THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
(Exercising its admiralty jurisdiction)

Case No: 12354/2020
Case No: AC28/2017

In the matter between:

JURGENS JOHANNES STEENKAMP N.O.	**First Applicant**
GARY DONOVAN WALLACE N.O.	**Second Applicant**
LOUISE GROENEWALD N.O.	**Third Applicant**
SIYABONGA SAMUEL MOHLOMI N.O. [in their capacities as joint liquidators of Matrix Yachts (Pty) Limited (in liquidation)]	**Fourth Applicant**

and

MIRAGE CATAMARAN (PTY) LIMITED (Registration number: 2016/001323/07)	**First Respondent**
MARK WEHRLEY	**Second Respondent**
THE MASTER	**Third Respondent**

Coram: Bozalek J

Heard: 17 November 2020

Delivered: 20 January 2021

JUDGMENT

BOZALEK J

[1] This matter commenced as an urgent application which first came before Court on 23 September 2020 and thereafter before me for hearing on the semi-urgent roll on 17

November 2020. The Court exercises its Admiralty jurisdiction since the subject matter of the dispute is a catamaran yacht, SY '*Mirage'* ('the yacht').

[2] The applicants are the joint liquidators of Matrix Yachts (Pty) Ltd (in liquidation) ('Matrix') whilst the first respondent is Mirage Catamaran (Pty) Ltd and the second respondent is Mark Wehrley. The central dispute in this application concerns ownership of the yacht which was initially manufactured for the second respondent by Matrix.

[3] The application is the most recent chapter in a long running legal saga arising out of a bitter family dispute. Second respondent's father and step-mother, Peter and Fiona Wehrley ('the Wehrley's), founded Matrix. Each held a 25% shareholding therein whilst a company which they controlled held a 40% shareholding and second respondent held the remaining 10%. Matrix carried on business for some years as a builder of luxury catamaran sailing vessels. First respondent is a company formed by second respondent and his partner in December 2015.

[4] In early 2015 Matrix commenced building the yacht pursuant to an agreement between Matrix and second respondent, the terms of which were later disputed, to be used as a charter boat operating day charters and day trips from the Victoria and Alfred Waterfront. The yacht was completed and launched in December 2015 and second respondent began conducting the envisaged charter business. The relationship between second respondent and the Wehrley's appears to have become strained over the ensuing year or two arising out of differences relating to the expense of building the yacht, control over it and the disposition of the proceeds of the charter business.

[5] In July 2017 second respondent instituted an action against Matrix and the Wehrley's for an order confirming that he was the lawful holder of the rights, title and

interest in the yacht. The following month the Wehrley's, through Matrix, launched a spoliation application against first and second respondents in order to regain possession of the yacht. The application was opposed but in September 2017 Meer J granted an order awarding Matrix temporary possession of the yacht pending the determination of second respondent's action. Importantly for the purposes of the present application, second respondent was also interdicted and restrained from receiving income from the yacht's charter business. At the same time the Court granted second respondent's counter application interdicting and restraining Matrix from taking any steps to sell or dispose of the yacht pending the outcome of his action.

[6] The parties then agreed to refer the issues in second respondent's action to arbitration before Advocate Mitchell SC. It was further agreed that the following issue would be separated out and heard first, namely, *'Was a contract concluded between the parties as alleged by the plaintiffs and, if so, what are the terms of that contract?'*. It was also agreed that the remaining issues would stand over for later determination by the arbitrator, to be concluded within two months of the final determination of the separated issue.

[7] After an arbitration lasting some three weeks the arbitrator handed down an award confirming the conclusion of an oral agreement between Matrix and second respondent. He did so in the following terms:

> *'[85] I conclude therefore that a valid contract was entered into between Mark and Matrix on 13 March 2015. The terms of the contract were as follows:*
>
> *(a) Matrix agreed to manufacture a Mirage 760 sailing catamaran for Mark;*

(b) Mark would use the vessel to conduct a charter business for his own account at the Victoria & Alfred Waterfront, Cape Town;

(c) the costs incurred by Matrix in manufacturing the vessel would be paid to it by Mark by applying all of the profit earned from the charter business until Matrix's costs had been paid in full;

(d) ownership of the vessel would remain vested in Matrix until full payment of the costs had been effected, whereupon ownership would pass to Mark'.

