IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case No.: **AC 28/2017**

Name of Ship: **SY "MIRAGE"**

In the matter between:

MATRIX YACHTS (PTY) LTD Applicant

and

MIRAGE CATAMARAN (PTY) LTD First Respondent

MARK WEHRLEY Second Respondent

JUDGMENT: 12 SEPTEMBER 2017

MEER, J.

Introduction

[1] This application regrettably emanates from a dispute between a father and son over a yacht. It is brought against the backdrop of an action in this Court, under Case No: 12440/17, instituted by the Second Respondent against the Applicant.

[2] The application before me concerns the possession and control of a luxury yacht, "the Mirage" ("the yacht") which operates from the V&A Waterfront, in Cape Town. The Applicant claims that the Respondents have unlawfully commandeered the yacht, and the income from the yacht's charter business. The Applicant seeks orders:

2.1 Interdicting the Respondents from unlawfully disturbing its possession of the yacht, including its income from the yacht's charter business;

2.2 Directing the Respondents to restore possession of the yacht and its income to the Applicant;

2.3 Interdicting and restraining the Second Respondent from boarding the yacht, and the Respondents from receiving income from the yacht's charter business, pending the final determination of the Second Respondent's claim against the Applicant under Case No: 12440/17.

[3] In a counter-application the Respondents seek an interdict:

3.1 Restraining the Applicants from taking any steps to sell or dispose of the yacht; and

3.2 Interfering in any way with the Second Respondent's possession of the yacht and the charter business.

[4] The directors of the Applicant ("Matrix"), are Peter and Fiona Wehrley. The Second Respondent is the son of Peter Wehrley. He is the Director of the First Respondent ("Mirage"). In this judgment, for reasons of convenience, and meaning no disrespect, I shall refer to the Second Respondent as Mark and to his father as Peter.

[5] It is the Applicant's contention that the yacht was built by, and at the expense of, the Applicant. Peter and his wife Fiona decided to offer the yacht to Mark in order that Mark could run a charter business in Cape Town, and

ultimately buy the yacht at cost. If Mark decided to stay in Cape Town this would allow Peter and Fiona to continue enjoying their grandchildren.

[6] Construction of the yacht was completed at the end of 2015 and from early 2016 until mid-July 2017 the yacht was operated in the name of Matrix, with the income being paid to Matrix and the expenses being paid by Matrix. The yacht's crew and Mark were employed by Matrix and their salaries were paid by Matrix. According to the Applicant on or about 12 July 2017, and without any notice or consultation with Matrix, Mark began to implement a scheme in terms of which the yacht was operated in the name of the First Respondent, Mirage, for Mark's benefit. As part of the scheme, Mark diverted the income from the yacht's charter business from Matrix's bank account to Mirage's bank account. He also took over the employment of the crew.

[7] The Applicant submits that Mark and Mirage acted unlawfully and for this reason they seek a spoliation order and an interdict restoring its control and possession of the yacht, as well as the income from the yacht's charter business. Mark disputes that he acted unlawfully and in his counter-claim seeks the aforementioned interdicts pending the determination of the action instituted by him against the Applicant under Case No: 12440/17.

[8] In the action under Case No: 12440/17, instituted on 12 July 2017, Mark seeks a declaration, *inter alia,* that the cost of construction of the vessel amounts to R8 065 002.43, which he contends was the agreed purchase price for the vessel in an agreement of sale concluded between himself and the Applicant. He seeks a declaration moreover that all rights, title and interest in and to the vessel and the charter business vests in him. He also seeks an order, *inter alia,* that he pays to the Applicant the amount, if any, which may still be due to the Applicant in respect of the purchase price of the vessel upon debate of the account. In opposing this application Mark relies, *inter alia* on the

disputed contract of sale and his purported ownership of the yacht flowing therefrom. It is important at the outset to consider whether an agreement of sale as alleged by Mark came into being.

Agreement of Sale

[9] The crux of Mark's claim is contained at paragraphs 4 and 5 of the particulars of claim in the aforementioned action under Case No: 12440/17. There it is averred that an oral contract of sale had been concluded between him and Matrix on 13 March 2015, and that he became the owner of the yacht on 7 December 2015. Mark's answering affidavit in this application, at paragraph 38, explains that the oral contract arose during a conversation with his father on 13 March 2015:

> "He said that I could own the boat, that Matrix would build for me at cost, and that I would have to pay the costs out of income generated by the charter business, which would be my responsibility. He also stated that I would have to be entirely responsible for the project, including the design, construction, licensing etc. This is the contract to which I refer in the Particulars of Claim."

