

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-GEN-2021/00494

In the matter between:

OVERBERG FISHING COMPANY (PTY) LTD

1ST APPLICANT

CATO FISHING COMPANY (PTY) LTD

2ND APPLICANT

And

CALTOP INVESTMENTS (PTY) LTD

1ST RESPONDENT

MERLUS FISHING (PTY) LTD

2ND RESPONDENT

CALTOP FISHING OPERATIONS (PTY) LTD

3RD RESPONDENT

MINISTRY OF FISHERIES AND MARINE RESOURCES

4TH RESPONDENT

PEYA JORAS TERAS HITULA

5TH RESPONDENT

ANDRE VISSER

6TH RESPONDENT

Neutral citation: *Overberg Fishing Company (Pty) Ltd v Caltop Investment (Pty) Ltd*
(HC-MD-CIV-MOT-GEN-2021/00494) [2022] NAHCMD 679 (9
December 2022)

Coram: PRINSLOO J

Heard: 31 August 2022

Delivered: 9 December 2022

Flynote: Application – Breach of Joint Venture Agreement – Enforcement of an order – Contempt of court – Onus and standard of proof – Appropriate sanction for civil contempt – Coercive and punitive orders – Standing of opposing parties – No interest in the subject-matter of litigation – Direct and substantial interest – Financial interest not sufficient to oppose the relief sought.

Summary: This is an application wherein the applicants seek declaratory relief that the court order made by Geier J on 16 July 2020 in terms of s 31(1) of the Arbitration Act 42 of 1965 remains in full force and that the first and fifth respondents are in contempt of court. The relief that the applicants seek is directed solely against Caltop Investments and Mr Hitula, the first and fifth respondents. Neither of these two parties has filed an answering affidavit, and the application proceeded on an unopposed basis.

The second respondent (Merlus) and the third respondent (Caltop Fishing) were joined as potentially interested parties, but no relief was and is sought against them. Merlus and Caltop Fishing (Merlus respondents) opposed the relief sought by the applicants. The Merlus attacked the validity of the arbitration award as well as the court order dated 16 July 2020.

In September 2015, the applicants and Caltop Investments entered into a Joint Venture Agreement. In March 2016, in compliance with the JV Agreement, an agreement of Sale of Share Agreement was entered into between applicants and Caltop Investments in respect of Motor Vessel Minchos Novemo, and 50 per cent of the shares held by Overberg in the said vessel was passed from Overberg to Caltop Investments. As contemplated in the JV Agreement, the parties also entered into a Charter Agreement with the JV in May 2016, in terms of which Overberg and Caltop Investments chartered the vessel to the JV.

On 28 June 2019, Caltop Investment terminated the JV Agreement as well as the Charter Agreement and the Sales Agreement entered into by the parties in 2016. The applicants refused to accept the cancellation of the JV Agreement. They regarded Caltop Investment's conduct as constituting a repudiation of the agreement, which was

contrary to the terms and provisions of the JV Agreement. Overberg refused to accept Caltop Investment's purported repudiation.

The matter was referred for arbitration and the arbitrator, Adv Herman Steyn, issued an arbitration award on 31 March 2020. In terms of the arbitration award it was declared that the JV Agreement had not been terminated.

The applicants launched an application in terms of s 31 of the Arbitration Act 42 of 1965 under case number HC-MD-CIV-MOT-GEN-2020/00160. The matter was set down on the First Motion court roll for 19 June 2020. On 4 June 2020, Caltop Investments filed a notice to oppose the application but no answering papers were filed on behalf of Caltop Investments and the matter was set down for determination. On 16 July 2020, Geier J made an order that the Arbitration Award, dated 31 March 2020, is made an order of this Court, in terms of section 31(1) of the Arbitration Act 42 of 1965.

Two urgent applications were filed thereafter. In the first urgent application Sibeya J on 23 November 2020, issued orders that operated as an interim interdict, pending the final determination of further arbitration proceedings to be instituted by the applicants. However, the second urgent application was struck from the roll because the applicants did not correctly execute the documents before the court.

In brief, what brought about this current application, according to the applicants' case, is that since 2019 Caltop Investments and Mr Hitula, the fifth defendant demonstrated brazen disregard and contempt for its contractual obligations, the arbitration award and the order of this court.

Held that: Caltop Investments is in contempt of the court order dated 14 July 2020.

Held that: the contemptuous behavior of Caltop Investments can be superimposed on Mr Hitula, who actively participated in and had been responsible for Caltop Investment's contempt. As such, Mr Hitula is liable as the main perpetrator alternatively as an accessory as far as Caltop Investment's contempt is concerned.

Held that: the only party that could attack the validity of the court order dated 16 July 2020 is Caltop Investments.

Held that: no relief is sought by the applicant against the Merlus respondents, and no relief can be sought against them. The current proceedings arise from the enforcement of contractual obligations against Caltop Investments as opposed to the Merlus respondents, who have no horse in the current race.

Held that: the enforcement of the contractual obligations between the applicants and Caltop Investments was limited to those parties only. The Merlus respondents could neither be a party to the arbitration proceedings nor could they be a party to the Geier judgment. The adverse effect on the Merlus respondents is limited to financial interest, which is limited to indirect interest only and not a substantial interest in the current litigation.

Held further that: the Merlus respondents, despite having been joined to these proceedings, do not have a direct and substantial interest in the matter sufficient to oppose the relief sought by the applicants.

