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

REPORTABLE

CASE NO. AC 33/2005

In the matter between:

AVENTURE CATAMARANS LIMITED
APPLICANT

And

FLORIDA MARINE CORPORATION
RESPONDENT

JUDGMENT DELIVERED ON 24 MARCH 2006

DLODLO, J

INTRODUCTION

1) The vessel "Duetto" was arrested for the purpose of providing security for a counterclaim pursuant to a *Rule Nisi* granted by this Court in an application brought in terms of Section 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 as amended (the Act). This is the return day of the said *Rule Nisi*. Mr. Steenkamp and Mr. Wragge appeared for the Applicant and the Respondent respectively.

BACKGROUND

2) The Applicant is Aventure Catamarans limited, a company with limited liability incorporated in the Grand Cayman Islands and having its registered address as c/o Pensum Ltd., Cayman Business Park, A7, Charlotteville, Grand Cayman, Cayman Island, BMI. The Applicant is the Defendant in an action pending in this Court under the case

number AC150/04. It has pleaded to the Summons and has instituted a Claim in Reconvention (the counterclaim) against the Respondent in the action under the said case number AC150/04.

3) The Respondent is Florida Marine Corporation, a company with limited liability, duly incorporated as such in accordance with the company laws of the British Virgin Islands and which carries on business at Road Town, Tortola, British Virgin Islands. The Respondent is the Plaintiff in the action under case number AC150/04 aforementioned. The Respondent is a *peregrinus* of this Court. The nature and grounds of the Applicant's claim is to be found in the Applicant's plea read together with the Plaintiff's Particulars of Claim and Counterclaim. These are set out *infra* in summary form under the heading "the Founding Affidavit".

4) On or about 23 June 2000 and at Cape Town, the parties duly represented, entered into a written agreement in terms of which the Applicant and the Respondent established a Joint Venture for the purpose of manufacturing, marketing and exporting power catamarans. A copy of the Joint Venture Agreement is annexed to both the Respondent's Particulars of claim and the Applicant's Plea and Counterclaim filed in the proceedings to which this application relates. These pleadings are annexed to Mr. Hunter's Founding Affidavit as Annexures "FA1" and "FAII" respectively.

5) In terms of the Joint Venture Agreement:

5.1 The Joint Venture would contract with Bongers Marine CC for the construction of Lavranos Marine designed Aventure

1300 power catamarans.The Joint Venture would place all orders for the construction of catamarans with Bongers Marine or with such other manufacturers as the parties might agree from time to time in writing (Clause 5.3).

5.2 The parties would contribute equally to all costs in respect of the design and drawings and all plugs and moulds for the building of the catamarans, which would be amortized at R100 000.00 per catamaran manufactured and sold (Clause 6.3). The ownership of the drawings, plugs and moulds would vest in the parties in equal shares (Clause 6.4).

5.3 The first catamaran would be produced and built for the Respondent, and the second one for and at the cost of the Applicant. Thereafter each catamaran would be produced in the same order. In the event, however, that either party forfeited his allocations, he would be entitled to the next allocation available. Changes in this order of preference could, however, be altered by the parties in writing (Clause 7).

5.4 A ten (10%) percent commission on the total ex factory price would be paid by the Respondent to the Applicant should the Respondent sell a catamaran and likewise the Applicant would pay a 10% commission to the Respondent should the Applicant sell a catamaran (Clause 8.1).

5.5 On the sale of a catamaran the amortized cost of the design and drawings and the plugs and moulds would be paid to the parties as to R50 000.00 each (Clause 8.2). Other than the parties' contribution to the costs of the design and drawings and plugs and moulds, each party would pay to Bongers Marine the cost of the vessel ordered by it (Clause 8.3). No alteration, cancellation, variation of or addition to the Joint Venture Agreement would be of any force and effect unless reduced to writing and signed by the parties' authorised representatives (Clause 15). After the Joint Venture Agreement was signed the first catamaran was built for and at the cost of the Respondent. This was the "Duetto" which is currently under arrest. This catamaran was built by Bongers Marine pursuant to the terms of the Joint Venture Agreement. Bongers Marine had also made the moulds for the construction of Aventure 1300 power catamarans. The cost of the moulds, exclusive of VAT, was R1 075 000.00. The cost of the design and plans, including legal fees for the Aventure catamarans was R166 586.00. Pursuant to the terms of the Joint Venture Agreement the Applicant and the Respondent each paid one-half of these costs. The Respondent's share was R620 796.00. After "Duetto" had been constructed the Applicant exercised its right in terms of the Joint Venture Agreement to have the second Aventure 1300 catamaran built for it at its cost. Bongers Marine constructed the hull and deck of the second catamaran which was named "Kiwanda".

5.6 During the latter part of 2001, whilst Bongers Marine was constructing the hull and deck of the "Kiwanda", Mr. Bongers advised that the construction of the Aventure 1300 power catamarans was having an adverse impact on his work. He planned to downsize his staff and to re-arrange the factory. He advised further that Bongers Marine could not build any more catamarans for the Joint Venture and gave the Joint Venture five (5) months to make alternative arrangements. The parties decided, (so as to continue with the construction and marketing of Aventure 1300 catamarans in terms of the Joint Venture Agreement), to form a company in which the Applicant and Respondent would hold equal shares, and which would act as an agent for the Joint Venture and which would supervise the construction of Aventure catamarans. The company, named Power Catamaran Projects (Pty) Limited ("PCP"), was duly formed and on 2 January 2002, the parties entered into an agency agreement with PCP. A copy of the agency agreement is annexed to the Applicant's Plea and counterclaim marked Annexure "C". In terms of Clause 1.4 of the agency agreement it is recorded that the construction of the Aventure range of catamarans would be sub-contracted to Helderberg Marine CC. This close corporation appears to have been established to attend to the actual construction of the catamarans.

5.7 There is a dispute of facts on whether or not the agency agreement replaced the Joint Venture Agreement. The Respondent maintains that the latter agreement remained operative and in force. According to the Respondent the purpose of the agency agreement was simply to provide for the construction of Aventure 1300 catamarans by Helderberg Marine CC under the supervision of PCP. All the parties' rights and obligations in terms of the Joint Venture Agreement remained of full force and effect.

5.8 The construction of "Kiwanda" was completed by Helderberg Marine and sold to Mr. K. Millisor for an ex factory price of US$335 661, 04. The SA Rand equivalent of this amount at a SAR/US$ exchange rate of 10, 1332, which was the prevailing exchange rate during May 2002 when "Kiwanda" was shipped to the seller and the purchase price became payable, was R3 401 320,45. According to the Respondent, in terms of the Joint Venture Agreement, the Applicant should have paid the following amounts to the Respondent: R340 132, 05, being 10% of the ex factory price of the catamaran; R50 000,00, being the Respondent's share of the amortised costs of the design and drawings and moulds as provided for in Clauses 6.2 and 8.2 of the Joint Venture Agreement.