[10] He states further that the express terms of the contract were that Matrix would manufacture the vessel for him, the purchase price would be the cost of construction, he would fund the purchase price from income earned from the charter business and all profits therefrom would be paid to Matrix until such time as the purchase price had been paid in full. It is Mark's stance moreover that the oral contract was a credit sale and because no reservation of ownership of the vessel had been agreed, by operation of law ownership passed to him when he took delivery on 7 December 2015.

[11] In his replying affidavit Peter denies that an agreement of sale was ever concluded. He states the objective facts show that the parties attempted to reach

an agreement in terms of which Mark would ultimately become the owner of the yacht when it was paid for in full, but no such agreement was ever concluded as the parties could not agree on the essential terms. He states also that he did not charge Mark with the responsibilities for the project, that Mark in fact does not have the knowledge to design a vessel such as the yacht, and that Mark was employed by Matrix to operate the yacht for the benefit of Matrix, but Matrix was ultimately in control of the yacht and its business.

[12] The particulars of claim, at paragraph 5.1 of the action under Case No: 12440/17, in addition elaborate further on how the cost of the vessel would be determined:

> "...the cost of the construction of the vessel would be objectively determined with reference to generally accepted norms and standards of accounting practice as laid down in the International Financial Reporting Standards ("IFRS")."

[13] Peter, in his replying affidavit in the application before me, denies that the cost would be determined in this manner, and does so with reference to an email from Matrix's accountant, (Annexure "T" to the answering affidavit), dated 5 April 2016, which states:

> "...with reference to the cost findings report ... and based on the IFRS knowledge of yourself, Peter and Mark, it is clear that neither party to the so called verbal agreement would be using IFRS as a basis of determining the cost of building the yacht and that at least from your and Peter's view the costing would be based on your costing spread sheets you have used for all yacht costings to date.
>
> It is further clear that there is a fundamental disagreement in the cost method/valuation by the parties to the verbal agreement and this would suggest the verbal agreement could not have been concluded correctly. If both parties can't agree on the costing and no written agreement is in place then one has to wonder if there actually is an agreement."

According to Peter the comments about IFRS were made by the accountant because neither Mark nor Peter was familiar with these principles.

[14] The evidence reveals the following objective facts pertaining to consensus on the purchase price of the yacht:

14.1 As of 3 January 2016 Peter and Mark were ad idem that the cost of the yacht would be established by extracting its costs from the Matrix accounts;

14.2 By June/July they had agreed in principle that the cost of the yacht was to be taken at R10 million, but at that stage other essential issues such as interest, repayment terms and the control of the business were unresolved;

14.3 On 4 August 2016 Mark suggested the appointment of an expert/arbitrator to determine the purchase price;

14.4 On 18 August 2016 Mark stated that he had tried every method available in trying to get Peter to agree to a price, but to no avail;

14.5 On 31 January 2017 Mark agreed to buy the yacht from Matrix for R9 million cash, but no final agreement was concluded.

[15] Mr Cooke for the Applicant, argued that there was no agreement as to how the purchase price, being the construction cost or cost price of the vessel, was to be determined, and as there was no agreement on the purchase price, no contract of sale had come into being.

[16] Mr Van Eden, for the Respondents, countered that the "cost price" of the yacht is clearly a determinable price. A sale at cost price he submitted, was analogous to an agreement to sell at a reasonable price and in this regard he

referred, *inter alia,* to the following extract from *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd)* 1992 (1) SA 566 (A), at 577 I to J:

> "While it is clear law that the price will not be certain if it has either to be fixed by the parties themselves in the future, or by an unnamed third party,... it does not follow that there cannot be a sale at a reasonable price: that which can be reduced to certainty is certain and an agreement to pay a reasonable price may be capable of being reduced to certainty if the court is able to determine what is reasonable in the circumstances of a particular agreement."

The mere fact that the parties have not been in agreement as to the actual cost of the construction of the vessel, he submitted, does not mean that the cost is not objectively determinable.

[17] I am in agreement that the "cost price" of an item, in this case a yacht, may indeed be determinable. However, as the evidence referred to above shows, there was no agreement on, but in fact a dispute as to how the "cost price" of the vessel was to be calculated. Under these circumstances the cost is neither capable of being reduced to certainty nor capable of being calculated, and there was in fact no agreed purchase price. For, as was stated in *Burroughs Machines Ltd v Chenille Corporation of SA Ltd* 1964 (1) SA 669 (W), at 673 B:

> "It seems to me that the manufacturing costs of an article are capable of being computed in a variety of ways dependent upon the views of the cost accountant who computes them;..."