Held further that: the application before Sibeya J pertained to the 2021/2022 fishing season. The breach of the JV agreement in respect of the 2021/2022 in my view stands separate from the current application before me. The parties relevant to the JV agreement were ordered by the court in that matter to subject themselves to arbitration proceedings in respect of the 2021/2022 fishing season.

The court is of the view that the relief that this court could grant is limited for the reasons advanced.

ORDER

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1. The order of the Court given under case number HC-MD-CIV-MOT-GEN-2020/00160 and made on 16 July 2020 per the Honourable Justice Geier (the enforcement order) is and remains operative and of full force and effect.
 2. The first and fifth respondents have been and remain in contempt of the enforcement order handed down by this Court on 16 July 2020.
 3. The first respondent and the fifth respondent are convicted of being in contempt of this Court.
 4. The first respondent and the fifth respondents are granted 30 days from the date of this judgment to purge the contempt set out in paragraph 2 above, failing which the applicants may set the matter down upon notice as a matter of urgency, with or without further amplification of the papers, calling upon the respondents to show cause why:-
 - (a) a further order should not be issued in terms of which the first respondent and the fifth respondents would be prohibited from proceeding in any other litigation in any other matter that they may be involved with in the High Court until they have purged the said contempt;
 - (b) alternatively, why this court should not sentence the first respondent and the fifth respondents to a fine or a period of imprisonment;
 - (c) first respondent and the fifth respondents should not pay the costs of any further proceedings on an attorney and client scale;
 - (d) further sanctions to ensure purging of the contempt should not be imposed against them.

5. Today's order must be served on the first and fifth respondents at the cost of the applicants.
6. The opposition of the second and third respondents is dismissed.
7. The first, second, third, and fifth respondents are ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved. Such costs are to include the costs of one instructing and two instructed counsel.

JUDGMENT

PRINSLOO J:

Introduction

[1] This is an application wherein the applicants seek declaratory relief that the court order made by Geier J on 16 July 2020 remains in full force and effect and that the first and fifth respondents are in contempt of court.

[2] The relief sought by the applicants in its Notice of Motion is set out in the following terms:

'KINDLY TAKE NOTICE that the abovementioned applicants intend to make application to the above Court for orders in the following terms:

1. Declaring that the order of this Court given under case number HC-MD-CIV-MOT-GEN-2020/00160 and made on 16 July 2020 per the Honourable Justice Geier (the enforcement order) is and remains operative and of full force and effect;
2. Declaring that in terms of the enforcement order the first respondent is precluded from taking any steps whatsoever to make its monk fish quota for the 2022/2023 fishing season available to

third parties contrary to the joint venture agreement concluded between the first applicant, the second applicant and the first respondent on or about 15 September 2015 (the JV agreement);

3. Declaring that the first respondent is required to take all necessary steps and to provide all necessary assistance (including signing all required documentation) for the licensing of the MFV Minchos Noveno, in order for the joint venture provided for in the JV agreement to exploit the MFV Minchos Noveno, in order for the joint venture provided for in the JV agreement to exploit the monk fish quotas of the first applicant and the first respondent for the 2022/2023 fishing season;

4. Declaring that the first respondent and the fifth respondent have been and remain in contempt of the enforcement order handed down by this Court on 16 July 2020;

5. Convicting the first respondent and the fifth respondent of contempt of this Court, and imposing such fine or sentence of imprisonment on the first respondent and the fifth respondent, as this Court considers appropriate in the circumstances;

6. Alternatively, directing that any such fine or sentence of imprisonment imposed in terms of paragraph 5 above be suspended for a period determined by this Court, on the condition that the first respondent (assisted by the fifth respondent as may be required of him) duly complies with its obligations under the JV agreement and as required by the enforcement order, and in particular with paragraphs 2 and 3 above;

7. Directing the first respondent, within 10 (ten) days of the date of this order, to sign all documentation necessary in order to give effect to paragraph 3 above;

8. In the event of the first respondent failing to sign the required documentation as provided for in paragraph 7 above, the sixth respondent is authorised and directed to sign all such

documentation and to take what further steps may be necessary in order to give effect to paragraph 3 above;

9. In the alternative to paragraphs 1 to 8 above and only in the event of this Court finding that final relief should not be granted pending the determination of the rescission application brought under case number MD-CIV-MOT-GEN-2020/00160 by the first respondent (the rescission application), directing that paragraphs 2, 3, 7 and 8 above are to operate as interim interdicts and orders pending the final determination of the rescission application;

10. That the first and the fifth respondents be ordered to pay the costs of this application on the scale between attorney and client, together with any such other respondents who may oppose this application, the one paying the others to be absolved, which costs are to include the costs of one instructing and two instructed counsel;

11. Further or alternative relief.'

The parties

[3] The applicants are Overberg Fishing Company (Pty) Ltd (Overberg) and Cato Fishing Company (Pty) Ltd (Cato), respectively, with their principal places of business in Walvis Bay.

[4] The respondent against whom the applicants are seeking the relief above is the first respondent, Caltop Investment (Pty) Ltd (Caltop Investments), with its principal place of business in Walvis Bay and the fifth respondent, Peya Hitula, an adult male person and a director of Caltop Investments (Pty) Ltd.

[5] The applicants are not seeking relief against the second respondent, Merlus Fishing (Pty) Ltd (Merlus), or in respect of Caltop Fishing Operations (Pty), the third respondent (Caltop Fishing).

