



REPORTABLE

CASE NO: SCR 3/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CALTOP INVESTMENTS (PTY) LTD

Applicant

and

OVERBERG FISHING COMPANY (PTY) LTD

First Respondent

CATO FISHING COMPANY (PTY) LTD

Second Respondent

MERLUS FISHING (PTY) LTD

Third Respondent

CALTOP FISHING OPERATIONS (PTY) LTD

Fourth

Respondent

**MINISTER OF FISHERIES AND MARINE RESOURCES
Respondent**

Fifth

Coram: DAMASEB DCJ, MAINGA JA and MAKARAU AJA

Heard: 7 March 2025

Delivered: 11 April 2025

Summary: Applicant (Caltop) approached this Court by way of notice of motion in terms of s16 of the Supreme Court Act 15 of 1990 (the Act) on the order of Hoff JA of 15 December 2023 in chambers, seeking to review and set aside the proceedings and order of the High Court of 9 December 2022, which among other things, convicted the applicant and its Director for contempt of court.

Caltop and the first four respondents are private companies incorporated in terms of the laws of Namibia, with their principal place of businesses at Walvis Bay, Namibia. The fifth respondent is the Minister of Fisheries and Marine Resources (the Minister), duly appointed as such in terms of the Namibian Constitution.

Overberg and Caltop are holders of Monk fishing 'rights of exploitation'. They have the right to catch Monk fish in the Exclusive Economic Zone of Namibia. These rights were granted to them in terms of the Marine Resources Act 27 of 2000. On 15 September 2015 and at Walvis Bay, Overberg, Caltop and Cato entered into a Joint Venture Agreement (JV agreement). In terms thereof, Overberg and Caltop formed a long-term joint venture with the aim of exploiting their full quotas together. They further entered into a Sale of Shares Agreement as well as a Charter Agreement.

Caltop made its monk fish quota available to a third party contrary to the provisions of the JV agreement. The dispute which arose as a result of Caltop's actions resulted in arbitration proceedings. An arbitration award was issued in favour of Overberg and Cato, which award was subsequently made an order of court (the enforcement order). Owing to Caltop's continued non-compliance, Overberg and Cato obtained a temporary interdict against Caltop. Following further non-compliance with the enforcement order, Overberg and Cato successfully sought an order holding Caltop and Mr Hitula in contempt of the enforcement order.

Caltop applied to this Court for an order invoking its review jurisdiction in terms of s 16. The order was granted. In considering the review application, this Court –

Held that, in Christian v Metropolitan Life Namibia Retirement Annuity Fund & others 2008 (2) NR 753 (SC) this Court explained that the s 16 review jurisdiction is limited to irregularities in proceedings where this Court on its own accord decides to invoke such review jurisdiction. In explaining what a reviewable irregularity is, the court held that '(t)he applicant, first and foremost, must establish that the review relates to an irregularity in the proceedings. . . . The irregularity need not be apparent from the proceedings but may be established by evidence *aliunde* the record. Precisely what would constitute a reviewable irregularity will depend on the facts and circumstances of each case and the body of laws applicable to the adjudication thereof, the most fundamental of which is the Constitution and, in the context of the review of judicial proceedings, the fair trial provisions guaranteed under Art 12 thereof.'

*Held that, in terms of the relevant parts of the arbitration award, para 85 thereof confirms the existence of the JV agreement or in the words of the arbitrator (the joint venture agreement) 'has not been terminated'. In paras 86 and 87 Caltop was directed to refrain from making its monk fish quota available to third parties contrary to the provisions of the JV agreement 'with effect from the 2020/2021 season commencing on 1 May 2020' and to take all necessary steps for the licensing of the motor vessel *Minchos Noveno* to enable the JV to harvest and exploit the joint monk fish quota of Caltop and Overberg in terms of the JV agreement for the 'duration' of the JV agreement with effect 'from the 2020/2021 season commencing on 1 May 2020'. The words 'with effect from the 2020/2021 season commencing on 1 May 2020', mean that the award did not confine Caltop's compliance with the JV agreement only to the 2020/2021 fishing season but until termination of the agreement in accordance with the provisions of the termination clause or until such time (if at all) the rescission application might be successful. The finding in the court below that the arbitration award was confined to the fishing season 2020/2021 cannot be correct.*

*Held that, the interdictory (Sibeya J's) order repeated the arbitration award wording except that in para 2 of his order, Caltop was ordered to take steps to cancel the licence under which MFV *Helgoland* was catching (or intended to catch)*

the monk fish quota, allocated by the Minister to Caltop on or about 1 June 2020 "the quota" in order to give effect to the order of court handed down on 16 July 2020 under Case No. HC-MD-CIV-MOT-GEN-2020/00160.