[8] Some two months later and before the remaining issues could be arbitrated the Wehrley's brought an application to liquidate Matrix pursuant to which it was finally liquidated on 25 October 2019. Thereafter the applicants were finally appointed as its liquidators on 28 April 2020.

[9] In his founding affidavit in the liquidation application Mr Peter Wehrley confirmed that second respondent was entitled to *'acquire the ownership of the yacht upon full payment of the manufacturing costs and that as a consequence of that claim Matrix was unable to sell or otherwise encumber the vessel'*. In November 2019 second respondent gave notice to the applicants in terms of sec 359(2)(a) of the Companies Act that he intended to continue proceeding either by way of litigation or arbitration to adjudicate the remaining issues set out in the arbitration agreement.

[10] On 31 July 2020 and at the instance of the applicants this Court granted an order granting an extension to the powers of the liquidators, *inter alia* to abandon uncompleted contracts and dispose of the assets of the company by public auction or private treaty. In regard to the remaining issues the liquidators addressed a letter to second respondent on 4

August 2020 advising that they had considered the question of where ownership in the yacht vested as at date of liquidation and, although the disputes in respect of the construction costs of the yacht and the profits of the charter business remained, they were satisfied *'upon consideration of the information available'* that at such stage ownership in the yacht had vested in Matrix. They further advised second respondent that they would not abide the agreement which the arbitrator had found to have been established, that they would now proceed to sell the yacht for the benefit of all creditors and they invited second respondent to lodge a claim against Matrix (in liquidation) for any loss he might suffer as a result of the liquidators not abiding by the agreement and selling the yacht.

[11] Second respondent's attorney responded to the liquidators by pointing out *inter alia* that the interim interdict granted by Meer J precluded them from taking any steps to sell the yacht pending the finalisation of the remaining issues. He recorded furthermore that second respondent's position was that he had fully paid the yacht's construction costs out of the profits of charter business.

[12] In the face of this standoff the applicants launched the present proceedings on 4 September 2020 on an urgent basis claiming the following substantive relief:

1. a declaration that Matrix is the owner of the yacht;
2. discharging Meer J's order restraining Matrix from taking any steps to sell or dispose of the yacht.

[13] The application is opposed by first and second respondents who raised a number of points in *limine* and who also brought a counter application seeking a declaration that Meer J's order prohibiting the sale of the yacht remained in force pending the final

determination of the action, for access to Matrix's books, documents and records in terms of sec 360 of the Companies Act and for a statement and debatement of account in respect of the profits generated by the charter business and the yacht's construction costs.

The issues

[14] The primary issue which arises for determination is whether the applicants have established that Matrix is the owner of the yacht and therefore that paragraph 4 of Meer J's order falls to be discharged. Determining this question requires *inter alia* interpreting the arbitrator's award and a consideration of the applicants' argument that, even on second respondent's version of events, ownership of the yacht could not have passed to him.

The applicants' case

[15] The applicants contend that it is not necessary to establish what the costs of manufacture of the yacht were or, for that matter, whether or not there has been full payment of those costs by second respondent. In essence their argument is that even if it is assumed in favour of second respondent that he made full payment prior to liquidation, ownership in the vessel was not automatically or by operation of law transferred from Matrix to second respondent. The argument is based on the principle that ownership only passes when delivery of possession is given, accompanied by an intention on the part of the transferor to transfer ownership and on the part of the transferee to receive it. The applicants point out that pursuant to Meer J's order in the spoliation application Matrix regained possession of the yacht which situation obtained until the date of liquidation. They contend further that it was common cause that when Matrix regained possession of the yacht the construction costs had not been paid in full. Furthermore, they contend, no

real agreement to effect transfer of the ownership of the yacht had been concluded and it had not been delivered to second respondent; finally, they contend, neither Matrix nor the applicants ever had the intention of transferring ownership of the yacht to second respondent.