[6] The fourth respondent, the Minister of Fisheries and Marine Resources is cited in his official capacity as the relevant Minister under the provisions of the Marine Resources Act 27 of 2000. However, no relief is sought against the Minister, and he is cited as an interested party to the proceedings.

[7] The sixth respondent is the Deputy Sherriff for the district of Walvis Bay, duly appointed in terms of the High Court Act 16 of 1990, cited in his official capacity as the relevant deputy sheriff for the district of Walvis Bay.

[8] The only respondents who opposed the application before this court are the second and third respondents. The respondents against whom the applicants seek relief failed to oppose the application.

Background

Remarks

[9] From the onset, I must remark that there is an extensive litigation history between the applicants and the first respondent, which evolved as time progressed it integrated other litigants, like the second and third respondents, either as interested parties or as fully-fledged litigants.

[10] Various applications and action proceedings were instituted against the first respondent since 2019. I do not intend to burden the record with reciting the entire litigation history. It is necessary to paint the said history in broad strokes to place all the parties into context in the current application.

Litigation history

[11] Overberg and Caltop Investments are holders of monkfish fishing rights for exploitation (which includes monkfish quotas) to catch monkfish in the Namibian

Exclusive Economic Zone (EEZ) established in terms of the Territorial Sea and Exclusive Economic Zone of Namibia Act 3 of 1990.

[12] In September 2015, Overberg, Cato and Caltop Investments entered into a Joint Venture Agreement (JV Agreement), the details of which I will not discuss at this stage.

[13] In March 2016, in compliance with the JV Agreement, an agreement of Sale of Share Agreement was entered into between Overberg and Caltop Investments in respect of Motor Vessel Minchos Novemo 50 per cent of the shares held by Overberg in the said vessel was passed from Overberg to Caltop Investments.

[14] As contemplated in the JV Agreement, the parties also entered into a Charter Agreement with the JV in May 2016, in terms of which Overberg and Caltop Investments chartered the vessel to the JV.

[15] On 28 June 2019, Caltop Investment directed a letter to Overberg in terms of which it terminated the JV Agreement as well as the Charter Agreement and the Sales Agreement entered into by the parties in 2016.

[16] According to Overberg, the letter of cancellation of the JV Agreement by Caltop Investments constituted a repudiation of the agreement. However, as it was contrary to the terms and provisions of the JV Agreement, Overberg refused to accept Caltop Investment's purported repudiation and informed it accordingly via its legal representatives, ESI Namibia (ESI).

[17] Under the said communication with Caltop Investment, ESI directed a further letter to Caltop Investments in September 2019 regarding the other alleged breach by Caltop Investments.

[18] Following hereon, a meeting was held between the parties, and subsequently, at the insistence of Overberg, the matter was referred for arbitration in conformity with the JV Agreement. Although the arbitration procedure was fraught with incidences, the

arbitrator, Adv Herman Steyn, issued an arbitration award on 31 March 2020. In terms of the arbitration award:

- a) It was declared that the JV Agreement had not been terminated;
- b) Caltop Investments was directed to refrain from making its monkfish quota available to third parties, contrary to the JV Agreement with effect from the 2020/2021 season commencing 1 May 2020;
- c) Caltop Investments was ordered to take all necessary steps and to provide the necessary assistance for the licencing of the MFV Minchos Noveno, in order for the JV to harvest and exploit the monkfish quotas of Overberg and Caltop Investments in terms of the JV Agreement for the duration thereof, with effect from the 2020/2021 season commencing on 1 May 2020.

[19] As Caltop Investments apparently had no intention to abide by the arbitration award, the applicants launched an application in terms of s 31 of the Arbitration Act 42 of 1965 under case number HC-MD-CIV-MOT-GEN-2020/00160.

[20] The matter was set down on the First Motion court roll for 19 June 2020. On 4 June 2020, Caltop Investments filed a notice to oppose the application. However, as no answering papers were filed on behalf of Caltop Investments, the matter was set down for determination, and on 16 July 2020, Geier J made the following order:

- '1. The Arbitration Award, dated 31 March 2020, is made an Order of this Court, in terms of section 31(1) of the Arbitration Act 42 of 1965.
1. The Final Cost Award, dated April 2020, is hereby made an order of this Court, in terms of section 31(1) of the Arbitration Act 42 of 1965.
2. The respondent is hereby directed to pay the costs of this application including the costs of one instructing and one instructed counsel.'

First urgent application

[21] At this point, I must interpose and mention that on 11 June 2020, an urgent application was filed by Overberg and Cato against Caltop Investments¹. The applicants prayed for various reliefs to be granted in their urgent application and inter alia sought to obtain interdictory relief against Caltop Investments pending the outcome of the application for the enforcement of the arbitration award.

[22] The urgent application was triggered when the new monk fish quotas for 2020/2021 were allocated, and Caltop Investments failed to comply with the terms of the JV Agreement and the arbitration award by failing to sign the necessary documentation to licence MFV Minchos Noveno for its monkfish quota. Caltop Investment caused another vessel, MFV Helgoland, to be licenced to catch its 2020/2021 monkfish quota. During the urgent application proceedings, it was divulged that Caltop Investments entered into a Shareholders Agreement with Merlus on 25 July 2019. In terms of that agreement, Caltop Investments and Merlus agreed to a joint venture company to utilise, exploit and market the monkfish fishing rights and quotas. Caltop Investments and Merlus established a private company named Caltop Fishing Operations (Pty) Ltd, in which both Caltop Investments and Merlus would hold shares and in which the joint venture would be conducted.