Held that, it is now settled law that given the factual presumption that a person is not likely to be deemed to have waived his or her rights, the onus to prove the applicant's alleged waiver on a balance of probabilities rests on the respondent. To succeed in such a defence, Caltop had to allege and prove that, when the alleged waiver took place, Overberg and Cato either expressly or by necessary implication abandoned that right and that they conveyed their decision to that effect to Caltop.

Held that, Overberg and Cato at most should have vacated the enforcement order and communicated same to Caltop. Caltop assumed that Overberg and Cato waived the enforcement order when they brought the urgent application before Sibeya J, who restrained Caltop in paras 2 and 3 of his order pending the final determination of the arbitration proceedings and the rescission application.

Held further that, there was nothing in the evidence, even remotely to suggest that Sibeya J's order preempted the enforcement order or that Overberg and Cato waived their right in the enforcement order. The evidence *aliunde* was that the enforcement order formed the substratum on which Overberg and Cato litigated against Caltop.

Accordingly, the review application was dismissed with costs.

REVIEW JUDGMENT

MAINGA JA (DAMASEB DCJ and MAKARAU AJA concurring):

Introduction

[1] Applicant is before this Court by way of notice of motion in terms of s16 of the Supreme Court Act 15 of 1990 (the Act) on the order of Hoff JA of 15 December 2023 in chambers, seeking to review and set aside the proceedings and order of the High Court of 9 December 2022, which among other things, convicted the applicant and its Director for contempt of court.

Parties

[2] The applicant (Caltop Investments (Pty) Ltd (Caltop)), and the first to fourth respondents are private companies incorporated in terms of the laws of Namibia, with their principal place of businesses at Walvis Bay, Namibia. The fifth respondent is the Minister of Fisheries and Marine Resources (the Minister), duly appointed as such in terms of the Namibian Constitution. For ease of reference we refer to applicant, first to the fourth respondents by name and fifth respondent as Minister.

Background

[3] Overberg and Caltop are holders of Monk fishing 'rights of exploitation'. They have the right to catch Monk fish in the Exclusive Economic Zone of Namibia. These rights were granted to them in terms of the Marine Resources Act 27 of 2000.

The joint venture agreement

[4] On 15 September 2015 and at Walvis Bay, Overberg, Caltop and Cato entered into a Joint Venture Agreement (JV agreement). In terms thereof, Overberg and Caltop formed a long-term joint venture with the aim of exploiting

their full quotas together. It was further agreed that at a management fee of four per cent of the turnover of the JV, Cato would manage the JV. Profit sharing in the JV was agreed to be Caltop 60 per cent and Overberg 40 per cent. The parties agreed that should the joint venture incur losses for whatever reason, Overberg shall carry such losses in full.

[5] Overberg and Caltop then concluded a Sale of Shares agreement, in terms whereof, Overberg sold 32 of its 64 shares in the MFV '*Minchos Noveno*' (the vessel/MFV *Minchos Noveno*) to Caltop. They then as masters and owners of the vessel agreed that the JV would employ the vessel to catch the Overberg-Caltop quota. That agreement would be signed by Cato on behalf of the JV.

[6] The JV, Overberg and Caltop then entered into a Charter Agreement, in terms of which Overberg and Caltop chartered the vessel to the JV. The Charter agreement was agreed to remain in force from 1 October 2016 until the termination of the JV agreement.

[7] Pertinently, Overberg and Caltop agreed that they would avail their full quotas to the JV for as long as their fishing rights are valid and for the duration of any extension of such rights. They in turn would be entitled to a remuneration, which for the season of 2015/2016 was agreed to be N\$2650 per metric tonne of the monk quota and that the beneficiation fee would increase by seven per cent annually for the duration of the agreement. The beneficiation fee was payable upon presentation of a tax invoice.

[8] In clause 7.2.4 of the JV agreement, Overberg and Caltop were obliged to obtain all necessary legal permits and licenses to enable the vessel to exploit their quota.

[9] On 28 June 2019, Caltop by letter informed Overberg and Cato that it canceled the JV agreement on account of Overberg and Cato's failure to remedy issues which constitute material breaches of the JV agreement, alternatively repudiatory conduct. Consequently, the Charter agreement was cancelled as well.

[10] Overberg regarded this to be a repudiation of the JV agreement by Caltop and refused to accept such repudiation.

[11] Caltop, on 16 August 2019, made its quota available to the master(s), owner(s) and / or operator(s) of the MFV *Laxe Dos*. It further failed or refused – so it was averred a quo – to provide its cooperation and consent for the licensing of the vessel for the harvesting of monk fish for 2019 as per the JV agreement. This conduct by Caltop constituted breach of the JV agreement and Overberg called upon Caltop to remedy this breach by terminating its arrangements with the owner or operator of the MFV *Laxe Dos*. It was further called upon to take necessary steps for the licensing of the MFV *Minchos Noveno* in compliance with the JV agreement.

[12] On account of the alleged breaches of the agreement by Caltop, Overberg referred the dispute to arbitration in terms of the JV agreement.

