express or tacit agreement between the parties judged from the terms of their agreement, the surrounding circumstances and their conduct. In the absence of express agreement as regards the nature of a transaction a cash sale is presumed. Such presumption is rebuttable but it is not permissible to infer that credit has been extended merely because delivery has taken place but the purchase price has not been paid. A cash sale may be transformed into a credit sale by a subsequent express or a tacit agreement (See: **Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and Others** 1976(4) SA 646 (A) at 494 in fin – 495 E, referred to with approval in **De Wet v Santam Bpk** 1996(2) SA 629 (AD) at 638 E – J).

14] Clause 1.2 of the Contract provides that the last of the three payments provided for therein had to be made "… on delivery after completion of sea-trials"

and clause 1.3 that "… the purchaser shall not be entitled to take delivery of the product until all amounts due by the purchaser to the builder in respect of the yacht have been paid" (underlining provided). By contrast, provision is made for extras to be paid within 21 days of presentation of invoice. I, on the basis of those provisions, find myself in agreement with the submission of counsel for the respondent that the parties to the Agreement had agreed expressly that the sale of the vessel would be for cash and that, in the absence of a subsequent agreement transforming it into a credit sale, ownership therein would remain vested in the respondent until the purchase price has been paid in full. As clause 1.1 specifically states that the purchase price excludes all taxes and the ordinary meaning of the concept "exclude" is "to leave out, omit purposely, except" (See: **The Oxford English Dictionary,** Vol III, s.v. exclude) any dispute relating

to liability for the payment of value-added tax in terms of the provisions of the Value-Added Tax Act, No 89 of 1991, in my view, does not have any bearing on the question of whether or not the purchase price has been paid in full.

15] It is not in dispute that the sail-away price of the vessel was the Rand equivalent of 535 000 Dollars. As the purchase price as reflected in the Agreement is 591 880 Dollars it follows logically that it included extras to the value of 56880 Dollars. In the light thereof the term "extra's to be paid within 21 days of presentation of invoice" could only have been intended to refer to extras, if any, other than those included in the purchase price. As is apparent from the statement which emanated from the respondent dated 26 September 2005 (Annexure G23), it also does not appear to be in issue that the extras amounted to only 30 650 Dollars so that the final

contract price was only 561 230 Dollars. Although the Agreement reflected the purchase price in Dollars it provides that only the first instalment of 197 293 Dollars had to be paid in that currency and that two equal instalments of R1797 343 had to be paid in the local currency. As the purchase price of the vessel as well as the amounts of the two instalments payable in local currency were clearly determined with reference to an exchange rate of R9.11 to the Dollar, the last of the instalments needs to be reduced by an amount of R238 955,30 i.e. 56 880 Dollars minus 30 650 Dollars = 26 230 dollars multiplied by R9.11.

16] Despite the fact that clause 8 of the Contract, dealing with "Warranties / Representations", provides as follows:

> "The purchaser acknowledges that the order form, the relevant specification/s and these General Conditions of Contract constitute the entire agreement between the parties, and that no

> warranties or representations have been made by or on behalf of the builder save and except for those contained in such documents.
>
> No addition to or variation of the order form, specification/s and/ or these General Conditions shall be effective and binding upon the parties unless reduced to writing and signed by them."

the respondent relies on an oral agreement concluded between it, represented by Mr Duncan Stewart Lethbridge (Mr Lethbridge) and the applicant, represented by Mr Greeff, in terms whereof the latter was obliged to effect payment of the second and third instalments in Dollars calculated on the basis of the Dollar / Rand exchange rate prevailing on the date of payment, despite the fact that clause 1.2 of the Agreement specifically provided for payment in Rands. The respondent in its answering affidavit foreshadowed an application for the rectification of that clause of the Agreement and sought support for the existence of such an agreement in the wording of the last paragraph of an

e-mail (annexure DL 2) dispatched by him to Mr Greeff on 7 November 2002 (prior to the conclusion of the written agreement) by reading into it a meaning that severely strains the clear language used.