So too, in this case the cost of construction of the yacht is capable of being computed in a variety of ways. The evidence shows that there was no agreement on how this was to be done, let alone agreement on the purchase price, which varied throughout the negotiation period.

[18] In *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A), at 574 B – C, Corbett JA aptly stated:

> "It is a general rule of our law that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They may do so by fixing the amount of the price in their contract or they may agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them. There can be no valid contract of sale if the parties have agreed that the price is to be fixed in the future by one of them."

The evidence shows that the parties before me neither fixed the amount of the price in their contract nor were able to agree upon some external standard to determine the "cost price" of the yacht.

[19] The evidence further shows that from about December 2015 until early 2017, the parties also negotiated other possible terms of an agreement, but no agreement was reached. In this regard Matrix made a written proposal on 16 December 2015, Mark made a written counter-proposal on 3 January 2016, then submitted a draft written agreement in about July 2016 and an unsigned offer to purchase sometime after January 2017. None of these proposals was agreed. If indeed the oral contract relied upon by Mark as the basis for his action was concluded, this begs the question as to why there was a flurry of negotiations between December 2015 and early 2017 concerning that very contract. The answering affidavit of Mark in fact records that in August 2017 he informed the V&A Waterfront that the parties were in the process of trying to finalise an agreement.

[20] The Applicant aptly notes that the conduct of the parties was at odds with any final and binding agreement having been concluded. Without any demur, it is contended the yacht was placed in the name of Matrix and insured by Matrix, the gross income from the yacht's charter business was paid to Matrix, the

yacht's expenses were paid by Matrix and Mark and the crew were employed by Matrix. These circumstances, so the argument correctly continues, suggest that the parties had not agreed that Mark would use the yacht to conduct the charter business for his own account, as alleged by him.

[21] In view of all of the above I find that no agreement of sale was concluded between the parties.

Ownership of the yacht

[22] If no sale agreement was concluded, then the alleged basis for transfer of ownership to Mark did not exist. It is also the case, as the Applicant points out, that the formal documents relating to the yacht, name Matrix as the owner. These include the local general safety certificate, the radio license, the lease agreement with the V&A Waterfront and the indemnity forms signed by passengers. In addition, the hull and machinery insurance was taken out in the name of Matrix and the safe manning document names Matrix as the operator. Whatever expenses Mark paid from his personal account for the website charter business, were credited to his loan account with Matrix, and therefore cannot support his ownership claim, as averred by him. These expenses were effectively paid by Matrix.

[23] The evidence points instead to Mark having been an employee of Matrix until his dismissal on 2 August 2017. Mark's contention that he had not been employed by Matrix since 25 January 2016, and that he was nothing more than a nominal employee, is gainsaid by the following objective facts: he has, until his dismissal, at all times drawn a salary from Matrix and Matrix has paid his PAYE, UIF, medical aid and leave pay. Matrix has issued IRP5 forms for

Mark, including for the 2017 year, and monthly pay sheets in respect of him. Moreover in August 2016, when asked to resign, Mark declined stating,:

> "I think I should make it clear I have no intention of resigning."

Spoliation

[24] The mandament van spolie has been described as a speedy and robust remedy, designed to restore possession only, irrespective of the validity or otherwise of the underlying causa for the possession in order to prevent 'self-help'. Possession is restored to the spoliatus "as a preliminary to any enquiry or investigation on the merits of the dispute". *(Microsure (Pty) Ltd and Others v Net 1 Applied Technologies South Africa (Ltd)* 2010 (2) SA 59 (N) paragraphs 13 to 15.

[25] In *Pinzon Traders 8 (Pty) Ltd v Clublink (Pty) Ltd and Another* 2010 (1) SA 506 (ECG) at paragraph 5 it was stated that in order to succeed, the spoliatus must prove the following:

> "(a) that he or she was in de facto possession of the property (which includes physical possession of movable and immovable property, and, in the case of incorporeal property, the physical exercise or enjoyment of the right in question which is sometimes called quasi-possession and which I shall include under the general concept of possession…); and
>
> (b) that he or she has been despoiled of that possession, without recourse to the courts and hence without lawful authority."

[26] The Applicant therefore bears the burden of proving the requirements for the mandament, on a balance of probabilities, these being that he was in 'peaceful and undisturbed possession of the property and that he was unlawfully deprived of that possession". See *Wightman v Headfour (Pty) Ltd* 2008 (3) SA

371 (SCA), at para 24. See also paragraph 27 where it was held that actual violence or fraud was not a requirement, "provided the act is done against the consent of the person despoiled and illicitly".