[13] The arbitration award delivered on 31 March 2020 was in favour of Overberg. The arbitration award provided that –

'84. For these reasons, I make the following award:

85. It is declared that the written long-term joint venture agreement between the parties concluded at Walvis Bay on 15 September 2015 (the joint venture agreement) has not been terminated.

86. The respondent is directed to refrain from making its monk fish quota available to third parties contrary to the joint venture agreement with effect from the 2020/2021 season commencing on 1 May 2020.

87. The respondent is ordered to take all the necessary steps, and to provide the necessary assistance, for the licensing of the MV Minchos Noveno, in order for the joint venture between the parties established in terms of the joint venture agreement to harvest and exploit the monk fish quotas of the first claimant and the respondent in terms of the joint venture agreement for the duration thereof with effect from the 2020/2021 season commencing on 1 May 2020.

88. The respondent is ordered to pay my fees amounting to N\$103 500.00 as calculated in the accompanying tax invoice.

89. The respondent is ordered to pay claimant's costs of the arbitration on the attorney and client scale, which cost shall include the costs of one instructed and one instructing counsel and the venue, to be quantified as follows:

89.1 The claimants must within 14 calendar days after the publication of this award provide me with an itemised bill of their costs of arbitration, and a copy thereof to the respondent, which shall have an opportunity to respond thereto within 7 calendar days after the claimants have sent a copy thereof to the respondent.

89.2 After expiry of the periods mentioned in the preceding subparagraph, I shall make an award quantifying such costs, which may include an award that the

claimants are not entitled to their costs, should they fail to provide me with the bill of costs.'

The proceedings in the High Court

[14] On 28 May 2020, Overberg and Cato launched an application in the High Court in terms of s 31(1) of the Arbitration Act 42 of 1965 (Arbitration Act) for the arbitration award to be made an order of court. That application was served on Caltop on 1 June 2020. Caltop though it opposed the application, failed to file an answering affidavit. As a result, the High Court after hearing the matter on 16 July 2020 made the following order:

- '1. The arbitration award dated 31 March 2020, is made an order of court, in terms of s 31(1) of the Arbitration Act.
2. The final cost award dated April 2020 is hereby made an order of court, in terms of s 31(1) of the Arbitration Act 42 of 1965.
3. The respondent is directed to pay the costs of this application, including the costs of one instructing and one instructed counsel.'

[15] When the monk fish quotas for 2020/2021 fishing season were allocated, Caltop had already caused another vessel '*Helgoland*' to be licensed to catch its 2020/2021 monk fish quota (contrary to the arbitration award). At that stage, the application to have the arbitration award made an order of court was not yet finalised (enforcement application). It must be mentioned here that on 25 July 2019, a month after its purported cancellation of the JV agreement and prior to the subsequent arbitration award, Caltop entered into a similar agreement with Merlus

(third respondent) and therein agreed to procure the MFV *Helgoland* for purposes of harvesting its and Merlus' 'Frozen Monk quota'.

[16] On 11 June 2020, which was a little over a month prior to the date on which the arbitration award was made an order of court 'the enforcement order', Overberg instituted an application for urgent interim interdictory relief against Caltop, pending the finalisation of the enforcement application. During this urgent application it became apparent that Caltop had entered into a Shareholders' Agreement with Merlus on 25 July 2019, which was shortly after it sent a letter to Overberg and Cato wherein it cancelled the JV agreement. The urgent application was triggered when the new monk fish quotas for 2020/2021 were allocated, and Caltop 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* as per the terms of the JV agreement. Caltop did not file opposing papers but Merlus and Caltop Operations did. Subsequently, Overberg and Cato entered into a settlement agreement with Merlus and Caltop Operations, withdrawing the application against Merlus and Caltop Operations.

[17] On 23 November 2020, the court after hearing the urgent application, made an order in the following terms:

'1. The applicants' failure to comply with the prescribed periods of time and forms of service, is hereby condoned and the matter is enrolled as one of urgency in terms of Rule 73(4) of the Rules of this court.

2. The First Respondent is ordered to take steps to cancel the licence under which Motor Fishing Vessel Helholand (*sic*) is catching (or intends to catch) the monk fish quota, allocated by the Fourth Respondent to the First Respondent on or about 1 June 2020 ("the quota") in order to give effect to the order of court handed down on 16 July 2020 under Case No. HC-MD-CIV-MOT-GEN-2020/00160.

3. The First Respondent is interdicted and restrained from taking any steps to make the quota available to a third party.