(6) The Respondent contended that the Applicant did not pay these amounts to it. It is further contended by the Respondent that in terms of the Joint Venture Agreement the Respondent had the right to the allocation of the next catamaran to be constructed. The Respondent however forfeited its allocation and the Applicant commissioned the construction of the third catamaran, named "Yum Yum" for and at its cost. The latter was constructed by Helderberg Marine cc in accordance with the Lavranos design for an Aventure 1300 power catamaran. The only difference, save for minor alterations, was that the hulls were extended by approximately one (1) metre. The moulds made by Bongers Marine were used for the construction of this catamaran, save that the hull moulds were extended as aforesaid and referred to thereafter as the Aventure Flybridge 460 model. "Yum Yum" was originally commissioned for construction by Mr. and Mrs. Franklin. During October 2002 Mr. Franklin came to South Africa to inspect the catamaran. He concluded that the design of the catamaran was not suitable for fishing, which he required, and cancelled the order.

(7) As a result of Mr. Franklin having cancelled his order for "Yum Yum", Mr. Jordaan decided to change the design of the Aventure catamaran to make it more suitable for fishing. Mr. Jordaan decided to use the same hull moulds which had been made by Bongers Marine. He, however, constructed new moulds for the catamaran's hull internals and superstructure in which he converted the catamaran into a four level vessel and changed the layout below decks. Mr. Jordaan ordered new superstructure moulds for the modified catamaran from Helderberg marine. He called the modified catamaran the Aventure Flybridge 480 "Sportster" model. The Respondent was not in favour of the manufacture of new superstructure moulds and did not agree to

bear one-half of the cost of the new moulds. Clause 6.2 of the Joint Venture Agreement applied only to plugs and moulds for the building of "the Vessel", "Lavranos Marine Design New Zealand designed Aventure 1300 power Catamaran" as appeared from the summary specification annexed to the Joint Venture Agreement. The Sportster model catamaran was not a "Vessel" as described in the Joint Venture Agreement.

(8) The Respondent decided not to take up its entitlement to the fourth catamaran to be built by Helderberg Marine. The Respondent therefore forfeited its allocation and the fourth catamaran, named "Split Decision", was constructed for and at the Applicant's cost. This catamaran, which was constructed by Helderberg Marine, was built using the Aventure 1300 model extended hull moulds and the Sportster model superstructure moulds. "Split Decision" was sold to Mr. and Mrs. Franklin during October 2002 for an ex factory price.

(9) On 18 March 2005 this Court granted a *Rule Nisi* calling upon interested parties to show cause why a final order in the following terms should not be made:

a) Authorising the Sheriff to arrest a catamaran known as "Duetto" in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 as amended ("the Admiralty Act") for the purpose of providing security for a counterclaim instituted by the Applicant in the proceedings under Case No. AC50/2004 for:

(i) payment of the sum of R770 379,87 being in respect of the Respondent's half share of the cost of preparing certain moulds "until the date of termination of the Joint Venture";

(ii) alternatively, payment of the sum of R1 038 879,87, should the Court find that the Joint Venture Agreement or new agreement and/or Agency

Agreement have not come to an end;

(iii) payment of the sum of R154 065, 00 being the Respondent's half share of the audit costs of the Joint Venture;

(iv) payment of the sum of US$426 688,38 being in respect of expenses paid by the Applicant in respect of a catamaran named "Yum Yum";

(v) payment of the sum of US$35 955,10 "in respect of 10% of the ex factory selling price".

(10) This order was given effect to and the "Duetto" was arrested. However, the Respondent opposed the confirmation of the Rule Nisi granted by the Court calling upon interested parties to show cause why a final order should not be granted authorising the Sheriff of the High Court to arrest the Respondent's power catamaran "Duetto" then lying alongside at Club Mykonos, Langebaan, Western Cape in terms of Section 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 as amended. The matter came before Court on 19 April 2005 when an order by agreement (consequent upon the parties' business arrangement) in the following terms was made:

a) directing the Respondent to provide security in an amount of R350 000,00;
b) directing that the catamaran "Duetto" be released from arrest on the provision of such security; and
c) extending the Rule Nisi to 2 August 2005, being the first available date on the semi-urgent roll.

(11) The security referred to in the above order was provided and the "Duetto" was released from arrest. The Respondent persists with its opposition to the confirmation of the *Rule Nisi* granted on 18 March 2005.

FOUNDING AFFIDAVIT

The deponent hereto is John Graham Hunter, an Attorney acting on the instruction of Ms Lesley Paitaki, a director of the Applicant Company duly authorized by the latter in terms of a resolution. Mr. Hunter also derived his instructions from Mr. Tim Jordaan and Ms Rosa Deyer. According to Mr. Hunter the purpose of this application is to cause the arrest for purposes of security in that the Respondent is allegedly indebted to the Applicant in the sum of R924 444,87 or alternatively R1 192 944,87 and US$462 543,48

(12) It is Mr. Hunter’s contention that the Applicant’s claim is maritime in nature and that it arises and relates to the design and construction of moulds and catamarans which are the subject matter of the various agreements concluded between the parties. Describing the property to be arrested, Mr. Hunter averred that the estimated value of the catamaran is an amount of R2 400 000.00. Referring to the provisions of the Joint Venture Agreement, Mr. Hunter stated that Clause 7 thereof provides that “the Vessel produced will be built for and at the cost of Florida Marine Corporation”. According to Mr. Hunter the first vessel produced was built for and at the cost of the Respondent and that is the vessel named “Duetto”. Mr. Hunter also refers to the allegations by the Respondent, in an application for arrest under case number AC144/04, namely that it is a 50% owner of certain moulds used for the production of Aventure Flybridge 460 model power catamaran. Mr. Hunter averred that these moulds have already been attached by the Respondent and are of low value. Mr. Hunter alluded to the fact that the percentage ownership of the Respondent in the moulds is disputed by the Applicant.

(13) In support of the genuine and reasonable need for security, Mr. Hunter made an averment that the Respondent does not have any other assets within the Republic in respect of which the Applicant would be able to levy execution should it be successful in its counterclaim. Accordingly, submitted Mr. Hunter the Applicant has a genuine and reasonable need for security. Mr. Hunter alleged that the Respondent Company is not trading and that according to information gathered from Mr. William Christopher O'Reilly, the Respondent (in which Mr. O'Reilly has an interest) is under investigation by the South African Revenue Services in respect of alleged tax irregularities. According to Mr. Hunter this application was brought on *ex parte* basis because there was a risk that should the Respondent be given notice of the application, it may seek to alienate its interests in the aforementioned vessel and therefore defeat the very purpose of the application or even remove the vessel from the jurisdiction of this Court. "The Vessel is fully seaworthy and could depart at a moment's notice from the territorial waters of the Republic", concluded Mr. Hunter on this aspect.

THE RESPONDENT'S CLAIMS UNDERCASE NUMBER AC 150/2004

(14) The Respondent alleges that pursuant to the terms of the Joint Venture Agreement in January 2002 the parties commissioned Bongers Marine to construct a set of moulds for the construction of a catamaran known as Aventure Flybridge 460 model power catamaran ("the Flybridge moulds"). The Plaintiff and the Defendant duly effected payment of the sum of R1 075 000, 00 VAT excluded to Bongers Marine, being the costs of the construction of the Flybridge moulds. Subsequently in October 2003 the South African Revenue Services assessed

Value Added Tax payable in respect of the construction of moulds in an amount of R150 500, 00 together with penalties and interest amounting to a further R40 357, 45, a sum of money which Bongers Marine paid to the South African Revenue Services. This resulted in Bongers Marine claiming the sum of R190 857, 45 from the Respondent and the Applicant. The sum of money was settled by the Respondent alone, hence its claim in the sum of R95 428, 75 against the Applicant.