[16] Insofar as second respondent argues that the arbitrator held that it was a tacit term of the agreement that ownership of the yacht would pass to second respondent on payment of its total construction costs, the applicants take issue with the suggestion that this could take place 'automatically' on that event. They contend that the arbitrator made no finding that the initial delivery had been subject to a condition that ownership would automatically pass as and when payment was made in full. They argue further that inasmuch as the arbitrator found that there was a tacit term that ownership would pass upon payment of the costs this meant that neither party had any express intention in respect of the passing of ownership and thus could not have had the intention to conditionally transfer ownership, this being the argument relied upon by second respondent in these proceedings. They point out furthermore that, inasmuch as second respondent contends that the yacht's construction costs and the total profit repaid to Matrix have yet to be determined with the result that ownership of the yacht cannot presently be confirmed, neither he nor Matrix, represented by the Wehrley's, could have had the subjective intention to accept or give transfer of ownership to the yacht.

[17] In making their case the applicants seek to distinguish the matter of *Info Plus v Scheelko and Another*[1] which held, in the context of a written instalment sale agreement containing a reservation of ownership clause until such time as the final instalment was

[1] 1998 (3) SA 184 (SCA).

paid, that a redelivery or further delivery of the *merx* was unnecessary on the facts. They contend further that no delivery, even in the form of *traditio brevi manu*, could take place in the present matter since second respondent lost possession of the yacht pursuant to the spoliation application and without such possession fictitious transfer could not be effected.

[18] As an adjunct to its argument the applicants contend that inasmuch as the contract was uncompleted as at date of Matrix's liquidation and their having given notice to second respondent that they refused to fulfil the contractual obligations imposed on Matrix, they could not be compelled to render specific performance. Inasmuch as ownership of the yacht had or still vested in Matrix, as its liquidators they were entitled to realise the yacht as an unencumbered asset in the estate, leaving second respondent with a concurrent claim for damages. In this regard they argue that there could be no dispute that the contract was uncompleted at the date of liquidation as Matrix was in possession of the vessel and had not transferred ownership to second respondent.

The respondents' case

[19] The respondents contend that on a proper interpretation of the arbitrator's award it is clear that the common intention of the parties was that ownership of the yacht would pass automatically to second respondent upon repayment of the vessel's construction costs; furthermore, that the applicants' argument that ownership in the vessel could never have been transferred to second respondent, irrespective of whether he had repaid its construction costs because there had been no physical delivery, is flawed inasmuch as it ignores the terms of the agreement as expressed in the arbitrator's award. The respondents contend that the applicants' reliance on the argument that transfer of

ownership could never have passed *inter alia* because second respondent was not in possession of the vessel at the time of any final payment was a technical argument not previously advanced and designed to avoid a proper ventilation of the remaining issues in the action. They contend further that the applicants' arguments relating to possession and delivery misconstrue the law and in particular the decision in *Info Plus* where, according to the respondents, the Supreme Court of Appeal rejected the argument that for ownership to have passed in circumstances similar to the present the purchaser had to be in possession of the *merx* at the time of fulfilment of the condition. The respondents argue that the tacit term found by the arbitrator regarding the passing of ownership suspended the transfer of ownership until repayment of the construction costs at which point the conditional delivery of the yacht to second respondent became unconditional without any further real agreement or act of delivery or redelivery being necessary. They take issue with the grounds upon which the applicants seek to distinguish the *Info Plus* case from the present matter. The applicants' case is that the provision found by the arbitrator concerning where ownership of the vessel lay and when it would pass amounted to a suspensive condition which suspended the transfer of ownership and was not a term with the consequence that as and when second respondent paid the construction costs in full the suspensive condition was fulfilled and ownership automatically passed to him. As a further consequence the respondents contend that the applicants' purported election not to abide by the agreement, thereby purporting to leave second respondent with no more than a concurrent claim for damages, was invalid since the agreement had already been completed and ownership had passed prior to liquidation. In this regard they argue in the alternative that the applicants purported election not to abide by the agreement was invalid as they had already elected to abide by the agreement

either expressly or tacitly.