4. The orders 2 and 3 above operate as interim interdict, pending final determination of:

4.1 The arbitration proceedings to be instituted by the applicants in terms of the Long Term Joint Venture Agreement and Charter Agreement (both entered into between Applicants and First Respondent), and the agreement of Sale of Shares in Motor Fishing Vessel Minchos Noveno (entered into between First Applicant and First Respondent) in relation to the current dispute between the parties concerning the quota for the 2020/2021 fishing season, such arbitration proceedings to be instituted within 21 days of this order. [My underlining]

4.2 The rescission application instituted under case number HC-MD-CIV-MOT-GEN-2020/00160 in this court by the First Respondent on 10 September 2020.

5. The First Respondent is ordered to pay costs of the application and such costs to include costs of one instructing and two instructed Counsel.

6. The matter is removed from the roll and regarded as finalised.'

[18] On account of this order, Overberg and Cato initiated arbitration proceedings in respect of the 2020/2021 fishing season. A pre-arbitration meeting was held on 29 June 2021. The minutes of that meeting reflect that counsel for Caltop was to seek instructions and invite the third parties (Merlus and Caltop

Operations) to indicate their attitudes to the arbitration. It appears that or rather Overberg and Cato alleged that Caltop abandoned the arbitration proceedings.

[19] On 18 December 2020, Caltop filed a notice of appeal against the entire judgment and order, including the order of costs by Sibeya J of 23 November 2020. Caltop failed to prosecute the appeal.

[20] For completeness it bears mentioning that Caltop instituted a rescission application against the enforcement order of 16 July 2020, on 10 September 2020. Overberg and Cato opposed the application and filed answering papers on 8 October 2020. That rescission application, is still pending in the High Court.

The declaratory and contempt of court application –

[21] On 13 December 2021 Overberg and Cato instituted yet another application in the High Court for declaratory and contempt of court relief. The application was served on Caltop's director (Mr Hitula) personally who also received same on behalf of Caltop.

[22] The application was necessitated allegedly, by the fact that since 2019 to 2021, Caltop and its director demonstrated a brazen disregard and contempt for its contractual obligations, the arbitration award, the enforcement and interdictory orders, the administration of justice and the rule of law. That it was very clear from Caltop's conduct that it had no intention of complying with the arbitration award and the High Court orders.

[23] On 24 January 2024, Caltop's counsel noted opposition to the application but did not file answering affidavits. Merlus and Caltop Operations also opposed the application and filed answering papers. Caltop did not sign the case management report subsequently issued by the court. On 12 May 2022, one Ms Hauwanga for Caltop was present at the case management hearing conducted by the court. Caltop was absent on 18 May 2022 when the other parties proposed dates for the hearing of the matter but Ms Hauwanga for Caltop was present when the court set dates for the hearing of the matter on 9 June 2022. When the other parties filed heads of argument during August 2022, Caltop failed to do so. Caltop was also conspicuously absent at the hearing of the matter.

[24] Prinsloo J delivered judgment on 9 December 2022, finding Caltop to be in contempt of court of the enforcement order (enforcement order) of 16 July 2020.

[25] The learned judge found that Caltop and its director were missing in action or very selective in which proceedings they participated in. Caltop and Mr Hitula were well aware of the arbitration award, the application seeking the enforcement order as they filed notices of opposition, but failed to file answering papers. As a result Geier J granted the enforcement order, making the arbitration award an order of court. Prinsloo J further found that Caltop filed a rescission application during August 2020 seeking to rescind the arbitration award and the enforcement order of 16 July 2020. Further that the application as by then (9 December 2022) had not been prosecuted. The learned judge further noted that the arbitration award that was made an order of court by Geier J was clear that Caltop refrain from making its monk fish quotas available to third parties in respect of the

2020/2021 season and had to take steps to provide the necessary assistance for the licensing of the MFV *Minchos Noveno*, for the joint venture to harvest and exploit the monk fish quotas of Overberg and Caltop in terms of the JV agreement in the 2020/2021 season.

[26] The court below further found that Caltop did not respect that agreement as was disclosed before Sibeya J, instead Caltop caused another vessel, MFV *Helgoland* to be licenced to catch its 2020/2021 monk fish quota, the conduct which stood in direct contravention of the JV agreement. The court below relied on the holding 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 established¹ and the fact that Caltop chose not to take part in the proceedings before Geier J, it was satisfied that Caltop was in contempt of the court order of 16 July 2020.

[27] What followed in the judgment was whether Mr Hitula the director of Caltop should be held in contempt for his active participation in and his responsibility for Caltop's contempt and the opposition of Merlus and Caltop Operations to the contempt proceedings and relief sought. The court *a quo* dismissed the opposition of Merlus and Caltop Operations as meritless, for reasons not relevant for this review. The court superimposed the contemptuous behaviour of Caltop on Mr Hitula as he was and probably still is the mouthpiece of Caltop and found him guilty of contempt of court.

¹ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) paras 12 and 42(d).