THE SECOND CLAIM

(15) The Respondent alleges in the Particulars of Claim that during the period 2003 to 2004 and pursuant to the Joint Venture Agreement the Applicant ordered and sold three (3) catamarans, namely:

a) the “Kiwanda” at an ex factory price of R3 258 212,00
b) the “Yum Yum” at an ex factory price of R3 122 527,00, and
c) the “Split Decision” at an ex factory price of R3 200 500,00.

The Respondent further alleges that pursuant to the provisions of the Joint Venture Agreement it is entitled to commission of 10% of the amount referred to in paragraphs (a) to (c) *supra* constituting a total amount of R958 123, 90. On 8 December 2004 this Court granted an order for the attachment of property owned by the Applicant to found and/or confirm the jurisdiction in respect of the Respondent’s First and Second Claims. The attachment was effected and the provisional order of attachment was confirmed in January 2005.

APPLICANT’S PLEA

(16) The Applicant in its plea admitted the conclusion and existence of the Joint Venture Agreement as from 23 June 2000 and it enumerates what it termed were the material express, tacitly and/or implied terms thereof. I will only briefly set out those terms alleged by the Applicant on which its subsequent counterclaim is founded. These are among others:

a) the first vessel produced would be built for and at the cost of the Respondent and the second for and at the cost of the Applicant; thereafter each vessel produced would be in the same order;

b) a 10% commission of the total ex factory price would be paid by the Respondent to the Applicant should the Respondent sell a vessel and likewise the Applicant would pay the Respondent a 10% commission should the Applicant sell a vessel.

c) On the sale of the amortised joint costs would be paid to the parties as to R50 000,00 each;

d) No alteration, cancellation, variation of or addition to the written Joint Venture Agreement would be of any force or effect unless reduced to writing and signed by the duly authorized representatives of the parties.

(17) The Applicant pleads that on a proper interpretation of the written Joint Venture Agreement, it only applied to the construction of one Aventure 1300 power catamaran (Flybridge 430) known as “Duetto” built by Bongers Marine retained by the Respondent as its vessel. The Applicant pleads further that during the period September/October 2001 to January 2002 and at Cape Town, the Respondent and the

Applicant concluded an oral agreement ("the new agreement") which had certain material express, tacit and/or implied terms *inter alia*:

a) it was agreed that in order to audit and follow the expenses incurred and amounts contributed by the parties, a private company would be formed to be controlled by the Respondent and the Applicant acting as conduit and "agent" in the management of the activities of the joint venture parties;

b) the company would be formed in South Africa and known as Power Catamaran Projects (Pty) Ltd ("PCP"), the shares of which would be held as to 50% by W.C O'Reilly and 50% by T.C Jordaan;

c) after expenses raised in PCP had been accounted for and paid by the joint venture parties, the net profits or losses from the sale of any catamaran would be distributed between the Plaintiff and the Defendant in equal shares.

(18) Pursuant to the new agreement it is pleaded that the Respondent, the Applicant and PCP duly represented, concluded a partly oral and partly written agreement called "the Agency agreement" which had certain material express, tacit and/or implied terms. It is further pleaded that the written Joint Venture Agreement was terminated, alternatively substituted, alternatively replaced, alternatively novated by the new agreement and/or the agency agreement pleaded *infra*. The Applicant denied that the construction of the Flybridge 460 Model Power Catamaran came about as a result of the Joint Venture Agreement. It also disputes the amount alleged to have been paid by the parties to Bongers Marine and the VAT allegedly assessed and paid by Bongers Marine

which the latter reclaimed from the parties. The Applicant admits the sale of "Kiwanda", the "Yum Yum" and the "Split Decision" but denies that there were any profits generated by the sale of all three (3) catamarans. In the alternative in this regard the Applicant pleads prescription in respect of whatever commission was claimable arising from the sale of the "Kiwanda"

THE APPLICANT'S CLAIM IN RECONVENTION

(19) Under Claim A the Applicant avers that the following moulds were constructed on behalf of the parties, namely:

i) Flybridge 430 Model Power Catamaran moulds;
ii) Flybridge 460 Model Power Catamaran moulds;
iii) Flybridge 480 Model Power Catamaran or Sportster moulds;

The Applicant claims the sum of R770 379, 87 in respect of half share of the costs of preparing the mould until termination of the joint venture. In the alternative, in the event that the Court should find that the written Joint Venture Agreement, or new agreement and/or the agency agreement has come to an end, the Applicant pleads that the Respondent is indebted to it for the additional amount of R268 500, 00, being its half share in respect of the Sportster moulds constructed by Applicant after 13 October 2003 on which the Applicant spent R537 000, 00.

(20) In its Claim B the Applicant claims the sum of R154 065, 00 being its half share of R308 130, 00 representing the audit costs in respect of account of PCP and the Joint Venture. In a conditional Claim C the Applicant avers that in the event of the Court holding that the written Joint Venture Agreement still subsists between the parties and that it applied to the manufacture of all three (3) vessels referred to in this matter,

then the Applicant avers that pursuant to Clause 7 of the written Joint Venture Agreement, the allocation of vessels could only be varied by the parties in writing and consequently the Applicant would be entitled to the sum of US$462 543, 48 being 10% of the ex factory selling price in respect of the “Yum Yum”.

ANSWERING AFFIDAVIT

(21) This was deposed to by William Christopher O’Reilly, the Manager of the Respondent Company. Mr. O’Reilly specifically admitted that the Respondent is the owner of the power catamaran “Duetto” presently under arrest. It is contended on behalf of the Respondent that the Applicant has failed to demonstrate the existence of a *prima facie* case in respect of its claim. In Mr. O’Reilly’s view the Applicant is engaged in harassing the Respondent because an alternative and less disruptive opportunity was available to the Applicant to obtain security for its claim in reconvention. He mentioned an application in terms of section 5(2) (b) and (c) of the Admiralty Act as one such alternative remedy the Applicant should have resorted to instead of arresting the vessel. In other words, in terms of section 5(2) (b) and (c), according to Mr. O’Reilly, the Applicant could have brought an application in which it sought an order that the Respondent furnishes security for the Applicant’s claim in reconvention, and that, in the event of the Respondent being ordered to furnish such security and not doing so, that the Respondent’s attachment of the Applicant’s assets shall lapse or be set aside.

(22) Mr. O’Reilly averred that in terms of the Joint Venture Agreement the Applicant should have paid the Respondent a commission amounting to R273 672.48 plus a further amount of R50 000.00 for the amortised costs of the design of the

drawings as well as the moulds, but these payments were not made. These amounts according to Mr. O'Reilly, form part of the claim being advanced by the Respondent against the applicant in the action to which this application is related. Further, according to Mr. O'Reilly, on 12 May 2003, the Applicant sold "Yum Yum", which was by then 60% completed, to Mr and Mrs P. Barrette for an ex factory price of US$ 358 007.00, (R2 689 420.00). It is by virtue of this sale that certain commission accrued to the Respondent. It is accepted by the parties as common cause that the Joint Venture Agreement terminated by no later than 13 October 2003.