[23] Once this information came to light during the hearing of the urgent application Merlus and Caltop Fishing were joined in the application with the leave of court. The relief sought by the applicants was extended to Merlus and Caltop Fishing. However, on 7 October 2020, the applicants and Merlus and Caltop Fishing reached a settlement on the basis that the application would be withdrawn against these two respondents. This was also accordingly recorded by the court in the order of even date.

[24] On 23 November 2020, my Brother Sibeya J, issued orders that operated as an interim interdict, pending the final determination of further arbitration proceedings to be instituted by the applicants in respect of the dispute between the parties concerning the 2020/2021 fishing season and the determination of the rescission application instituted

¹ *Overberg Fishing Company (Pty) Ltd vs Caltop Investments (Pty) Ltd* HC-MD-CIV-MOT-GEN-2020/00173.

by the first respondent under case HC-MD-CIV-MOT-GEN-2020/00160 instituted on 10 September 2020. A notice of appeal was filed on 18 December 2020 in respect of the court's order dated 23 November 2020.

[25] It is noticeable that the first defendant moved neither the application for leave to appeal to the order dated 23 November 2020 nor did it move the application for rescission of the order dated 4 June 2020.

Second urgent application

[26] During May 2021 the applicants launched a second urgent application as a result of the fact that Caltop Investments again licenced a vessel other than MFV Minchos Noveno to catch its quota for the 2021/2022 fishing season.

[27] That application was however struck from the roll on the basis that the applicants did not correctly execute the documents before the court.

Applicants' contentions regarding Caltop Investment's conduct to date

[28] It is the applicants' case that since 2019 Caltop Investments and Mr Hitula, the fifth defendant demonstrated brazen disregard and contempt for its contractual obligations, the arbitration award and the order of this court.

[29] The applicants further take the view that there is no reason to anticipate that Caltop Investments will alter its future conduct in any way. The applicants contend that Caltop's conduct is evidence of their contention as it entered into a shareholders agreement with Merlus even before the purported cancellation of the JV Agreement between the applicants and Caltop Investments. The position of Caltop Investments and the fifth respondent is therefore, according to the applicants, clear that neither respondents have the intent to conform to the JV Agreement.

[30] The applicants submit that the arbitration award and the enforcement order are binding against Caltop Investments. As the fifth respondent has been a director of Caltop Investments and has been representing the said entity at all stages of the dealings with the applicants, it is evident that the fifth respondent is the directing mind of Caltop Investments. As such, the applicants contend that if Caltop Investments is held to be in contempt of court, the fifth respondent should be found to be in contempt of court.

[31] The applicants submit that the general requirements for contempt of court have been clearly established and that the fifth respondent was aware of the enforcement order at all material times and that he was an active participant in furthering Caltop Investment's contempt. Thus, in the circumstances, the conduct on the part of Caltop Investments has not only been willful but also mala fides. As a result, the declaratory relief as sought should be granted as prayed for.

The opposition by the second and third respondents

[32] The second and third respondents oppose the current application on a number of principal themes, i.e:

- a) The relief sought will adversely affect Merlus and Caltop Fishing (which adversity is not denied), yet the applicants move such relief without having made out a case for such relief as against Merlus and Caltop Fishing.
- b) The relief now being sought (being relief premised upon the arbitration award) has become settled between the applicants and Merlus and Caltop Fishing.
- c) The arbitration award upon which all the relief is premised is a nullity and thus unenforceable as against any party.
- d) The existence of Merlus and Caltop Fishing's competing contractual rights.
- e) Material factual disputes arise on the papers on pertinent issues which preclude the applicants from obtaining the relief sought.

Arguments advanced in respect of the parties

[33] The respective counsel filed comprehensive heads of argument and supplement same with further oral arguments. I will refer to salient points raised on behalf of the parties in my discussion hereunder and do not, therefore, intend to repeat the arguments so advanced.

Legal principles and discussion

The purpose of contempt proceedings

[34] Mainga J (as he was then) in *Sikunda v Government of the Republic of Namibia and Another*² stated as follows:

‘Judgments, orders, are but what the courts are all about. The effectiveness of a court lies in execution of its judgments and orders. You frustrate or disobey a court order you strike at one of the foundations which established and founded the State of Namibia. The collapse of a rule of law in any country is the birth to anarchy. A rule of law is a cornerstone of the existence of any democratic government and should be proudly guarded.’

[35] Needless to say the courts cannot sit by idly and allow a total disregard of its judgments and court orders. Failure to adhere will be met with contempt of court either in the civil law or criminal law context. The institution of contempt of court has an ancient and honourable, if at times abused, history. If we are truly dealing with contempt of court then the need to keep the committal proceedings alive would be strong, because the rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained³.

[36] The object of contempt proceedings is therefore to impose a penalty that will vindicate the court’s honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order⁴.

² *Sikunda v Government of the Republic of Namibia and Another* 2001 NR 86 (HC) at 92D – E.

³ *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) para 61.

⁴ *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* 2015 (5) SA 600 (CC) para 28.