[20] Overall the respondents contend that the applicants have failed to discharge the onus which they bear of proving Matrix's ownership of the yacht and as such had failed to justify a discharge of the relevant portion of Meer J's order with the result that the application fell to be dismissed in toto.

Points in *limine*

[21] The respondents raised a number of points in *limine* contending that these alone justified the dismissal of the action. These were that the application was not urgent, that the subject matter of the dispute was *lis pendente*, that the substantive relief sought was not competent in the absence of any procedural or substantive ground to justify interfering with Meer J's order and, lastly, that there were foreseeable disputes of fact which could not be resolved on affidavit. In my view none of these preliminary points has any merit. Firstly, the argument regarding urgency has been overtaken by the fact that the matter was placed on the semi-urgent roll by agreement. As regards the contention that the subject matter is *lis pendens*, the very purpose of the application is, on the basis of a law point, to avoid having to determine the remaining issues in the arbitration which flow out of the action. The subject matter of the pending dispute is thus not sought to be determined again in different proceedings but to be circumvented. Nor is there any merit in the suggestion that the applicants should have applied for a variation or discharge of Meer J's order in those proceedings. The provisions of Rule 42 are not applicable to the present matter and there can be no objection in principle to the applicants seeking a declaratory order that the relevant portion of Meer J's order is no longer applicable or falls to be discharged or varied through the vehicle of this separate application. Finally,

although the foreseeability of disputes of facts may play a role in the present application it does not preclude the determination of the primary basis for the applicants' challenge in these proceedings inasmuch as it is founded on a legal point which in effect accepts the respondents' version of events on the facts.

The merits

[22] In considering the opposing submissions the starting point must be the terms of the arbitrator's award declaring the terms of the contract between the parties and more particularly how ownership of the yacht would be treated. The arbitrator found that *'ownership of the vessel would remain vested in Matrix until full payment of the costs had been effected whereupon ownership would pass to (second respondent)'*.

[23] The interpretational dispute between the parties was whether this declaration made provision for an 'automatic' passing of transfer. It is correct, as the applicants contend, that the arbitrator never made use of the term 'automatic' nor expressly provided that ownership would automatically pass. It is difficult however to see how any other interpretation can be given to this aspect of his award. It is now trite that the proper approach to interpretation is to regard it as a process of attributing meaning to the words used having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. In this process consideration is given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. The process is objective not subjective and a sensible meaning is to be preferred to one which leads to insensible or unbusinesslike results or

undermines the apparent purpose of the document. See *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2] and *Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[3].

[24] Applying this approach to clause 85(d) of the arbitration award it is difficult to interpret the clause as providing for anything else but an automatic transfer of ownership. The ordinary dictionary definition of *'whereupon'* is *'immediately thereafter'* or *'immediately after which'*. In my view the arbitrator used the word *'whereupon'* and the further wording of clause 85(d) to indicate the common intention of the parties that ownership of the yacht would automatically pass to second respondent upon payment of the yacht's construction costs. In paragraph 64 of his award the arbitrator observed that the term regarding transfer of ownership was necessary to give business efficacy to the contract. Furthermore, it must be borne in mind that when the arbitrator declared the terms of the contract he was analysing and declaring what the parties had agreed in March 2015 when the vessel was yet to be constructed and when all the subsequent difficulties which arose between the parties lay in the future. At that stage it was envisaged, and indeed agreed, that second respondent would use the vessel to conduct a charter business and to that end would be in possession of, or at least the detentor of, the vessel. In those circumstances it would have been impractical and unnecessary, if not absurd, to have required Matrix to redeliver the yacht to second respondent in some or other form.

[25] The applicants' further contention is that on the facts in the present matter no such automatic transfer could have taken place since second respondent was neither in

[2] 2012 (4) SA 593 (SCA).
[3] 2014 (2) SA 494 (SCA).

possession of the *merx* when any final payment would have been made and neither he nor Matrix had the requisite intention to accept or give transfer at the relevant time.