[28] When that court turned to the appropriate remedy it declined to grant prayers 2 and 3, ie the terms of the enforcement order precluding Caltop offering its monk fish quota available to third parties in the fishing season 2022/2023 and take the necessary steps to licence MFV *Minchos Noveno* for the same fishing season. I reproduce the reasons for the refusal of granting the two prayers as Caltop heavily relies on these reasons for its case and are in this form:

[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 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.'

[29] Finally that court gave the following order:

‘[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 16 July 2020.
3. The first respondent and the fifth respondent are convicted of being 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 implication 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 respondent 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.'

[30] It is this order which is the subject matter of this review.

Caltop's case before this Court.

[31] Mr Hitula the deponent of Caltop petitioned the Chief Justice on 4 August 2023 that is almost eight months after judgment was delivered. He requested the Chief Justice for this Court to invoke its jurisdiction in terms of s 16 of the Act, to review and set aside the proceedings of the High Court per Prinsloo J. The petition came before Hoff JA in chambers who granted same on 15 December 2023. As already stated Caltop is before this Court on the strength of that order.

[32] Caltop's review application is crisp – it amounts to this: The court below committed an irregularity when it convicted Caltop and its director for contempt of court because the order of 16 July 2020 by Geier J which the court below found not to have been complied with was superseded/pre-empted/varied by the order of 23 November 2020 by Sibeya J which in para 4 of the order ordered that paras 2 and 3 of the order operate as an interim interdict pending final determination of the arbitration proceedings to have been instituted by the applicants then (Overberg and Cato) and rescission application instituted by Caltop on 10 September 2020. Caltop argues that once the dispute relating to the 2020/2021 fishing season was referred to arbitration by Sibeya J, there was nothing left for Prinsloo J to hold Caltop and its director on contempt in respect of the same dispute giving rise to Geier J's enforcement order. Caltop further contends that as per para 76 of

Prinsloo J's judgment, Caltop and its director were held in contempt for 2020/2021 fishing season only and not for any other period.

[33] Caltop contends that the presiding judge was precluded by the doctrine of peremption to hear and determine the contempt of court application. Caltop further contends that the order of 9 December 2022 effectively reviewed or negated Sibeya J's order of 23 November 2020. Therefore the irregularities so committed should be reviewed and set aside.

Overberg and Cato's case before this Court

[34] The case for the two parties is that Caltop's review application is unsustainable as there is no irregularity in the judgment or order of Prinsloo J. Overberg and Cato argued that the review application cannot succeed for interrelated reasons, namely: the background and circumstances of Sibeya J's order were fully dealt with in the papers of the contempt application which served before Prinsloo J, ie the arbitration award of 31 March 2020, the enforcement order of Geier J of 16 July 2020, the interim interdictory relief which culminated in Sibeya J's order, the attempt to commence the arbitration proceedings contemplated in Sibeya J's order and a second assertive urgent application to obtain interdictory relief against Caltop and others. Neither Caltop nor Mr Hitula filed answering papers, neither did Caltop nor Mr Hitula appear at the hearing before Prinsloo J. The contempt application was personally served on Mr Hitula but both Caltop and Mr Hitula chose to ignore the application. Thus the irregularity complained of was never raised nor argued before Prinsloo J.

[35] Merlus and Caltop Operations who opposed the contempt application did not contend before Prinsloo J that Sibeya J's order varied or amended the enforcement order of Geier J or that Overberg and Cato abandoned any of their rights under the arbitration award and the enforcement order.

[36] They contend that the assertions by Caltop that the proceedings before Sibeya J related to the 2021/2022 fishing season, which also is contained in para 77 of Prinsloo J's judgment is erroneous, in that the proceedings related to the 2020/2021 fishing season. They disagree with the reasons given by Prinsloo J when refusing to grant their prayers 2 and 3 but nevertheless that error is unrelated to the irregularity contended for in the review application and therefore entirely immaterial. In any event they argue that Prinsloo J in their opinion was wrong on that point because in terms of para 86 of the arbitration award which was incorporated in the enforcement order of 16 July 2020, the arbitrator directed that Caltop was to refrain from making its monk fish quota available to third parties with effect from the 2020/2021 fishing season commencing on 1 May 2020.

[37] Overberg and Cato further narrate the background and history of litigation between Caltop, Overberg and Cato and argue that Caltop and Mr Hitula have brazenly disregarded the enforcement order and the interdict granted by Sibeya J, that their conduct flies in the face of the administration of justice and the rule of law that Geier J's order was not revived, was still in force and will remain so until it is set aside, or the JV agreement is validly terminated. Therefore, so they argue,

Prinsloo J was competent to hear the matter and to have found both Caltop and Mr Hitula in contempt of court.

Submissions

Caltop –

[38] Caltop contends that it has met the requirements of a review application in terms of s16 of the Act as articulated by this Court in *Christian v Metropolitan Life Namibia Retirement Annuity Fund & others*.² It is further contended that Overberg and Cato waved their rights under the arbitration award and Geier J's order by the operation of the doctrine of peremption when they sought an order from Sibeya J to proceed to arbitration in respect of the 2020/2021 fishing season and commenced a new arbitration pursuant to Sibeya J's order of 23 November 2020.