Onus and standard of proof

[37] Muller J summarized the onus in contempt proceedings as follows in *IAE//Gams Data (Pty) Ltd and Others v ST Sebata Municipal Solutions (Pty) Ltd And Others*⁵:

'[33] In contempt proceedings the onus rests on the applicant to set out the grounds of contempt. The applicant has to prove the existence of the court order, service thereof and proof that the respondent failed to comply with it. The applicant has to prove wilful or reckless disregard of the order of court. (*Clement v Clement* 1961 (3) SA 861 (T) at 866A; *Haddow v Haddow* 1974 (2) SA 181 (R) at 182H.) Unreasonable non-compliance, provided it is bona fide, does not constitute contempt; it must be wilful and mala fide. (*Fakie* supra at 333.) In the *Fakie* case Cameron JA held that the contempt procedure survives constitutional scrutiny and he approved what Pickering J held in *Uncedo Taxi Service Association v Maninjwa and Others* 1998 (3) SA 417 (E) (1998 (2) SACR 166; 1998 (6) BCLR 683) at 425 – 6, namely that contempt proceedings brought by notice of motion does not entail unconstitutional unfairness. The decision of Cameron JA in the *Fakie* case brought a change to the common law in the sense that a respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but has to provide evidence to establish reasonable doubt. (*Herbstein and van Winsen* supra at 1104; *Fakie* supra at 334H – 335A.) Cameron JA carefully considered the standard of proof in committal for contempt cases and what the approach of a court should be. He concluded his analysis of what the law in this regard should be and summarised it. I respectfully agree with Cameron JA's statements as set out in paras 41 and 42 on 344E – 345A of the *Fakie* case, where he stated the following:

'[41] Finally, as pointed out earlier (in para [23]), this development of the common-law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide, the requisites of contempt will have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt. It

⁵ *IAE//Gams Data (Pty) Ltd and Others v ST Sebata Municipal Solutions (Pty) Ltd And Others* 2011 (1) NR 247 (HC).

follows, in my view, that Froneman J was correct in observing in Burchell (in para [24]) that, in most cases, the change in the incidence and nature of the onus will not make cases of this kind any more difficult for the applicant to prove. In those cases where it will make a difference, it seems to me right that the alleged contemnor or should have to raise only a reasonable doubt.

[42] To sum up:

- (a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
- (b) The respondent in such proceedings is not an accused person, but is entitled to analogous protections as are appropriate to motion proceedings.
- (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.
- (d) But, once the applicant has proved the order, service or notice and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.
- (e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.'

Discussion

Should Caltop Investments be held in contempt of court?

[38] There is an interesting twist in the matter before me. The actual parties against whom the relief is sought are missing in action or very selective in which proceedings they would engage themselves in.

[39] Although there was some resistance in the beginning, when arbitration proceedings were initiated, the arbitration proceedings were conducted and concluded by agreement between the parties and in conformity with the JV Agreement.

[40] The Caltop Investments and Mr Hitula, the fifth respondents, were well aware of the arbitration award and when the applicants approached the court in case HC-MD-CIV-MOT-GEN-2020/00160, seeking an enforcement order in terms of the Arbitration Act. These respondents were aware of the application to obtain an enforcement order as a notice of opposition was filed on their behalf. The respondents failed to file any answering papers and as a result, Geier J dealt with the matter on an unopposed basis and granted the order, making the Arbitration Award dated 31 March 2020, an order of this Court.

[41] Hereafter, on 21 August 2020, the applicants obtained a writ of execution against the respondents in respect of the final cost order. The respondents attempted to counter the earlier proceedings by filing an application to rescind arbitration proceedings as well as the court order dated 16 July 2020. This application was opposed, and the applicants filed their answering papers as far back as October 2020, yet to date, the rescission application has not been moved or prosecuted in any way.

[42] The purpose of rehashing the occurrences in 2020 is to illustrate that pursuant to the granting of the order by Geier J on 16 July 2020, Caltop Investments and Mr Hitula were aware of the order. Mr Hitula also deposed to the founding affidavit in respect of the application to rescind. There can thus be no doubt that either of these respondents were in the dark regarding this court's order. In the context of the current application, I am satisfied that the writ of execution served as sufficient notice to the respondents of the court order.

[43] Once the court determined that there was a court order and service or notice of the order it is necessary to determine that there was non-compliance with the order. The arbitration award that was made an order of court by Geier J was clear that Caltop Investments had to refrain from making its monkfish quotas available to third parties in respect of the 2020/2021 season and had to take steps to provide the necessary assistance for the licencing of the MFV Minchos Noveno, for the joint venture to harvest and exploit the monkfish quotas of Overberg and Caltop Investments in terms of the JV Agreement in the 2020/2021 season.

[44] This clearly did not happen as was disclosed before Sibeya J in case HC-MD-CIV-MOT-GEN-2020/00173 that Caltop Investment caused another vessel, MFV Helgoland, to be licenced to catch its 2020/2021 monkfish quota. This conduct on the part of Caltop Investments stands in direct contravention of the JV agreement.

[45] The question is, however, whether Caltop Investments acted willfully and with mala fides. In the *IAE//Gams Data* matter, Muller J confirmed *Fakie No v CCII Systems (Pty) Ltd*⁶ wherein Cameron JA held that unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide, the requisites of contempt will have been established.

[46] Caltop Investments chose not to take part in the proceedings before Geier J and I am satisfied that Caltop Investment is in contempt of the court order dated 16 July 2020.

Should Mr Hitula be held in contempt of court?