[26] A similar situation is dealt with in *Info Plus*, a case upon which second respondent relied and which the applicants sought to distinguish on the facts. One of the issues in that matter was whether, in the context of an instalment sale agreement, a transfer of ownership in respect of a vehicle could have taken place where there had been a reservation of ownership on the part of the seller until such time as the final instalment was paid and where, furthermore, the vehicle was no longer in the possession of the purchaser when such instalment was paid.

[27] The Court held, per Van Heerden JA, that, as to delivery, under a hire purchase contract no further real agreement concluded subsequent to the delivery of the *merx* was required to transfer ownership. The real agreement reached when delivery took place sufficed. Because of the conditional term in the hire purchase contract that agreement was also conditional. Notwithstanding delivery, ownership of a thing sold therefore did not pass prior to fulfilment of the condition, the condition in the circumstances being payment of the amount due to Wesbank. The Court held that it was therefore not necessary that the purchaser had to be in possession of the vehicle at the time of the fulfilment of the condition and that there was no warrant for insisting that one of the requirements of *traditio brevi manu* had to be satisfied. In the course of reaching this decision the Court stated as follows:

> *'It is, of course, trite law that transfer of ownership of corporeal movable property requires delivery i.e. transfer of possession, of the property by the owner to the transferee coupled with the real agreement between them. The constituent*

elements of this agreement are the intention of the owner to transfer ownership and the intention of the transferee to enquire it. Transfer of possession can be actual or constructive … The requirement that subsequent to delivery of the merx under a hire purchase contract there should be a further agreement between the parties, in the sense of a mutual intention at the time of fulfilment of the condition that ownership should be transferred to the purchaser, with due respect strikes me as somewhat artificial. I would indeed be surprised if a substantial number of sellers give any consideration to the passing of ownership when the condition is fulfilled and even if a seller should prior to fulfilment inform the purchaser that he no longer intends transferring ownership to the latter that by itself would not preclude a transfer from taking place'.

I pause to observe that this last sentence is particularly relevant to the present matter given the applicants' contention that subsequent to the conclusion of the agreement Matrix never had the intention to transfer ownership to second respondent.

[28] The Court went on to deal with the situation where the purchaser is no longer in possession of the *merx* at the critical moment stating as follows: *'It remains to consider the question whether a different position obtains if the purchaser is no longer in possession at the relevant time. A positive reply gives rise to some rather curious consequence …'* After giving certain examples the Court continued:

'In my view however this is not the law. I fail to see why a second form of delivery should be required at the material time. It is true that pendente condicione ownership of the thing sold, say, a vehicle, remains vested in the seller, but nevertheless a transfer of possession which is one of the requirements of transfer

of ownership, does take place. Such transfer of possession is effected in terms of a real agreement embodying the intention of both parties that at the material time the purchaser shall without more ado become owner of the vehicle. At the risk of repetition, I stress that at that time both requirements for a transfer of ownership are satisfied inasmuch as the conditional delivery ipso jure becomes an unconditional one … It is therefore not necessary that the purchaser must be in possession of the vehicle at the material time. Such a requirement can only be justified on the premise, which I have already rejected that, conditio existente a second real agreement must be concluded. That being so, there is no warrant for insisting that one of the requirements of a traditio brevi manu must nevertheless be satisfied. I would add that if a purchaser under a hire purchase contract does not acquire ownership if at the material time he is not in possession of the merx, it is not at all clear to me by virtue of which legal principle he will become owner should he later regain possession'.