[39] Caltop relies on *Hlatshwayo v Mare & Deas*³ where it was said that the doctrine of peremption is based on 'the principle that no person can be allowed to take up two positions inconsistent with one another, or as it is commonly expressed to blow hot and cold, to approbate and reprobate'.

[40] Overberg and Cato accordingly perempted their rights so the argument went. Caltop dismisses Overberg and Cato's assertion that the further arbitration proceedings initiated in accordance with Sibeya J's order was to enable Overberg and Cato to claim their damages for losses suffered as a result of Caltop's breach in respect of the 2020/2021 fishing season as factually incorrect. That is so

² *Christian v Metropolitan Life Namibia Retirement Annuity Fund & others* 2008 (2) NR 753 (SC) 764G-765C.

³ *Hlatshwayo v Mare & Deas* 1912 AD 242.

because the notice of arbitration issued by Overberg and Cato on 24 December 2020, the dispute related to Caltop's non-compliance with the JV agreement and Caltop's refusal to make the monk fish quota for the season 2020/2021 available to Overberg and Cato. That Overberg and Cato only sought damages in the alternative in the event the monk fish quota for the season 2020/2021 was already fished out.

[41] It is submitted that Geier J's order fell by the way side when Sibeya J's order came into being – therefore Prinsloo J could not have convicted Caltop and Mr Hitula for contempt.

Overberg and Cato –

[42] Overberg and Cato argue that s 16 of the Act provides for a review remedy and not an appeal. They refer in detail to the principles distilled from the decisions of this Court relating to s 16 and contend that the irregularity contended for by Caltop is an appeal point masquerading as a review irregularity. That, had Caltop and Mr Hitula opposed and filed answering affidavits, setting out their defence, there can be little doubt that any rejection by the High Court of the waiver or abandonment defence, if it were to be challenged, have to be taken on appeal. That, that option of appeal is not open to Caltop and Mr Hitula, given the circumstances of their non-participation. They further contend that the fact that the appeal option is not open to Caltop and Mr Hitula, does not mean that the s 16 review door opens, without more. They submit that in the circumstances of this matter, Caltop was required to provide some explanation for its non-participation in the High Court proceedings, but it failed to do so. That all that Mr Hitula, the deponent for Caltop could say in reply is that the fact that Caltop did not file

answering papers 'does not mean there was no irregularity before the presiding judge'.

[43] Overberg and Cato submit that there was no irregularity in the judgment and order of Prinsloo J, for among other reasons, the litigation history between Caltop, Overberg and Cato was placed in sufficient detail in the founding papers in the contempt application. That at no stage did Merlus and Caltop Operations (who advanced defences on behalf of Caltop and Mr Hitula) contend that the order of 23 November 2020 varied or amended the enforcement order, or that Overberg and Cato had abandoned any of their rights under the arbitration award and the enforcement order. Merlus and Caltop Operations were concerned with the fact that, the arbitration award covered the 2020/2021 fishing season and not subsequent seasons.

[44] On the doctrine of peremption relied on by Caltop, Overberg and Cato argue that waiver or abandonment of rights in circumstances such as here in issue, is not lightly presumed, the person relying upon a waiver must establish that there has been some unequivocal act wholly inconsistent with any intention to maintain the rights. That in the present matter there is no reason which could or would have motivated Overberg and Cato to abandon the arbitration award and the enforcement order. In fact, the order of 23 November 2020 recognised the continuing efficacy of the arbitration award, subject only to the possibility of the rescission application being successful in due course; which fact the argument of Caltop ignores and focuses only on the second arbitration proceedings.

[45] Overberg and Cato finally submit that the High Court properly held that Caltop and Mr Hitula were in contempt.

The statutory framework

Review

[46] Section 16 of the Supreme Court Act 15 of 1990, provides –

- ‘(1) In addition to any jurisdiction conferred upon it by this Act, the Supreme Court shall, subject to the provisions of this section and section 20 have the jurisdiction to review the proceedings of the High Court or any lower court, or any administrative tribunal or authority established or instituted by or under any law.
- (2) The jurisdiction referred to in subsection (1) may be exercised by the Supreme Court mero motu whenever it comes to the notice of the Supreme Court or any judge of that court that an irregularity has occurred in any proceedings referred to in that subsection, notwithstanding that such proceedings are not subject to an appeal or other proceedings before the Supreme Court: Provided that nothing in this section contained shall be construed as conferring upon any person any right to institute any such review proceedings in the Supreme Court as a court of first instance.
- (3) The Chief Justice or any other judge of the Supreme Court designated for that purpose by the Chief Justice, may give such directions as may appear to him or her to be just and expedient in any particular case where the Supreme Court exercises its jurisdiction in terms of this section, and provision may, subject to any such direction, be made in the rules of court for any procedures to be followed in such cases.
- (4) The provisions of this section shall not be construed as in any way limiting the powers of the High Court as existing at the commencement of this Act

or as depriving that court of any review jurisdiction which could lawfully be exercised by it at such commencement.¹⁴ [My underlining]