[47] Apart from the current application, Mr Hitula has never been cited as a party to any of the proceedings. The applicants apply that Mr Hitula, in his capacity as a director of Caltop Investments be held in contempt of court as Mr Hitula actively participated in and had been responsible for Caltop Investment's contempt. As such, Mr Hitula is liable as the main perpetrator alternatively as an accessory as far as Caltop Investment's contempt is concerned.

[48] In *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)*⁷ the court held as follows:

[47] When a court order is disobeyed, not only the person named or party to the suit but all those who, with the knowledge of the order, aid and abet the disobedience or wilfully are party to the disobedience are liable.⁸ The reason for extending the ambit of contempt

⁶ *Fakie No v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

⁷ *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* 2015 (5) SA 600 (CC) at para 47.

⁸ *Cape Times Ltd v Union Trades Directories (Pty) Ltd and Others* 1956 (1) SA 105 (N) at 106 D-E.

proceedings in this manner is to prevent any attempt to defeat and obstruct the due process of justice and safeguard its administration. Differently put, the purpose is to ensure that no one may, with impunity, wilfully get in the way of, or otherwise interfere with, the due course of justice or bring the administration of justice into disrepute.⁹

[49] From the *Pheko* matter it is clear that Mr Hitula can be held in contempt of court, as long as the requirements for contempt of court have been satisfied.

[50] My earlier discussion in respect of Caltop Investments and its contemptuous behaviour can be superimposed on Mr Hitula, he was and probably still is the mouthpiece of Caltop Investments. As a result, I am satisfied that the applicants succeeded in making out a case against Mr Hitula for contempt of court.

The opposition of Merlus and Caltop Fishing (Merlus respondents) in respect of the contempt proceedings and the relief sought

[51] As indicated earlier in the judgment, the relief that the applicants seek is directed solely against Caltop Investments and Mr Hitula. Merlus and Caltop Fishing were joined as potentially interested parties, but no relief was and is sought against them.

[52] The Merlus respondents strongly disagree with contention above and argued that the notice of motion is silent on the fact that no relief is sought against them.

[53] Although the Merlus respondents conceded that they could not attack the arbitration process and proceedings subsequent thereto, they nonetheless attempt to hold a torch for Caltop Investments by advancing an argument that the arbitration proceedings were irregular as the advocate appointed by the Law Society to preside during the arbitration hearing was not senior counsel for not less than ten years and because the arbitrator, despite indicating in a letter to Caltop Investment's legal practitioner regarding the further conduct of the matter between the parties proceeded to hand down an award. According to the Merlus respondents, this was irregular,

⁹ *Fakie No v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at paras 6 and 8.

rendering the award nullity, further causing the court order issued by Geier J to be irregular.

[54] In this regard, it is necessary to refer to *Hamutenya v Hamutenya*¹⁰ where Maritz J referred with approval to *Bezuidenhout v Patensie Sitrus Beherend Bpk*¹¹ wherein Froneman J stated as follows:

'An order of a Court of law stands until set aside by a Court of competent jurisdiction. Until that is done the Court order must be obeyed even if it may be wrong (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494A--C). A person may even be barred from approaching the Court until he or she has obeyed an order of Court that has not been properly set aside (*Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA); *Byliefeldt v Redpath* 1982 (1) SA 702 (A) at 714).'

[55] In my view, the only party that could attack the validity of the court order dated 16 July 2020 is Caltop Investments. As indicated earlier, although Caltop Investments initiated an application for rescission, it did not prosecute it, and it is not now the place of the Merlus respondents to attack the validity of an order to which they are not a party to and have no standing to do so.

[56] The Merlus respondents raised a number of other defences in this matter, but I am of the view that it must be determined, first and foremost, what is the Merlus respondents' standing to oppose the current application because they were not parties to the arbitration proceedings and Merlus respondents incurred no contractual rights or obligations vis-à-vis the current application.

[57] Mr Rosenberg drew this court's attention to *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*¹² and although in the context of joinder and intervening, Corbett J said the following when addressing the locus standi of a sub-tenant to intervene in the ejectment of the main tenant:

¹⁰ *Hamutenya v Hamutenya* 2005 NR 76 (HC) at 78 G-H.

¹¹ *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B—D.

¹² *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415H.

'In my opinion, an applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish locus standi, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted. Before this approach can be usefully applied, however, it is necessary to examine more closely the right of a party to intervene in legal proceedings. (415 B)

[58] The court further states at p 415F to 416A:

'It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make (see *Amalgamated Engineering Union v Minister of Labour*, 1949 (3) SA 637 (AD); *Koch and Schmidt v Alma Modehuis (Edms.) Bpk.*, 1959 (3) SA 308 (AD). In *Henri Viljoen (Pty.) Ltd. v Awerbuch Brothers*, 1953 (2) SA 151 (O), HORWITZ, A.J.P. (with whom VAN BLERK, J., concurred) analysed the concept of such a 'direct and substantial interest' and after an exhaustive review of the authorities came to the conclusion that it connoted (see p. 169) -

'... an interest in the right which is the subject-matter of the litigation and... not merely a financial interest which is only an indirect interest in such litigation'.

This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division (see *Brauer v Cape Liquor Licensing Board*, 1953 (3) SA 752 (C) - a Full Bench decision which is binding upon me - and *Abrahamse and Others v Cape Town City Council*, 1953 (3) SA 855 (C)), and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court (see *Henri Viljoen's case*, supra at p. 167).