[29] As I understood the arguments advanced on behalf of the applicants they sought to distinguish *Info Plus* from the present matter *inter alia* on the basis that *detentio* of the yacht was recovered from second respondent by Matrix, the then owner, prior to liquidation, whereas in *Info Plus* the owner did not recover possession. In this regard I see no reason in principle why the situation should be any different because possession of the *merx* is in the hand of the seller at the relevant time rather than some other third party. Secondly, the argument put forward in effect shuttles back and forth in time in relation to the intention which the parties allegedly had and disregards the fact that a party's intention may have been based upon a mistaken view of what the original contract between the parties was. When Matrix regained possession of the yacht subsequent to the

spoliation application, and at least up until the arbitrator's award was made known, its mindset, as manifested in the views of the Wehrleys, was that no such agreement existed as found by the arbitrator to have been concluded, including an intention on the part of Matrix to pass transfer of ownership of the yacht once its construction costs had been paid in full. The terms and conditions of the contract having been declared by the arbitrator and in the absence of any appeal against his award, Matrix cannot be heard to state that it never had the intention to pass transfer. This would be to disregard the terms of the award now binding on it and/or to dispute the arbitrator's findings without appealing against them. Furthermore, as I have pointed out, the judgment in *Info Plus* holds that even if a seller should prior to fulfilment inform the purchaser that he no longer intends transferring ownership to the latter, that by itself would not preclude transfer from taking place.

[30] I do not find persuasive the further grounds relied upon by the applicants in seeking to distinguish *Info Plus*. The first such reason was that the present contract was one of *locatio conductio operis* and not an instalment sale contract. It is unhelpful to seek to pigeonhole the present agreement. Although the agreement provided for Matrix to build the yacht, key provisions were that the yacht would be delivered to the respondents who would be required to pay for its costs over an extended period of time from profits generated by the charter business. These provisions, including the reservation of ownership until such time as final payment was made, echo the hallmarks of an instalment sale agreement. That the contract as established by the arbitrator did not contain an express term that ownership would be transferred conditionally is neither here nor there since exactly the same can be said of a standard instalment sale agreement. That is a construction of the agreement. It was contended furthermore that there was no

delivery of the yacht to second respondent and it was not registered in his name after its launch. There was however an initial delivery of the yacht to second respondent whereafter he conducted the charter business for an extended period of time. Finally, the fact that the present matter involves insolvency and, arguably, an uncompleted contract is also no reason in principle to distinguish it from *Info Plus*.

[31] It was further contended on the applicants' behalf that the present contract had not been completed not least because second respondent, although claiming to have paid the costs of construction of the yacht, was unable to prove that he had done so and, at other stages, had stated that he did not know whether he had paid the construction costs from profits generated by the charter business. In my view it is futile to consider the question of whether the construction costs of the yacht have been paid for by profits when there is no agreement, let alone an assertion by either of the parties as to what the yacht's construction costs were nor as to how much of the monies generated by the charter business must be regarded as profit and set off against the aforesaid cost. There are numerous disputes between the parties in respect of these issues. Neither Matrix nor the applicants have ever stated what they regard as the costs of construction and whilst it appears that some R22mil turnover was generated by the charter business there is no clarity from either side as to how much of this must be treated as profit. Unless agreed these figures can only be established through an accounting exercise forming part of an arbitration.

[32] Thus the Court is left with the possibility, one which is not far-fetched, that the construction costs may well have been paid through profits received by Matrix from the charter business conducted by second respondent. The primary issue in the present

application is the question of ownership and in this regard it is clearly not incumbent upon second respondent, in order to succeed in his opposition to the relief sought, to prove that he has paid off the costs of construction and accordingly is owner of the yacht. He may well attract that onus in a subsequent hearing when the remaining issues in the arbitration arise for determination but in the present proceedings it is the applicants who, in order to succeed in setting aside the interdict granted by Meer J against the sale or disposal of the yacht, must prove that second respondent did not pay the costs of construction prior to the date of liquidation.

[33] The reasoning I have already expressed also puts paid to the applicants' argument that after liquidation the applicants were entitled to repudiate the uncompleted contract leaving second respondent with a concurrent claim for damages suffered. The applicants are in no position to prove that the contract was uncompleted since they cannot exclude or disprove the possibility that the yacht's construction costs were indeed paid off by the profits generated by the charter business either when it was conducted by second respondent or by Matrix following the spoliation proceedings. In this regard it was submitted on behalf of the applicants that there could be no dispute that the contract was uncompleted at the date of liquidation as Matrix was in possession of the yacht and had not transferred ownership to Mark. As dealt with in *Info Plus v Scheelko and Another* and as discussed above, although Matrix was indeed in possession of the yacht at the relevant time it does not follow that it had not transferred ownership to second respondent by virtue of that part of the agreement found by the arbitrator to have provided for automatic transfer of ownership.