17] Mr Lethbridge also alluded to an arrangement concluded during or about April 2005 in terms whereof Mr Greeff, because the Rand, contrary to his expectations, had strengthened considerably against the Dollar, put forward a proposal articulated by him in the following terms: -

> "20. Mr Greeff accordingly proposed to me that, in order to delay having to pay the balance of the purchase price in US Dollars at that stage, (because the SA Rand cost of US Dollars was increasing) he would advance a loan in South African Rands to the Respondent so as to enable the Respondent to support its cash flow requirements. This South African Rand loan would be interest free and would be redeemable upon the Applicant paying the balance of the purchase price and any additional amounts due for extras, in US Dollars.

21. By this stage the Respondent had spent a great deal of time and money in the construction of the catamaran. I believed that the Respondent had little alternative but to agree to Mr Greeff's proposal.
22. During the period 28 June to 14 December 2005 Mr Greeff advanced four amounts totalling R2 650 000,00 to the Respondent. In terms of the Respondent's agreement with Mr Greeff this amount would be repaid to him when the Applicant paid the balance of the purchase price for the catamaran and extras in US Dollars.
23. The amounts making up R2 650 000,00 are recorded in the accounts of the Respondent as a personal loan from Mr Greeff."

18] Mr Greeff in his replying affidavit admitted having paid amounts totalling R2 650 000 to the respondent during the period 28 June 2005 to 14 September 2005 but disavowed that such payments constituted loans which were to be repaid at a later stage. He in support of such disavowal placed reliance on certain calculations made by an auditor Mr Mornay Schafer from which he alleged it appears that the applicant

had "at that stage" already paid Dollars in excess of the sail-away price, as well as the extras that had been quoted in that currency, despite the fact that no invoices has been rendered in respect thereof. He alleged that such amounts were paid by him simply because Mr Lethbridge had requested him to do so. In view of the fact that all payments made by the applicant to 15 March 2005 had been made in Dollars and all subsequent payments in Rands and the statements of account provided by the respondent (annexures G34 and G23) reflected such payments as "Advance Loan", without any protest from the applicant, Mr Greeff's denial that such payments constitute loans, is anything but convincing, in my opinion.

19] In my view it is fair to infer from the rationale provided by the respondent for such loans namely, that it was "… to support its cash flow requirements …" that they

were to be utilized by the respondent in its business operations that would have encompassed the costs of completing and equipping the vessel, and be repaid only when the balance of the purchase price and extras in Dollars was paid. As Mr Letheridge attributed the reason for that request to either financial difficulties in the part of Mr Greef or a reluctance to purchase Dollars at the then prevailing exchange rate - in the hope that the rate of exchange would become more favourable - and absent an agreed cut-off date for that arrangement, the conclusion appears to be inescapable that the respondent, on its own version, permitted the applicant to deviate from the express terms of the Agreement as regards payment of the purchase price, by having permitted Mr Greeff to provide loans in local currency in lieu of the applicant discharging its obligations in Dollars.

20] The legal position is that the acceptance by a seller of security for the payment of the purchase price, accompanied by delivery of the subject-matter of the sale to the purchaser, brings about the passing of the ownership therein as credit is considered to have been granted by implication (See: **Lendalease Finance (Pty) Ltd v Corporation de Mercadeo Agricula and Others** (supra) at 490 (C)). The concept security, in a comparable context, has been held to mean "… speaking generally, anything that makes the money more assured in its repayment or more readily recoverable" (See: **Seamen Bros v Collett** 1928 EDL 170 at 173). As the loans by Mr Greeff, in addition to providing working capital, would have rendered payment of the balance of the purchase price in Dollars more readily recoverable - in the sense that he, in order to ensure the repayment thereof, would have to procure payment by the applicant of the balance of the purchase price

in Dollars - they in my view, amounted to the providing of security in the afore-mentioned sense and furthermore brought about the transformation of the transaction from a cash to a credit sale (Cf: **Lendalease Finance Ltd v Corporation de Mercadeo Agricola and Others** at 490 C).