(23) Mr. O'Reilly alleged that the Joint Venture effected payment of R1 075 000.00 to Bongers Marine, being the price of the construction of the Aventure 1300 moulds. However, according to Mr. O'Reilly, on 13 October 2003, the South African Revenue Services assessed Value Added Tax payable in respect of the construction of the moulds and directed that Bongers Marine pay a total amount of R244 225.58, being the outstanding VAT plus penalties and interest on the moulds and penalties and interest due in relation to "Duetto". Of the aforesaid amount, an amount of R190 857.45 constituted VAT, penalties and interest relating to the moulds. Concluding on this aspect, Mr. O'Reilly stipulated that in terms of the Joint Venture Agreement with Bongers Marine, and in the event that any VAT should become payable in respect of the moulds, the Joint Venture undertook to reimburse Bongers Marine for the VAT in question. Mr. Bongers allegedly called upon the Joint Venture to reimburse him in the mount of R244 225.88, an amount Bongers Marine had been obliged to pay to the Receiver of Revenue. This resulted in the arrest of the "Duetto" and the institution of proceedings in *rem* by Bongers

Marine in which it claimed payment of the aforesaid sum of money, being in respect of the VAT charges, penalties and interest levied by the Receiver of Revenue.

(24) Mr. O'Reilly averred that in order to procure the release of the "Duetto" from the aforementioned arrest the Respondent settled the Joint Venture's liability to Bongers Marine by arranging payment from an associated company called Mail Marketing (Pty) Ltd. (Mail Marketing cc) on loan account to the Respondent. Mr. O'Reilly averred that in terms of the Joint Venture Agreement the Applicant is liable to reimburse the Respondent for over half of R190 857.45, being VAT, interest and penalties payable in respect of the moulds, hence the claim in an amount of R95 428.73 in case number AC 150/04.

(25) In response to the averments contained in paragraph 6 of the Founding Affidavit, Mr. O'Reilly denied that the Respondent is indebted to the Applicant in any amount and disputed the Applicant's averment that it has made out a *prima facie* case in respect of its claim. As necessitated by the allegations contained in paragraph 8 of the founding Affidavit, Mr. O'Reilly dealt with the Applicant's Plea in case number AC 150/04 as follows:

i) He denied that, on a proper interpretation of the Joint Venture Agreement, it only applied to the construction of one Aventure 1300 power catamaran. He also emphatically denied the existence of an oral agreement in the terms alleged for that matter.

ii) He admitted that by no later than 13 October 2003 the Joint Venture Agreement, and therefore the Agency Agreement as well, had been terminated. He specifically denied that the Joint Venture was terminated, substituted, replaced or novated by the oral agreement referred to in paragraph 2 of the Applicant's Plea and he referred the Court to his earlier denial of the existence of the oral agreement.

(26) Mr. O'Reilly denied that, on a proper interpretation of the Joint Venture Agreement and the Agency Agreement it can be said that there was a reciprocal obligation on the parties to contribute equally to the costs and expenses of the moulds. According to him the question of the costs of the moulds is expressly dealt with in the Joint Venture Agreement. Mr. O'Reilly averred that the Respondent did contribute its shares of the costs of fabricating the moulds referred to in the Joint Venture Agreement. He stated and reiterated that it was the Applicant's decision to have other moulds fabricated so as to enable the Joint Venture, through the agency of PCP to cause sportster model catamarans to be constructed. Responding to the allegation of prescription Mr. O'Reilly stated that the Respondent commenced its action in *personam* against the Applicant by effecting an attachment of the Applicant's property by order of the court and that therefore in terms of section 1(2)(a)(ii) the Respondent's action against the Applicant commenced on the date that the attachment application was made. The result is that there can be no question of the Respondent's claim having prescribed.

(27) Mr. O'Reilly dealt at length with **THE APPLICANT'S CLAIM IN RECONVENTION.** The crux of his dealing with this is the following:
The Respondent contributed an amount of R668 075.66 being its half share of the moulds constructed by Bongers Marine and the costs of the design and plans for the Aventure 1300 power catamarans. The calculation of the sum of R131 943.26 by the Applicant is disputed by the Respondent. According to Mr. O'Reilly no obligation existed on the part of the Respondent to

contribute towards the cost of the sportster moulds constructed at the instance of the Applicant. Mr. O’Reilly mentioned and dealt with various figures allegedly owing to the Applicant and concluded that on the latter’s own figures Respondent is only liable to pay R235 190.00. As far as payment allegedly made by the Applicant to Van der Ahee Inc and Ms Deyer is concerned, Mr. O’Reilly averred that the Joint Venture did not have books of account and no audit was ever carried out and that in any event in terms of Clause 10.3 of the Joint Venture Agreement, the parties agreed that Greenwoods shall be the auditors of the Joint Venture. The Respondent denies that it is liable to the Applicant in the sum of R154 065.00 claimed.

(28) In response to paragraph 17 of the applicant’s claim in reconvention, Mr. O’Reilly denied that Clause 7 of the Joint Venture Agreement provides that the allocation of vessels could only be varied by parties in writing. In any event, according to Mr. O’Reilly, the parties agreed that the catamarans “Kiwanda”, “Yum Yum” and “Split Decision” would be built for and at the cost of the Applicant. Consequently “Yum Yum” was in fact built for and at the cost of the Applicant and the Applicant was paid the proceeds of the sale of the catamaran. In the view of Mr. O’Reilly the Applicant’s attempt to place reliance upon Clause 7 of the Joint Venture Agreement is unconscionable and it constitutes a manifestation of bad faith.

(29) Returning to dealing with the averments in the Founding Affidavit Mr. O’Reilly stated that the Respondent denies that the Applicant has any claim against the Respondent at all. He hastened to add that if the Applicant does have a claim arising from the Joint Venture Agreement, however, then such a claim would be a maritime claim as described in section 1(1)(q) of

the Admiralty Act. Mr. O'Reilly categorically stated that the Respondent invoked the jurisdiction and having done so, the Respondent's conduct constituted a submission to the jurisdiction of this Court in respect of its claim by an attachment of the Applicant's assets to found and confirm such jurisdiction of this Court in respect of Applicant's claim in reconvention. In the circumstances, holds Mr. O'Reilly the Applicant would have no entitlement to attach property belonging to the Respondent in order to found and confirm this Court's jurisdiction in relation to its counterclaim. Hence, the Applicant does not seek to attach the "Duetto" but rather to effect its arrest in terms of section 5(3) of the Admiralty Act for the purpose of providing security for its claim in reconvention. Mr. O'Reilly averred that the applicant's claim in reconvention is a spurious claim which has been devised to provide a basis for the arrest of "Duetto" so as to harass the Respondent.

(30) Mr. O'Reilly strongly denied that Mr. Erasmus mentioned by the Applicant was a tax advisor to any of the companies in which the Respondent was involved. He reiterated that Mr. Erasmus was however, once referred to him by Mr. Jordaan to advise on the question of the VAT, penalties and interest which the SA Revenue Services assessed as being payable by Bongers Marine on the construction costs of the moulds. He emphatically denied that the Respondent intended to sell "Duetto" and stated that he had never given the Applicant or Mr. Jordaan for that matter, any indication of his intention to sell the vessel.