[27] The Applicant contends that until mid-July 2017 Matrix physically controlled the yacht, and intended to possess it. Matrix was then deprived of its possession by Mark, without its consent, and without Mark having obtained legal sanction. This dispossession was thus unlawful. The evidence, it is contended, established on a balance of probabilities the requirements for a spoliation order, namely, unlawful deprivation of possession.

[28] The stance of the Respondents is that the Applicant never had possession of the yacht, nor was there any active spoliation which took place in respect of the yacht. Mark, it is contended, had effective physical control of the vessel since December 2015, and possessed it for his own benefit and on his own behalf, subject to his obligation to pay the agreed purchase price out of its profits. It is contended that the Respondents have therefore proved effective physical control and an intention to derive some benefit from possession. Possession protectable under the *mandament van spolie,* contend the Respondents, has been established.

[29] Mr Van Eden pointed to Peter's complaint in his founding affidavit, that Mark took it upon himself to operate the yacht, against his wishes, as acknowledgment of Mark's control of the yacht. The complaint is, however, on closer scrutiny, that Mark took it upon himself to operate the yacht full time and acting as if he was free to run the yacht as he wished, which, as contended by Mr Cooke, is not an acknowledgment of Mark's control of the yacht. Mr Van Eden contended further that if the Applicant's case is that spoliation is

constituted by the withdrawal of instructions to Mark to maintain custody of the vessel, it is misdirected. This, however, is not the Applicant's case, which is based on ownership and physical control of the vessel until it was deprived of possession by Mark in July 2017.

[30] That Mark did not hold the yacht for himself is, in my view, gainsaid by the following facts: until recently Mark and the crew were employed by the Applicant, their wages were paid by it and they were obliged to act in the Applicant's interests. Until mid-July the Applicant benefitted from the charter business and the income therefrom was paid to the Applicant's bank account.

[31] It was thus the Applicant who in fact had physical control of the vessel, albeit that Mark operated it. Possession comprises both an objective and a subjective element, namely physical control and the intention to possess. See Francois du Bois *Wille's Principles of South African Law* 9th Ed (2007) pg. 449. Physical control need not be exercised in person, but may be exercised by an agent on behalf of the principal; by a servant on behalf of the master (*Wille* page 450). A ship is usually controlled through the master and crew and the employer of the master and crew will thus have physical control of the ship. In the context of a demise charter, see John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2nd Ed (2009) pg. 741 fn. 51; *Halsbury's Laws of England* 5th Ed (2008) Vol 7 S 210-211. Given my finding that no agreement of sale had been concluded and that Mark was an employee of the Applicant, the basis for Mark's possession of the yacht as contended for by the Respondents, falls away.

[32] In the circumstances I accept that until mid-July 2017 the Applicant physically controlled the yacht, and intended to possess it. The Applicant was

then deprived of its possession by Mark, without its consent, and without Mark having obtained legal sanction. The dispossession was thus unlawful.

[33] With regard to the charter income, it is so that one is entitled to spoliation relief if one has been deprived of one's quasi-possession of an incorporeal. See *Wille* page 458 – 459 and Silberberg & Schoeman's *The Law of Property* 5th Ed (2006) at S13.2.1.3(c). The Applicant therefore has a right to the income from the charter business and was in possession of this right up until mid-July 2017, in the sense that it actively exercised that right and the income was paid to it. Mark thereafter took steps to divert the income to Mirage and by doing so he dispossessed Matrix of the yacht's income.

[34] The Applicant has therefore shown on a balance of probabilities that prior to mid-July 2017 it was in peaceful and undisturbed possession of the yacht and this possession was interrupted by Mark. The Applicant is thus entitled to the spoliation relief it seeks.

Interdict – prima facie right

[35] In view of my finding that no contract of sale was concluded, and that the Applicant was the owner of the vessel and the employer of Mark, the Applicant has established a *prima facie* right and indeed a right to the relief it seeks.

Well-grounded apprehension of irreparable harm

[36] The Applicant cites the following harm apprehended by it:

36.1 The operation of the yacht by Mark and Mirage may amount to a breach of the Applicant's lease with the V&A;

36.2 Without being able to exercise control of the yacht, the Applicant cannot ensure that the terms of the insurance policies are met and any claim by

the Applicant while the yacht is operated by a third party will be repudiated;

36.3 The Applicant is at risk of claims being advanced against its yacht or itself as a result of the operation of the yacht by Mark. Such liability could arise in the form of maritime liens or legislation which imposes strict liability on owners, it is contended;

36.4 The Applicant has concerns regarding Mark's honesty and his accounting ability.

[37] I do not accept the contentions on behalf of the Respondents that the concerns about the lease insurance and liens are of little consequence. However with regard to the Applicant's stated intention of wanting to sell the yacht, I agree with the Respondents that they will suffer severe prejudice should the yacht be sold pending the determination of the action. The aim of the interim interdict is to freeze the position until the Court decides in the main action where the right lies. Any sale of the vessel would be counter to this and there is, in my view, accordingly merit in the relief sought at paragraph 2.1 of the counter-application, which seeks that the Applicant be interdicted and restrained from taking any steps to sell or dispose of the vessel which is the subject of the action. The interdict sought at paragraph 2.1 of the counter-claim should accordingly be granted.