[59] In my view, the same principle applies to the Merlus respondents. In the current matter the Merlus respondents submit that they will suffer adverse consequences as a result of any order made by the court in respect of Caltop Investments, except for the part of the relief declaring Caltop Investments and Mr Hitula in contempt.

[60] It is the case of the Merlus respondents that the direct effect of the relief sought herein will lie in the fact that the order seeks to compel Caltop Investments to breach its Joint Venture agreement with Merlus in respect of Caltop Fishing. Accordingly, such an order, if implemented, will have a direct, adverse and significant effect on both Merlus and Caltop Fishing. The respondents do not elaborate on what 'adverse' and 'significant' effects would constitute, but it makes sense that it would involve financial implications down the line from this court's order.

[61] If the adverse financial effect for the Merlus respondents is measured to the *Henri Viljoen (Pty.) Ltd. v Awerbuch Brothers*¹³ matter referred to with approval in *United Watch & Diamond Co* (supra) that such financial interest is limited to indirect interest only and not a substantial interest in the current litigation. I am thus obliged to agree with the applicants that the Merlus respondents, despite having been joined to these proceedings, do not have a direct and substantial interest in the matter sufficient to oppose the relief sought by the applicants.

[62] The applicants seek no relief against the Merlus respondents, and no relief can be sought against them. The reason is simple. The current proceedings arise from the enforcement of contractual obligations against Caltop Investments as opposed to the Merlus respondents, who have no horse in the current race. The enforcement of the contractual obligations between the applicants and Caltop Investments was limited to those parties only and the Merlus respondents could neither be a party to the arbitration proceedings nor could they be a party to the Geier judgment.

[63] I understood that the Merlus respondents complained that because they were not parties to the arbitration proceedings and the enforcement order, the applicants could not obtain relief based on the enforcement order. However, for the reasons above, this defence by the Merlus respondents holds no merit.

¹³ *Henri Viljoen (Pty.) Ltd. v Awerbuch Brothers*, 1953 (2) SA 151 (O) at 169H.

[64] On the issue of the settlement reached between the applicants and the Merlus respondents, Ms van der Westhuizen argued that the relief now being sought (being relief premised upon the arbitration award) has become settled between the applicants and Merlus and Caltop Fishing.

[65] It was further contended that the settlement between the parties in case HC-MD-CIV-MOT-GEN-2020/00173 has the effect that the applicants will not seek relief against Merlus and Caltop Fishing, not then or now. Therefore, the relief now sought, or a significant part thereof is res judicata, alternatively the subject of the issue of estoppel.

[66] I fail to understand this argument because, firstly, there was no settlement agreement recorded by Sibeya J. Instead, it was recorded that the matter was withdrawn in respect of the Merlus respondents, nothing more, nothing less. Secondly, it is clear from the remainder of the orders by Sibeya J that the applicants had no intention not to actively pursue their claims against Caltop Investment based upon the enforcement of the applicants' rights under the JV agreement and the arbitration award. Therefore, this defence has no merits either.

[67] Lastly, there is the issue of the alleged factual dispute between the applicants and the Merlus respondents. The matter in casu relates to the arbitration award and the pursuant court order enforcing the arbitration award. There cannot be a dispute of fact between the applicants and respondents that never had an interest in the subject matter of the current litigation. As with the other defences raised on behalf of Merlus respondents, it is without merit.

Appropriate remedy with respect Caltop Investment and Mr Hitula

[68] In conclusion, I must, in light of the discussion above in respect of Caltop Investment and Mr Hitula consider what an appropriate remedy would be in terms of the contumacious conduct of the said respondents.

[69] The Court enjoys broad remedial discretion to determine appropriate relief in contempt proceedings. In doing so, the Court should be guided by the approach adopted by other courts¹⁴.

[70] The court can consider imposing a coercive or a punitive order as a remedy to contempt of court. Kamphepe ADCJ in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others*¹⁵ discussed the difference between the two types of orders as follows:

‘A coercive order gives the respondent the opportunity to avoid imprisonment by complying with the original order and desisting from the offensive conduct. Such an order is made primarily to ensure the effectiveness of the original order by bringing about compliance. A final characteristic is that it only incidentally vindicates the authority of the court that has been disobeyed. Conversely, the following are the characteristics of a punitive order: a sentence of imprisonment cannot be avoided by any action on the part of the respondent to comply with the original order; the sentence is unsuspended; it is related both to the seriousness of the default and the contumacy of the respondent; and the order is influenced by the need to assert the authority and dignity of the court, to set an example for others.’

[71] It is the accepted practice in contempt matters to seek compliance, using punishment as a means of coercing same. In *Matjhabeng Local Municipality v Eskom Holdings Ltd*¹⁶ the Court held that the “relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, mandamuses, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings. Their objective is to compel parties to comply with a court order. In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance.” [References excluded.]

¹⁴ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC) para 54.

¹⁵ Op. cit. at para 47.

¹⁶ *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018 (1) SA 1 (CC) para 54.

[72] The applicants indicated that they would no longer persist with the interdictory relief claimed in terms of para 9 of the Notice Motion. The applicants, however, seek orders in terms of paragraphs 1,2,3,4,5,7,8 and 10 of the Notice of Motion. The sanction sought by the applicants is a sentence to imprisonment alternatively payment of a fine alternatively such imprisonment or fine suspended in its entirety on condition that Mr Hitula complies with the court order dated 16 July 2020.