[34] In my view on a proper interpretation of the contract found by the arbitrator the

tacit term in paragraph 85(d) rendered delivery of the yacht conditional upon second respondent paying its construction costs in full and accordingly suspended the transfer of ownership of the vessel from Matrix to second respondent until that condition was fulfilled. Upon payment of those costs the conditional (initial) delivery of the yacht to second respondent became unconditional and ownership passed to him without any further real agreement or act of delivery being necessary. In the circumstances of the present matter the fact that for some period of time Matrix regained possession of the yacht takes the applicants' case no further; the condition could have been fulfilled before that stage and in any event, as in *Info Plus*, it is not necessary for a purchaser to be in possession of the *merx* for ownership to be transferred in circumstances such as the present. In this regard it must also be borne in mind that the nature of a spoliation application is to temporarily restore possession of property in order to preserve the status quo ante. Needless to say, in such proceedings the Court is not concerned with determining the parties' rights of ownership to the relevant property.

[35] For all these reasons I consider that the applicants have failed to establish, on the facts which are common cause supplemented by their legal argument, that they are the owner of the yacht and therefore that this Court can discharge the interim interdict granted by Meer J in September 2017 or grant declaratory relief to the effect that the yacht is an unencumbered asset in Matrix's liquidated estate.

[36] Turning to the counter application, the respondents seek firstly declaratory relief confirming that the relevant part of Meer J's order prohibiting the sale of the yacht remains operative or, in the alternative, an interim interdict prohibiting its sale pending the determination of the action. However, this Court's finding that the applicants have

failed to make out any case for the relief sought coupled with their repeated statements that they accept that Meer J's order remains in force until set aside or discharged renders both the declaratory relief and the alternative relief unnecessary.

[37] The third prayer in the counter application sought access to the books, documents and records of the company in liquidation in terms of sec 360 of the Companies Act. As Mr Olivier SC pointed out on behalf of the respondents, an order in these terms was granted by agreement by Erasmus J at an earlier stage in the present proceedings. To the extent that this order has allegedly not been complied with in full, second respondent's remedy lies in contempt proceedings or an order to compel and not in this Court making a duplicate order. To the extent that there was a debate or a dispute about the precise form in which access should be given, the parties were urged to reach agreement on the terms of an order which would govern the form of such access. No such agreement could be reached and since this issue was not argued, and strictly speaking was not properly before Court, no order will be made in this regard. Finally, second respondent sought a statement and debatement of account in respect of the profits generated by the charter business and the yacht's construction costs. Such relief is premature since it relates not to the issues in the present matter but to the remaining issues which must still be arbitrated. In the result I decline to grant any such relief.

Costs

[38] Counsel for the applicants initially contended that in the event of them being unsuccessful any costs order should stand over until such time as the remaining issues are arbitrated and a finding is made on whether second respondent indeed paid the costs of the yacht's construction with the result that ownership passed to him prior to Matrix's

liquidation. I am not persuaded that this would be a proper exercise of the Court's discretion regarding costs. These are separate proceedings which in effect sought a 'shortcut' as opposed to the full ventilation of the remaining issues which the contracting parties initially intended and which are necessary to determine the disputes between the parties. The respondents have been put to considerable expense in opposing the present application and in circumstances where they have prevailed I see no reason why the applicants should not have to pay their costs. As far as the counter application is concerned none of the relief sought has been granted. In the result I see no reason why the respondents should not be held liable for the applicants' costs in the counter application.

[39] For these reasons the following order is made:

1. Both the application and the counter application are dismissed with costs.

_____

BOZALEK J

For the Applicant	Adv L Olivier (SC)
As Instructed by	ENS Africa
For the Respondent	Adv J Foster
As Instructed by	Lawrence Whittaker Attorneys