Balance of convenience

[38] The Applicant contends that the balance of convenience favours it. Should the Respondents suffer any actionable harm they will be able to claim damages from the Applicant, which has sufficient assets to meet any damages claim. The converse, it is contended, is not the case. The Applicant contends moreover that even if it should be decided that questions of prejudice are evenly balanced, the evidence regarding Matrix's ownership of the yacht is

overwhelming and Matrix's prospects of success in the action are very strong. This should tip the balance in the Applicant's favour, it is contended.

[39] The Respondents argue that the balance of convenience can never favour a situation where both parties have seemingly equal *prima facie* claims to the ownership of the yacht, yet the one party whose avowed intention is to dispose of the yacht is placed in exclusive custody of the thing in dispute. The balance of convenience, contend the Respondents, favours Mark's continued operation of the charter business with the payment of the profits into a separate trust account. It is contended that Mark has little other income and his only source of income previously received from the Applicant has come to an end.

[40] The Applicant's counter to this is that Mark earns $2000 a month from managing another charter company, he owns an import export company and also a ten percent share of the Applicant. The charter business will not be stopped, but will continue under a skipper and marketer that the Applicant has employed and the existing crew will be maintained. Aptly, the Applicant points out, it is prejudiced by not having oversight of the accounts and finances and it has been deprived of income from the yacht. There is merit in the Applicant's submissions. The prejudice, in my view, to the Applicant would be greater.

[41] Given my findings concerning the contract and the ownership of the vessel, both parties do not have equal *prima facie* claims to its ownership and there is less need for the balance of convenience to favour the Applicant. Moreover, given my finding that the sale of the yacht should be interdicted as sought in the counter-claim, the sale does not arise. This and my finding above on the Applicant's prejudice, tips the balance of convenience in its favour.

Absence of any other satisfactory remedy

[42] I am satisfied that the Applicant has shown that it does not have any other satisfactory remedy.

Counter-application

[43] For the reasons stated above the relief sought at paragraph 2.1 of the counter-application, interdicting the sale of the vessel, must succeed. The sale of the vessel will clearly cause extreme prejudice if the relief in the action is successful.

[44] In view of my finding that the Applicant is entitled to the spoliation relief it seeks, that there was no contract of sale and accordingly ownership of the vessel did not pass to Mark, the claim for the relief sought at paragraph 2.2 of the counter-application cannot succeed.

Costs

[45] The Applicant has been successful in its claim whilst the Respondent has been successful only in respect of paragraph 2.1 of the counter-application. The costs order I intend granting will reflect this. The Respondents sought the costs occasioned by the matter not proceeding on 4 and 16 August 2017, due to the matter initially having been brought before the urgent judge. I am satisfied that the degree of purported urgency did not warrant the attention of the urgent judge and that the Applicant should be mulcted for the costs in respect of 4 and 10 August 2017.

Order

[46] I accordingly order as follows:

1. The Respondents are interdicted and restrained from unlawfully disturbing the Applicant's possession of the sailing yacht "Mirage" ("the

yacht"), berthed at the V&A Waterfront, including the income from the yacht's charter business.

2. The Respondents are directed forthwith to restore possession of the yacht and the income from the charter business to the Applicant.

3. Pending the final determination of the Second Respondent's action against the Applicant under Case No: 12440/2017:

   3.1 The Second Respondent is interdicted and restrained from boarding the yacht.

   3.2 The Respondents are interdicted and restrained from receiving income from the yacht's charter business.

4. Pending the determination of the aforementioned action under Case No: 12440/2017, the Applicant is interdicted and restrained from taking any steps to sell or dispose of the yacht.

5. The Respondents shall pay 90% of the costs of suit, excluding the costs occasioned on 4 and 16 August 2017.

6. The Applicant shall pay 10% of the costs of suit. The Applicant shall also pay the costs occasioned on 4 and 16 August 2017.

Y S MEER
Judge of the High Court