Discussion

[47] In *Christian v Metropolitan Life Namibia Retirement Annuity Fund & others*⁵ this court explained that the s 16 review jurisdiction is limited to irregularities in proceedings where this court on its own accord decides to invoke such review jurisdiction. In explaining what a reviewable irregularity is, the court held that '(t)he applicant, first and foremost, must establish that the review relates to an irregularity in the proceedings. . . The irregularity need not be apparent from the proceedings but may be established by evidence *aliunde* the record. Precisely what would constitute a reviewable irregularity will depend on the facts and circumstances of each case and the body of laws applicable to the adjudication thereof, the most fundamental of which is the Constitution and, in the context of the review of judicial proceedings, the fair trial provisions guaranteed under Art 12 thereof. The grounds of review must either expressly or by necessary implication identify the irregularities relied on in each instance. The application must also establish that the irregularity in the proceedings complained of resulted or is likely to result in an injustice or other form of prejudice being suffered.' As regards prejudice, the court explained that this Court will not interfere with a decision where an applicant has suffered no prejudice (even where there is an irregularity).

[48] The crux of applicant's case is that the court a quo had no jurisdiction to determine the contempt application in relation to the enforcement order as that

⁴ Section 16 of the Supreme Court Act 15 of 1990.

⁵ *Christian v Metropolitan Life Namibia Retirement Annuity Fund & others* 2008 (2) NR 753 (SC).

order had been superseded/varied by the subsequent order by Sibeya J and therefore that Court committed an irregularity.

[49] The question arises what effect the interdictory order (Sibeya J's order) had on the enforcement order (Geier J's order).

[50] In terms of the relevant parts of the arbitration award, para 85 thereof confirms the existence of the JV agreement or in the words of the arbitrator (the joint venture agreement) 'has not been terminated'. In paras 86 and 87 Caltop was directed to refrain from making its monk fish quota available to third parties contrary to the provisions of the JV agreement 'with effect from the 2020/2021 season commencing on 1 May 2020' and to take all necessary steps for the licensing of the MFV *Minchos Noveno* to enable the JV to harvest and exploit the joint monk fish quota of Caltop and Overberg in terms of the JV agreement for the 'duration' of the JV agreement with effect 'from the 2020/2021 season commencing on 1 May 2020'.

[51] We note that the words 'with effect from the 2020/2021 season commencing on 1 May 2020', mean that the award did not confine Caltop's compliance with the JV agreement only to the 2020/2021 fishing season but until termination of the agreement in accordance with the provisions of the termination clause or until such time (if at all) the rescission application might be successful. The finding in the court below that the arbitration award was confined to the fishing season 2020/2021 cannot be correct.

[52] The arbitration award dated 31 March 2020, was made an order of court, in terms of s 31(1) of the Arbitration Act.

[53] The interdictory (Sibeya J's) order above repeated the arbitration award wording except that in para 2 of his order, Caltop was ordered to take steps to cancel the licence under which MFV *Helgoland* is catching (or intends to catch) the monk fish quota, allocated by the Minister to Caltop on or about 1 June 2020 ("the quota") in order to give effect to the order of court handed down on 16 July 2020 under Case No. HC-MD-CIV-MOT-GEN-2020/00160. In para 3 of the order Caltop was interdicted and restrained from taking any steps to make the quota available to a third party.

[54] The orders 2 and 3 above were made to operate as interim interdict, pending final determination of:

‘4.1 The arbitration proceedings to be instituted by (Overberg and Cato) in terms of the Long Term Joint Venture Agreement and Charter Agreement in relation to the current dispute between the parties concerning the quota for the 2020/2021 fishing season, such arbitration proceedings to be instituted within 21 days of this order.

4.2 The rescission application instituted under case number HC-MD-CIV-MOT-GEN-2020/00160 in the High Court by (Caltop) on 10 September 2020.’

[55] Overberg and Cato initiated the arbitration proceedings but allege that Caltop abandoned those proceedings. Caltop, except for saying it launched a rescission application in the High Court on 10 September 2020, it appears that it

failed to prosecute the application or rather it does not appear to have done anything to prosecute the application after Sibeya J's order of 23 November 2020.

[56] The words 'in order to give effect to the order of court handed down on 16 July 2020 . . .' in para 2 of Sibeya J's order speak for themselves and require no further interpretation. In my opinion the words dispose of Caltop's argument that Sibeya J's order varied/superseded the enforcement order.