REPLYING AFFIDAVIT

(31) Ms Lesley Paitaki, a businesswoman and a director of the Applicant deposed to the Replying Affidavit on behalf of the

Applicant. Ms Paitaki stated that she has taken note of the averments made by Mr. O'Reilly but reiterated that the Applicant has a *prima facie* case in respect of its claims and that it has indeed demonstrated this *prima facie* case sufficiently in its Founding papers. She specifically denied that the Applicant is intent on the harassment of the Respondent or causing any inconvenience of any kind and added that the same procedure was adopted by the Respondent under case numbers Ac 148/04 and Ac 144/04 at a time when it was within the latter's knowledge that those assets were at the premises of Heldeberg Marine cc with the vessel not in a complete state and could not be put to sea.

(32) In response to the defence raised by the Respondent, Ms Paitaki averred in reply that the total cost of the moulds was R2 090 566.90. An additional sum of R420 000.00 was spent on sportster moulds during 2004. According to Ms Paitaki, the Respondent only paid R668 075.66 towards its half share of the moulds and a shortfall of R377 207.80 to which must be added the Respondent's half share of the tools and equipment of R139 925.34 amounting to a total of R517 133.10 less R131 943.26 (amount allegedly paid by the Respondent). That, according to Ms Paitaki's calculation gives a total of R385 189.84. Ms Paitaki explained that the relationship between the parties (Applicant and Respondent) was amended in accordance with the provisions of a partly written and partly oral agreement as is referred to in Paragraph 2 of the Applicant's Plea. According to Ms Paitaki the purpose of the Agency Agreement was to further regulate the relationship between the Joint Venture partners.

(33) Ms Paitaki responded on the aspect of the Receiver of Revenue and stated that the South African Revenue Services

agreed to refund the amount paid but did not do so due to the fact of the dispute between them and the Respondent relating to the Respondent's payment of VAT on the vessel "Duetto". In support of her contention in this regard Ms Paitaki attached annexure "C" to which the Court's attention was invited. In response to the Respondent's denial of the existence of any oral agreement, Ms Paitaki stated that the oral agreement superseded the Joint Venture Agreement and was simply never reduced to writing and signed by the parties and was the precursor to the Agency Agreement which was intended to further regulate the relationship between the parties. Having dealt with other claims, Ms Paitaki averred that the conditional claim "C" is predicted upon the terms of the written Joint Venture Agreement in terms whereof the catamaran "Yum Yum" was the Respondent's allocation and had to be constructed at its cost which cost was never paid by the Respondent and is now due, owing and payable.

(34) In response to the averment that Messrs Greenwoods were the appointed auditors in terms of the Joint Venture Agreement, Ms Paitaki explained that at a meeting the applicant expressed its dissatisfaction with what had been prepared by Greenwoods hence the draft financial statements and loan account were not settled by the Applicant. She described it as disingenuous for the Respondent to allege that Clause 7 of the Joint Venture Agreement could be amended otherwise than in writing. Ms Paitaki insisted that the Respondent indeed did intend to sell the "Duetto" and attached copies of an internet advertisement marked Annexure "E".

THE REQUIREMENTS FOR ARREST IN TERMS OF SECTION 5(3) OF THE ADMIRALTY ACT

(35) John Hare in his authoritative work, namely, **Shipping Law**

and Admiralty Jurisdiction in South Africa states that to be successful in an application such as the present one the Applicant must satisfy the Court:

a) That it has a maritime claim as defined by the Act (***The Rosario Delmar*** 1995(1) SA 716 (C)); and

b) That its maritime claim is enforceable (or would be enforceable but for arbitration or other unsecured Court proceedings) by an action in *personam* against the owner of the property to be arrested or by an action in *rem* against such property, including, where appropriate, an associated ship; and

c) That, on a balance of probabilities, it has a *prima facie* case based upon facts which if proved would give rise to a cause of action; and

d) That this *prima facie* case would, on a balance of probabilities, be enforceable in a forum or forums of the claimant's choice;

e) That the property to be arrested has not previously been arrested nor has security already been given for the same claim of the same claimant (The Act, **Section 3(8)**, unless top-up security is sought, in which case this must be averred, and the Applicant must make out a case for additional security); and

f) That it has a genuine and reasonable need for security for its claim. (See **Section 5(3)** of the Act)

Prima facie case has been held in numerous decisions to mean evidence which, if accepted, will establish a cause of action.

THE APPLICATION OF LAW TO FACTS

(36) Mr. Steenkamp submitted that seeing that the Applicant has three (3) claims against the Respondent, if the Applicant shows that it has a *prima facie* case in respect of any one of

these three (3) claims that alone will be sufficient to sustain the arrest of the vessel. In other words the purport of this submission is that the arrest will then be valid and that will render it an unnecessary exercise on the part of the Court to consider the merits or demerits of the other claims.

(37) The Applicant alleges that it is entitled to half of the amount that it has paid in excess of what the Respondent has paid in respect of the costs of the moulds and tools and equipment, in terms of the new oral agreement and the first written Joint Venture Agreement. Notably the Respondent denied that the parties entered into the new oral agreement and contended that the first agreement was applicable. In Mr. Steenkamp's submission the Respondent only relies on what he referred to as vague allegations of "good faith" to get around the problem that the written agreement on which it places reliance has not been amended in writing. Concluding his submission in this regard Mr. Steenkamp referred me to ***Brisley v Drotsky*** 2002(4) SA 1 (SCA) at para (11) to (34) where the Court dealt at length with the contention of "good faith". The Court expressed itself as follows in paragraph (26) to (27) of the ***Brisley v Drotsky*** case *supra*:

"(26) Dit staan dus vas dat 'n verskansingsklousule op sigself nie ongeldig is nie ten spyte daarvan dat 'n beroep daarop noodwendig sal neerkom op 'n weiering om uitvoering te gee aan 'n mondelinge ooreenkoms wat animo contrahendi aangegaan is. Wat beklemtoning uit die aanhaling verdien, is dat die verskansingsklousule beide party beskerm – en dit was hulle vrye keuse. Die potensiële ongelykheid van die partye in hulle bedingingsmag of finansiële vermoë en die beskerming van swakkere kontraktante kom dus glad nie hier te sprake nie.

(27) Die standpunt in die Miller-saak waarop die huurder steun, kom in wese daarop neer dat hoewel daar geen beswaar ingebring kan word teen die verskansingsklousule nie, 'n beroep op die toepassing van die klousule in stryd is met die beginsels van goeie trou. Suiwer logika toon dat so 'n standpunt onhoudbaar is. Die alternatiewe betoog was dat selfs al sou die beroep op die verskansingsklousule in die algemeen gesproke nie in stryd met die beginsels van goeie trou wees nie, die afdwinging daarvan in die onderhawige geval so onbillik sal wees dat die Hof in openbare belang behoort te weier om dit af te dwing. As gesag van hierdie betoog is 'n beroep gedoen op ***Magna Alloys*** *asook* ***Sasfin (Pty) Ltd v Beukes*** *1989(1) SA 1 (A)."*

(38) In Mr. Steenkamp's submission, under the circumstances it cannot be said that the Applicant has no action or that it cannot succeed because, in his views, it is clearly possible that at the very least, the Applicant's version that a new oral agreement was possible. In Mr. Steenkamp's views, it matters not that the Respondent has put up contested evidence that seeks to contradict the applicant's evidence in some respects. He contended that the Applicant has established that it has a *prima facie* claim in respect of claim A.