[73] Froneman J in *Burchell v Burchell*¹⁷ explored alternative penalties in an attempt to develop the common law further, by stating as follows:

‘Civil contempt proceedings have always had a dual nature and the discussion thus far has focused only on its criminal aspect. In my judgment the perceived difficulties associated with its continued treatment as a criminal offence should not prevent attention being given also to its purely civil character and the possible development of the common law in that regard. In addition to its retention as a criminal offence, albeit with a stricter standard of proof, the potential effectiveness of issuing a (civil) declaratory order that an offending litigant is in contempt of a court order should not be underestimated. Such a declaration would have as its purpose to uphold the rule of law too, but even if shorn of its criminal sanction or punishment there is, in my view, no reason why other civil sanctions may not attach to such an order. One of them may be that the offending litigant could be prohibited from using the civil courts in other litigation until he has purged his contempt, or, in the case of an appeal against such an order, that the usual suspension of the order pending the determination of the appeal should not come into operation. The important point is, however, that upholding the rule of law and ensuring the effective administration of justice is not wholly dependent on the effectiveness of civil contempt proceedings in its guise as the prosecution of a criminal offence that allows committal to gaol of the offender. Other possibilities, purely civil in nature, need to be explored and developed as well. The form of the order in this judgment will reflect an attempt to develop ancillary civil sanctions in this manner.’

[74] The sanction of refusing the respondents' access to the civil court in other litigation until they purge their contempt is a more appealing option other than imprisonment or a fine.

¹⁷ *Burchell v Burchell*¹ (ECJ 010/2006) [2005] ZAECHC 35 (3 November 2005).

[75] In terms of the relief sought (prayers 2 and 3), the applicants pray that this court declares that in terms of the enforcement order that Caltop Investments is precluded from making its monkfish quota available to third parties in the fishing season 2022/2023 and take the necessary steps to licence MFV Minchos Noveno for the fishing season 2022/2023. These terms are specific terms of the JV Agreement as well.

[76] I considered the relief mentioned above sought in prayers 2 and 3 but have difficulty granting such relief. The reason is that the enforcement order of 16 July 2020, in my view, is limited in the sense that although it confirms that the JV agreement was in full force and effect, it appears to be the only 'constant' in the order as it relates to the status of the JV Agreement. However, the remainder of the order only relates to the 2020/2021 season. Therefore, this court can hold Caltop Investments and Mr Hitula in contempt in terms of the application before me for the 2020/2021 season only. These respondents remained in contempt of court for as long as they acted in breach of the court order dated 16 July 2020, which would be extended to the date of awarding the quotas for the next fishing season. If Caltop Investments transfers its quota to a third party and fails to licence the vessel, it would be in breach of the JV agreement but not a violation of the court order dated 16 July 2020.

[77] The arbitration award enforced by the said order is not open-ended. It is limited to a specific fishing season. This much is clear from the application before Sibeya J pertains to the 2021/2022 fishing season. The breach of the JV agreement in respect of the 2021/2022 in my view stands separate from the current application before me. The parties relevant to the JV agreement were ordered by the court in that matter to subject themselves to arbitration proceedings in respect of the 2021/2022 fishing season.

[78] Therefore, this court cannot grant the relief set out in para 2 and 3 of the Notice of Motion.

[79] I am further of the view that ensuring fair trial rights in accordance with the Constitution would require me to hear the first and fifth respondents before imposing a penalty in respect of contempt of court. The finding of contempt of court could be made

on the papers before me, however, imposing a sentence of a fine or imprisonment would be intrusive to the offending litigant's right to freedom and security, and I need to hear the parties on this issue before I can pronounce myself on it.

[80] My order is as follows:

1. The order of the Court given under case number HC-MD-CIV-MOT-GEN-2020/00160 and made on 16 July 2020 per the Honourable Justice Geier (the enforcement order) is and remains operative and of full force and effect.
2. The first and fifth respondents have been and remain in contempt of the enforcement order handed down by this Court on 16 July 2020.
3. The first respondent and the fifth respondent are convicted of being in contempt of this Court.
4. The first respondent and the fifth respondent are granted 30 days from the date of this judgment to purge the contempt set out in paragraph 2 above, failing which the applicants may set the matter down upon notice as a matter of urgency, with or without further amplification of the papers, calling upon the respondents to show cause why:-
 - (a) a further order should not issue in terms of which the first respondent and the fifth respondents would be prohibited from proceeding in any other litigation in any other matter that they may be involved with in the High Court until they have purged the said contempt;
 - (b) alternatively, why this court should not sentence the first respondent and the fifth respondents to a fine or a period of imprisonment;
 - (c) first respondent and the fifth respondents should not pay the costs of any further proceedings on an attorney and client scale;

- (d) further sanctions to ensure purging of the contempt should not be imposed against them.
5. Today's order must be served on the first and fifth respondents at the cost of the applicants.
 6. The opposition of the second and third respondents is dismissed.
 7. The first, second, third, and fifth respondents are ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved. Such costs are to include the costs of one instructing and two instructed counsel.

J S PRINSLOO

Judge

APPEARANCES

APPLICANT: S P Rosenberg (with him T Wylie)
Instructed by Ellis Shilengudwa Inc., Windhoek

SECOND and THIRD RESPONDENT: C E Van Der Westhuizen (with him D Obbes)
Instructed by LorentzAngula Inc., Windhoek