[57] That argument is also without merit, when regard is had to the fact that the application culminating in Sibeya J's order, was launched long before the order of 16 July 2020 was issued. The application was triggered on urgent basis on 1 June 2020 when Caltop was allocated its quota, but failed to comply with the terms of the JV agreement and the arbitration award. Caltop proceeded to cause another vessel, MFV *Helgoland*, to be licensed to catch its 2020/2021 monk fish quota. That is why para 2 of Sibeya J's order, ordered Caltop to take steps to cancel the licence under which MFV *Helgoland* is catching (or intends to catch) the monk fish quota allocated to it.

[58] It was further argued that by operation of the doctrine of peremption, Overberg and Cato waived their rights under the arbitration award and the enforcement order when it sought an order in the urgent application to proceed to arbitration in respect of the fishing season 2020/2021. Overberg states that the subsequent arbitration proceedings referred to in Sibeya J's order pertained to damages occasioned by Caltop's non-compliance with the JV agreement and that

the second arbitration was not consistent only with the abandonment of the arbitration award.

[59] It is now settled law that 'given the factual presumption that a person is not likely to be deemed to have waived his or her rights, the onus to prove the applicant's alleged waiver on a balance of probabilities rests on the respondent'.⁶ To succeed in such a defence, Caltop had to allege and prove that, when the alleged waiver took place, Overberg and Cato either expressly or by necessary implication abandoned that right and that they conveyed their decision to that effect to Caltop.⁷

[60] Innes CJ explained the legal position in the following terms:

'... it seems to me that mere intention, a mere mental resolution to waive a right not communicated to the other party affected, and not evidenced by any overt act known to him, cannot in law constitute a waiver or renunciation of the right by the person entitled to enforce it Until the intention to waive the right is communicated to the other party, or evidenced to him by some overt act, a change of mind is always possible and permissible. Otherwise a man might by an entry in his own diary, or an account of a casual conversation with a friend (quite unknown at the time to the party affected), find himself debarred from enforcing a right which on further reflection he was desirous of vindicating. After all, waiver is the renunciation of a right. When the intention to renounce is expressly communicated to the person affected he is entitled to act upon it, and the right is gone. When the renunciation, though not communicated, is evidenced by conduct inconsistent with the enforcement of the right, or clearly showing an intention to surrender it, then also the intention may be acted upon, and the right perishes. But a mere mental resolve, not so evidenced, and not communicated to the other party, but discovered by him afterwards, seems to me (apart from considerations founded

⁶ *Opperman v President of Professional Hunting Association of Namibia* 2000 NR 238 (SC) at 251I-J.

⁷ *Ibid* at 252C and all the authorities referred therein.

upon lapse of time) to have no effect upon the legal position of the person making the resolve.⁸

[61] In the present case the only evidence or allegation relied on to aver peremption is that Overberg and Cato agreed to the second or subsequent arbitration proceedings. Indeed they agreed to those proceedings and initiated a pre-arbitration meeting and nothing further or there is no evidence that the arbitration was concluded or why it was not concluded. Overberg and Cato allege that Caltop abandoned those proceedings, which allegation is not denied by Caltop, conduct Caltop persisted in the whole litigation history between it and Overberg and Cato.

[62] The legal position above as already stated, Overberg and Cato at most should have vacated the enforcement order and communicated same to Caltop. Caltop assumes without more that Overberg and Cato waived the enforcement order when they brought the urgent application before Sibeya J, who restrained Caltop in paras 2 and 3 of his order pending the final determination of the arbitration proceedings and the rescission application.

[63] There is nothing in the evidence, even remotely to suggest that Sibeya J's order preempted the enforcement order or that Overberg and Cato waived their right in the enforcement order. The evidence *aliunde* is that the enforcement order formed the substratum on which Overberg and Cato litigated against Caltop. In fact, it is trite that that order remains valid until set aside by a competent court of

⁸ *Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 634H-635A-B.

law. The author of the order relied on by Caltop, unequivocally ordered that, to give effect to the enforcement order, Caltop is ordered to take steps to cancel the licence under which MFV *Helgoland* is catching (or intends to catch) the monk fish quota, allocated to Caltop. That in my opinion, as already stated, disposes of the whole case of Caltop.

[64] It follows necessarily that there is no irregularity committed by Prinsloo J and the application should fail with costs.

[65] In the result, I make the following order:

1. The application to review and set aside the order of 9 December 2022 and the proceedings before that Court, is dismissed.
2. The matter is remitted to the High Court for a status hearing on 17 April 2025 at 15:00 before Prinsloo, DJP.
3. Caltop to pay the costs of Overberg and Cato, which includes costs of one instructing and one instructed legal practitioner.

MAINGA JA

DAMASEB DCJ

MAKARAU AJA

APPEARANCES

APPLICANT:

G Narib (with him V Kauta)

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FIRST AND SECOND RESPONDENTS:

S P Rosenberg SC

Instructed by Ellis Shilengudwa Inc