(39) Dealing with genuine and reasonable need for security Mr. Steenkamp submitted that there are no other assets belonging to the Respondent which the Applicant would have been able to attach to levy execution, should the Applicant be successful in its counterclaim. In his view, in the light of the fact that the Respondent is a *peregrinus* the Applicant does have a reasonable and genuine need for security. With regard to the

Applicant's *prima facie* case, the Applicant need show no more that that there is evidence which, if accepted, will establish a cause of action. (See ***Cargo Lately Laden on board the MV "Thalassini Avgi" v MV "Dimitris"*** 1989(3) SA 820 (A) at 831 H-C.)

In ***Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd*** 1953(3) SA 529 (W), Steyn J, after examining a number of common law authorities and earlier decisions, made the following authoritative statement of the law in this regard (at 533 C-E):

> ***"The authorities and consideration to which I have referred seem 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 requirement 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."***

The aforesaid approach has become well established in all cases involving the attachment to found jurisdiction (See eg. ***Butley v Banimar Shipping Co.*** SA 1978(4) SA 753 (SE) at 757 C-G and case cited there).It is, however, important to note that there is a difference between **"evidence contradicted"** and **"contradictory evidence"**. The former, in my view refers to a scenario where the evidence tendered by the Applicant is contradicted by the evidence tendered by the Respondent. But where the Applicant's own evidence is contradictory, in my view, it cannot successfully be contended that such Applicant's evidence justifies the conclusion that a *prima facie* cause of action has been established.

(40) It is thus of paramount importance that the Court must carefully investigate the Applicant's case with a view of discerning from it whether it demonstrably makes out, first and foremost, a *prima facie* case even before the necessity arises to check if the Applicant has a genuine and reasonable need for security in respect of its claim. It is necessary also to note that evidence referred to in ***Cargo Lately Laden on board case*** *supra* does not include contention, submission or conjecture. (See ***Great River Shipping Inc v Sunnyface Marine Ltd*** 1994 (1) SA 65(A) at 75I).

(41) Should the Applicant satisfy the above requirements then, in assessing the quantity of security to which the Applicant is entitled, regard must be had to the Applicant's "reasonably arguable best case" It is incumbent upon the arrestor to demonstrate, on a balance of probabilities, that it has a genuine and reasonable need for security in respect of its claim (See: ***Bocimar NV v Kotor Overseas Shipping Ltd*** 1994(2) SA 563(A)). See: ***Zygos Corporation v Salen Rederierna AB*** 1984(4) SA 444 (C) at 457 C-E where the following appears:

> ***"It is appropriate therefore for the Court to determine the amount of security that should be furnished by Zygos Corporation in order to secure the release of its vessel.***
> ***Two points require to be met made at this stage. The first is that Salen is entitled to security sufficient to cover the amount of its claim, together with interest and costs, on the basis of***

> ***its "reasonably arguable best case" (See The Moschanthy (1971) 1 Lloyd's Law Reports 37 and The Polo II (1977) 2 Lloyd's Law Reports 115 at 119.) the second is that in assessing the amount of security to be furnished by Zygos Corporation, a deduction must be made for the security already held by Salen, ie security already furnished by Antaios Corporation. I turn, firstly, to an assessment of Salen's claims on the basis of its "reasonably arguable best case".***

In the ***Great River Shipping Inc. v Sunnyface Marine Ltd*** case *supra* Howie J (as he then was) agreed with the qualification submitted by counsel to the effect that evidence excludes contention, submission or conjecture. A statement in ***Cochran v Miller*** 1965(1) SA 162 (D), namely that in an application for arrest to found jurisdiction the test for a *prima facie* case is whether there is evidence which, if believed, might persuade a reasonable man to draw the inference that the wrong complained of had been committed, was relied on by counsel. Aforementioned statement is correctly likened to a prima facie case in the absolution context in a trial by his Lordship, Howie J (as he then was). In his view in the latter context a *prima facie* case is established by circumstance where the inference the Plaintiff seeks to have drawn is as 'more or less equally open' on all the available evidence as the inference favouring the defendant .

(42) The "reasonably arguable best case" test *supra* is not incompatible with proof on a balance of probabilities. In ***Bocimar NV v Kotor Shipping Ltd*** *supra* (at 582 F-J) Corbett CJ made the following authoritative observation:

> **"….with reference to his need for security, appellant's counsel referred us to three English cases: *The 'Moschanthy'* (1971) 1 Lloyd's Rep 37;**

***'The Polo II'* (1977) 2 Lloyd's Rep 115; *Greenmar Navigation Ltd v Owners of Ship 'Bazias 3' and 'Bazias 4'* and *Sally Line Ltd* (1993) 1 Lloyd's Rep 101. These cases establish the principle in English law that, where a vessel has been arrested in an action in *rem* or to provide security for an arbitration claim, the vessel will be released on provision of sufficient security to cover the amount of the claim, interest and costs on the basis of the Plaintiff's 'reasonably arguable best case'. This test was accepted and applied by Friedman J in *Zygos Corporation v Salen Rederierna* AB SA 444 (C) at 457 C-E. In my opinion, counsel's reliance on these cases is misplaced. The principle which they establish postulates that a valid arrest has taken place and it deals with the quantum of security to be furnished to secure the release of the vessel. In the case under consideration one is dealing with one of the requirements to be established in order to found a valid arrest. In any event, I am not persuaded that the 'reasonably arguable best case' test excludes or is incompatible with proof upon a balance of probabilities. And here I would point out that in applying this test and assessing the quantum of the claim in the Zygos case (1984) Friedman J seems to have made the probabilities his criterion. (See particularly 1984(4) SA 444 (C) at 458 E and 459 F)".** It is necessary that I have a close look at and consider deeply the Applicant's various claims before embarking on any further analysis of the legal principles applicable in this matter. I must now *infra* focus on the claims which form the subject-matter of this application.

THE APPLICANT'S FIRST CLAIM

(43) It is common cause between the Applicant and the Respondent that the parties entered into a written agreement in terms of which they established a Joint Venture for the purpose of manufacturing, marketing and exporting power catamarans. Clause 6.2 of the joint venture agreement stipulates that parties agreed that they would contribute equally to all costs in respect of the design and moulds for the building of the catamarans which would be amortised at a rate of R100 000.00 per catamaran manufactured and sold. In its counterclaim and in its application for the arrest of the "Duetto" the Applicant claimed that the Respondent was indebted to it in an amount of R770 397.87 in respect of the Applicant's half share of the costs of preparing the moulds until the date of termination of the Joint Venture. The calculation of the Respondent's indebtedness to the Applicant is set out in the Respondent's claim in Reconvention. It is thus not necessary to repeat same here. The Respondent contends that, even if the Applicant's allegations are accepted, the claim is most certainly miscalculated. Properly calculated and taking into account the fact that the cost of the moulds falls to be amortised in terms of the Joint Venture Agreement, on the Applicant's own figures the Respondent is only liable to pay to the Applicant the sum of R235 190.00.

(44) It would appear that the Applicant essentially agrees that, on its own figures, the Respondent's indebtedness to it is no more than R385 189.84. If, therefore, the amortisation of the costs of the moulds, arising from the sale of the catamarans "Duetto", "Kiwanda" and "Yum Yum" are taken into account, then the Respondent's indebtedness, at most, amounts to

R235 189.84. Under the circumstances, I cannot, but agree with Mr. Wragge's submission, namely, that the Applicant's contention as to what the cost of the manufacture of moulds actually was is contradictory and therefore cannot be accepted as constituting evidence which, if accepted, establishes the Applicant's cause of action as set out in this claim. I am mindful of the formulation namely, that "the mere fact that such evidence is contradicted would not disentitle the Applicant to the remedy".