21] The applicant contended that, despite the fact that the sea-trials envisaged in the contract had not taken place, the respondent effected physical delivery of the vessel to it by having consented to its removal from its premises to the harbour by means of a trailer; by having handed the keys thereof as well as the owner's manual to Mr Greeff; and by having assisted and participated in the launching thereof on 2 September 2005. The vessel as on that date was not in a sail-away condition because, inter alia, the mast and rigging had not been installed and two further substantial payments amounting to R1 150,00

(subsequently made on 3 September 2005 and 14 September 2005 respectively) had not been effected as yet. Accordingly, that contention has an air of unreality about it as in my view, it is unlikely that the applicant would have taken delivery of an incomplete vessel and that the respondent would in the circumstances have deprived itself of a potential object of security in the form of a lien.

22] The respondent contended that the vessel had at that stage been "delivered" to the applicant subject to an express agreement that it would be returned to the respondent for completion, the conducting of sea-trials, as well as commissioning after the boat show. It averred that Mr Greeff was merely permitted to use the vessel for exhibition and demonstration at the Cape Town Boat Show as well as for the undergoing of a course in sailing, whereafter it would be returned to the respondent. Mr Lethbridge averred that the

respondent's crew, accompanied by Mr Greeff, sailed the vessel to Cape Town for exhibition at the Cape Town Boat Show; that they participated in sailing demonstrations on 3 October 2005; that they in response to demands from Mr Greeff permitted him to take possession of the keys of the vessel and move in on board it; and used it to do a course in sailing before they left Cape Town and returned to St Francis Bay on 6 October 2005. It needs to be noted that Mr Lethbridge departed for the Annapolis Boat Show on 2 October 2005 so that any averments in his affidavit to events that occurred in Cape Town after that date, are clearly hearsay as no affidavits in support thereof have been filed. For that reason Mr Greeff's version of such events is to be preferred to that of Mr Letheridge. According to Mr Greeff only the respondent's factory manager and electrician were present in Cape Town on 3 October 2005 and that neither they nor any of the respondent's crew,

who had left shortly after their arrival in Cape Town, took part in any sailing demonstrations. He furthermore denied that he had compelled any members of the respondent's staff to hand the keys of the vessel to him.

23] As certain defects in the vessel and/or its equipment manifested themselves whilst Mr Greeff used it, voluminous correspondence ensued between him or his attorneys and the respondent thereanent and also the various items that needed to be attended to; who would be liable for the costs thereof; and the terms under which the applicant would be prepared to return the vessel to the respondent. As no accord could be reached in regard to those matters the vessel has to date not been returned to the respondent.

24] On the basis of the facts alleged by Mr Letheridge, as modified by Mr Greeff's version of events in Cape Town after 2 October 2006, the aforementioned conduct on the part of those who represented the respondent's interests in Cape Town, with the knowledge of Mr Letheridge, in my view, constituted the physical delivery of the vessel from the respondent to Mr Greef as the **alter ego** of the applicant. Such delivery, coupled with the aforementioned transformation of the transaction from a cash into a credit sale, in my opinion, brought about the transfer of the ownership in the vessel from the respondent to the applicant (Cf: **Groenewald v Van der Merwe** 1917 AD 233 at 238 et seq). The fact that the respondent had not asserted ownership of the vessel until it instituted the action **in rem** is consonant with that conclusion.

25] As in my opinion it is quite clear from the aforegoing that the respondent cannot succeed with the cause of action as formulated in the action **in rem,** the arrest of the spirit of Nyati under Case No AC5/2006 is herewith set aside with costs and it is directed that it be released from arrest forthwith.

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D. VAN REENEN