(See ***Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co. (Pty) Ltd*** *supra*) I must, however, hasten to add that there is a marked difference between "evidence contradicted" and "contradictory evidence". Where a litigant itself gives contradictory evidence on one and the same issue that certainly bears serious significance and should ordinarily result in certain negative inference. It does not fall to be ignored. It would not, in my view, entitle the Applicant to the remedy sought. When the Court referred to "the fact that such evidence is contradicted" in ***Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co. (Pty) Ltd*** *supra*, it certainly meant evidence from any other source including evidence from the Respondent in an application, which contradicted the assertions made by the Applicants.

(45) In paragraph 7 to 11 of the Applicant's Claim in Reconvention it is alleged that the total cost of the moulds, including the sportster moulds, until October 2003, was R2 090 566.90. In paragraph 12 of its Claim in Reconvention the applicant averred that an additional amount of R420 000.00 was spent on the sportster moulds after 13 October 2003. In paragraph 22 of Ms Paitaki's Replying Affidavit it is alleged that the total costs of the moulds was R2 090 566.90, and that an additional amount of R420 000.00 was spent on the sportster moulds

during 2004. In paragraph 75 of her affidavit Ms Paitiki contends that the total cost of the moulds was the sum of R2 036 576.00. Notably, no detail is given as to how the abovementioned amounts are made up, and there are no documents annexed to either the Applicant's claim in Reconvention or Ms Paitaki's affidavit supporting what I would be inclined to call "bald allegations" made in the above quoted paragraphs. Once again, I would under the circumstances be inclined to agree with Mr. Wragge's submission in this regard, namely, that these are simply contentions which are unclear and are contradictory. Such contentions, do not, in my view, constitute evidence which, if accepted, demonstrate that the Applicant has a cause of action for these amounts.

(46) It is noteworthy that the Respondent, on the other hand, has adduced evidence which demonstrates that the moulds referred to in the Joint Venture Agreement, were made by Bongers Marine and that the cost of the moulds exclusive of VAT was R1 075 000.00. The Respondent also avers that the costs of the design and plans, including legal fees for the Aventure Catamarans were R166 586.00. The Respondent has also annexed a copy of Bongers Marine's invoices for the construction of the moulds. In my view the Applicant has not established its *prima facie* case in respect of its very first claim. The alternative first claim contained in paragraph 12 consists of an additional amount of R268 500.00 explained as being one half of the amount allegedly expended by the Respondent in respect of the sportster moulds after 13 October 2003. This claim is advanced in the alternative and "insofar as the Honourable Court finds that the written Joint Venture Agreement, or the new agreement and/or the Agency Agreement have not come to an end". In my view this

alternative claim has no basis to exist because in any event it is common cause that the Joint Venture Agreement and any other agreement that might have existed between the parties came to an end on or about 13 October 2003.

THE APPLICANT'S SECOND CLAIM

(47) The Applicant avers that it has had books of account of a company named Power Catamaran Projects (Pty) Ltd ("PCP") and the Joint Venture written up and audited at the accost of R308 130.00. This amount is made up of two (2) amounts payable to Van der Ahee Inc and Rosa Deyer. Annexed to Ms Paitaki's Replying Affidavit are three (3) invoices, purporting to be supporting the Applicant's second claim, which invoices appear to be accounts rendered by a company named Moore Stevens VDA Ing. The difficulty I am faced with, however, is that these accounts do (as per annexed invoices) not reflect amounts payable to Van der Ahee Inc. They do not therefore support the allegation made in paragraph 99 of Ms Paitaki's Replying Affidavit. The Respondent, however, avers that as provided for in the Joint Venture Agreement, Greenwoods were the auditors of the joint venture and it alleges that Greenwoods drew up the Joint Venture's books of account. (See Joint Venture Agreement par. 10.3; Answering Affidavit par. 21.8.4 and Annexure "WOR 6").

(48) My difficulty is compounded by the fact that the Applicant has not produced any document which might suggest that, as is provided for in sub-paragraph 10.3 of the Joint Venture Agreement, auditors other than Greenwoods were retained as auditors of the Joint Venture. Most importantly, the Applicant has also produced no evidence which, if accepted, demonstrates that either Van der Ahee Inc or Ms Deyer was appointed to write up and audit the books of account of PCP.

My simple view is that the Applicant has not produced evidence which if accepted, sustains its second claim.

THE APPLICANT'S THIRD CLAIM

(49) The Applicant claims payment of the sum of US$462 543.48. This claim is conditional upon "the Honourable Court holding that the written Joint Venture Agreement still subsists between the parties and that it applied to the manufacture of all three (3) vessels referred to herein above". The Court does not have to make any such finding at all. It remains common cause that the written Joint Venture Agreement was terminated on or before 13 October 2003. Accordingly, for this, reason alone, the Applicant's third claim falls away.

(50) The Respondent, however, contends that the Joint Venture Agreement did apply to the construction and sale of the catamaran "Yum Yum". In regard to the latter vessel the Applicant contends that:

a) In terms of Clause 7 of the Joint Venture Agreement, the allocations of the vessels could only be varied by the parties in writing.
b) The allocation of "Yum Yum" was not varied in writing.
c) In the premises the Respondent was obliged to take up the allocation and to pay the expenses in respect of the manufacture of "Yum Yum".
d) The Applicant paid the expenses in respect of "Yum Yum", being US$426 588.38.
e) The Applicant is also entitled to payment of 10% of the ex-factory selling price of US$35 955.10.

(51) The reading of the Answering Affidavit paragraph 21.10.3 and Replying Affidavit paragraph 10.9 makes it abundantly clear that it is common cause that:

a) The catamaran “Yum Yum” was constructed at the instance of the Applicant and the Applicant was paid the proceeds of the sale of the catamaran.
b) The Applicant paid the cost of the construction of the catamaran.

(52) It is apparent that the Applicant’s averment that Clause 7 of the Joint Venture Agreement, the allocation of vessels could only be varied by the parties in writing is only partly correct. The clause in question provides as follows:

> **“The first vessel produced will be for and at the cost of FMC (ie the Respondent) and the second for and at the cost of AC (ie the Applicant). Thereafter each vessel produced shall be in the same order. In the event that either party shall forfeit his allocation, he will be entitled to the next allocation available. Changes in this order of preference/option may be altered by the parties in writing.”**

On a proper construction the above quoted clause clearly does not require a party that forfeits its allocation, to do so in writing. It is only if the parties wish to vary the order of preference and option set out in the first and second sentence of the clause that a written document is required evidencing such change. The consequence is that it is not the Respondent that is liable to the Applicant but that, it is the Applicant that is liable to the Respondent for 10% of the sale price of the catamaran “Yum Yum”.

CONCLUSION

(53) I am in full agreement with the Court in ***Katagum Wholesale***

Commodities v The MV Paz 1984(3) SA 261 NPD at 269 H-270 B where the learned Judge made the following important formulation, namely:

"It is a serious business to attach a ship. To stop or delay its departure from one of our ports, to interrupt its voyage for longer than the period it was due to remain, can have and usually has consequences which are commercially damaging to its owner or character, not to mention those who are relying upon its arrival at other ports to load or discharge cargo. Especially when the attachment is sought *ex parte*, as can be and almost always is done, the Court must therefore be given sufficient information to show that a measure with results so harmful to others is nevertheless necessary for the protection of the Applicant's legitimate interests. It will therefore want to assure itself, for instance, <u>that his claim in the main proceedings is apparently no spurious one, that he is not bent on harassing the other side in these or gaining a tactical advantage in relation to them</u>, that his need for security is both genuine and reasonable, <u>that no alternative and less disruptive opportunity for obtaining such has been or is likely to become available to him and, if</u> one has already been lost, that this was not his fault or, I should rather say, not his fault to such a degree as to be fairly held against him. The Court must be told enough to put it at its ease on all these scores……………………………………………… To scare ships away is hardly good for domestic business. It would be unfortunate were our Courts to damage this Country's commerce, or even to harm the individual interests of any local traders…………."

(54) The arrest of the vessel has been recognized time and again as a drastic remedy. The following has crystallized into legal requirements for the arrest of the vessel, namely:

a) It is incumbent upon the party seeking the arrest to assure the Court that he is not bent on harassing the Respondent or gaining a tactical advantage in relation to the Respondent.

b) The Applicant must demonstrate that his need for security is reasonable and that no alternative and less disruptive opportunity for obtaining such security is available to him. (See: ***Katagum Wholesale Commodities Co Ltd v The MV "Paz"*** *supra*; ***The MV cc Thalassini Avgi"*** *supra* at 832 F-H; ***Bocimar HV v Kotor Overseas Shipping*** *(supra)* at 581 F-H of the report.

(55) It is apposite to set out infra the provisions of section 5(2) of the Admiralty Act. This Section provides as follows:

"5(2) A Court may in the exercise of its Admiralty jurisdiction

a) consider and decide any matter arising in connection with any maritime claim, notwithstanding that such matter may not be one which would give rise to a maritime claim;

b) <u>order any person to give security for costs or for any claim</u>;

c) <u>order that any arrest or attachment made or to be made or that anything done or to be done in terms of this Act or any order of the Court be subject to such conditions as to the court appears just, whether as to the furnishing of security or the liability for costs, expenses, loss or damage caused or likely to be caused, or otherwise;</u>

................................." (My underlining)

The aforesaid provisions of the Admiralty Act empower the court, in the exercise of its admiralty jurisdiction, to order that counter-security be furnished. (See: ***MV Leresti: Afris Shipping International Corporation v MV Leresti (DMD Maritime Intervening)*** 1997(2) SA 681 (D)). In the latter case Squires J said:

> ***"As a general approach and without more ado, or more than can be said for the intervening respondent here, I share the caution expressed by King J in Sunnyface Marine Ltd v Hitoroy Ltd (Trans Orient Steel Ltd and Another Intervening); Sunnyface Marine Ltd v Great River Shipping Inc 1992(2) SA 653 (C) at 657 G-I that the granting of security to a peregrine claimant in circumstances such as these, is a power which should be sparingly exercised. Unless it is to assist a litigant with a firm claim to bring against the defendant who may not otherwise satisfy a judgment, I do not think it should be readily granted."***

(56) I fully agree with the cautious approach advocated for *supra*. I am, however, also mindful of ***The Yu Long Shan Guangzhou Maritime Group Co v Dry Bulk SA*** 1997(2) SA 454 (D&CLD), a judgment wherein Hurt J held that the Court had the power, in its discretion, to order the security requested. In the latter judgment, Hurt J appears to have disagreed that such power should be exercised sparingly. He held that the Applicant for counter-security under Section 5(3) had to show a *prima facie* case in respect of the counterclaim. In the instant case it has not been shown that there was no alternative and less disruptive opportunity available to the Applicant to obtain security for its claim in Reconvention. The

Applicant could have brought an application in terms of Section 5(2)(b) and (c) of the Admiralty Act set out supra in which it sought for an order that the Respondent furnish security for the applicant's claim in Reconvention and that, in the event of the Respondent being ordered to furnish such security and not doing so, the Respondent's arrest of the Applicant's assets should lapse or be set aside (See: ***MV "Heavy Metal" 2000(1) SA 268 (C)).***

(56) The conclusion I arrive at is that the applicant's arrest of the "Duetto" in circumstances where it could have invoked a less drastic, but no less effective remedy, constituted an attempt by the applicant to harass the Respondent. This arrest was not at all necessary for the protection of the Applicant's legitimate interests. In reply the Applicant pointed out that the Respondent itself utilized the procedures set out in Section 5(3) of the Admiralty Act under case numbers AC 148/04 and AC 144/04 at a time when it was within Respondent's knowledge that those assets were at the premises of Heldeberg Marine cc with the vessel not in a complete state and could not be put to sea. The papers make it apparent that both the applicant and the Respondent are peregrine in the Republic of South Africa. They are in law entitled to bring these proceedings before our Courts. It may well be true that the Respondent utilized the same procedure in obtaining relief. In my view the allegation the Applicant makes in this regard provides no grounds for a finding that the Applicant was also entitled to invoke the procedure under section 5(3) of the Admiralty Act on a type of "tit for tat" basis as Mr. Wragge correctly submitted. John Hare is perfectly correct in his book, ***Shipping Law and Admiralty Jurisdiction in South Africa*** (1999 first publication) when he sounds the following warning:

"Detaining a ship by arrest or attachment is a serious matter with potential of causing huge losses not only to the ship owner but to many others who depend upon her uninterrupted operation. Most ships are chartered, and the arrest of a ship, for a claim against her owner is likely to result in her being put off hire. Delays may result further in cancellation of charter party fixtures, cargo shipments and general damages claims. Shippers and receivers of cargo may suffer prejudice through no fault of their own." I am of the firm view that the Applicant seeking to arrest or cause the vessel to be arrested whether for purposes of jurisdiction or as security for anticipated costs in a pending action must first exhaust all other available alternative remedies which are less harmful to the business operations of the vessel, but which are also equally effective in addressing the needs of the Applicant. In *casu* it has not been shown that the Applicant could not have had security provided by following other paths. It is my view that it is quite clear that the Applicant cannot succeed in all of its counterclaims. It is trite law that the remedy of *attachment ad fundandam jurisdictionem* in order to create jurisdiction in our Courts is certainly an exceptional remedy. Similarly the arrest of a vessel for purposes of providing security for costs in a pending action is an equally exceptional remedy. It must be applied or resorted to with care and caution. It has been held that, if, on the facts as revealed either in the petition, or after hearing both sides, the Court comes to the conclusion that *prima facie* the Applicant has not made out his case, then it should not grant an order of attachment, or if it had granted such an order, it should set same aside on the return date. (See: ***Exparte Acrow Engineers (Pty) Ltd.*** 1953(2) TPD 319 at 321H) I have already demonstrated *supra* that the applicant has not succeeded in making out a *prima facie* case and is therefore in my view not entitled to the confirmation of the *Rule Nisi*.

COST

(57)The rule with regard to cost is well-known, namely that the successful party is entitled to its costs. No submissions have been made with a view of persuading me not to follow the general rule in this matter. I have gathered no circumstances in the matter persuading me from not following the general rule.

ORDER

In the circumstances I make the following order:

a) The Application is dismissed and the granted on 18 March 2005 is discharged.
b) The Applicant is ordered to pay costs of this Application.

DLODLO, J