



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2020/00209

In the matter between:

EHIKA FISHING (PROPRIETARY) LIMITED

APPLICANT

and

MINISTER OF FISHERIES AND MARINE RESOURCES

FIRST RESPONDENT

MARK FISHING (PROPRIETARY) LIMITED

SECOND RESPONDENT

COLLINS JOHANNES N.O

THIRD RESPONDENT

EDWARD VAN WYK N.O

FOURTH RESPONDENT

ROJO VAN WYK N.O

FIFTH RESPONDENT

Neutral citation: *Ehika Fishing (Proprietary) Limited v Minister of Fisheries and Marine Resources* (HC-MD-CIV-MOT-GEN-2020/00209) [2021] NAHCMD 104 (10 March 2021)

Coram: ANGULA DJP

Heard: 20 January 2021

Delivered: 10 March 2021

Flynote: Civil Contempt of court proceedings – Contempt of court to be established beyond a reasonable doubt – Applicant must prove that there was a court order made by a competent court – That the party alleged to be in contempt was made aware of the court order – That the respondent was both willful and *mala*

fide in failing to comply with the court order – In the present matter, the applicant failed to make out a case that the relief he claimed was not complied with, was part of the order made pursuant to the settlement agreement reached between the parties.

Summary: The applicant is a holder of fishing rights in respect of horse mackerel which rights were granted to it by the Minister of Fisheries and Marine Resources and valid for seven years commencing on 1 January 2012 and terminating on 31 December 2018 – During February 2019, the minister extended the applicant's said fishing rights for a further period of three years expiring on 31 December 2021 – In his letter advising the applicant about the extension of the fishing rights, the minister informed the applicant that notwithstanding the extension of the rights, no fishing quota would be allocated until the issue 'regarding equity participation and the beneficiation of fishermen's widows', which remain outstanding had been resolved.

Aggrieved by the minister's decision, the applicant launched review proceedings in which it sought an order to review and set aside the minister's said decision. The minister initially opposed the application, the parties however managed to settle the dispute and the settlement agreement was made an order of court. The interpretation of that court order is the source of the present dispute between the parties.

The applicant adopted the position that on a proper interpretation of the court order of 5 May 2020, in addition to it directing the minister to allocate to the applicant fishing quotas for the year 2020, it also ordered the minister to allocate to the applicant the fishing quotas for the year 2018/2019 which had been held in reserve by the minister. The minister disputed the interpretation contented by the applicant. This prompted the applicant to launch the present contempt proceedings.

Held; that the minister does not have the power in terms of the Marine Resources Act, No. 27 of 2000 to keep in reserve fishing quotas that had already been allocated for commercial harvesting.

Held; that the minister, in law has no power in terms of the Marine Resources Act, 2000 to allocate fishing quotas with retrospective effect.

Held; that the court order dated 5 May 2020 is a replica of prayer one of the relief set out in the notice of motion of the review application which was conceded to by the minister and which by agreement was made an order of court.

Held; that the quotas allocation for 2018/2019 was not mentioned in the notice of motion which sought to review and set aside the minister's decision made not to allocate fishing quotas to the applicant. Therefore, fishing quotas allocation for 2018/2019 was not part of in the relief sought in the review application and was accordingly not embraced by or being part of court order of 5 May 2020.

Held; that the court order of 5 May 2020 was clear and unambiguous and did not require any interpretation, all it required was the basic understanding of the English language and for the words to be given their ordinary meaning.

Held; that the applicant had failed to make out a case that the minister was in contempt of the court order; and that on the contrary the minister had complied with the court order.

ORDER

1. The application for committal of the first respondent for contempt of a court order is dismissed.
2. The applicant is to pay the first respondent's costs, such costs to include the costs of one instructed counsel and one instructing counsel.
3. The matter is removed from the roll and is regarded as finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1] I have before me an application whereby the applicant seeks an order declaring the first respondent, the Minister of Fisheries and Marine Resources (the 'minister') to be in contempt of a court order and for that reason that the minister be committed to imprisonment. The minister opposes the application and contends that he has complied with the court order in question. The rest of the respondents did not join the proceedings.

Factual background

[2] The facts which gave rise to the dispute between the parties are by and large common cause. The applicant is a holder of fishing rights in respect of horse mackerel which rights were granted to it by the minister. They were valid for seven years, commencing on 1 January 2012 and terminating on 31 December 2018. During February 2019, the minister extended the applicant's said fishing rights for a further period of three years, expiring on 31 December 2021. In his letter advising the applicant about the extension of the fishing rights, the minister informed the applicant that notwithstanding the extension of the rights, no fishing quota would be allocated until the issue 'regarding equity participation and the beneficiation of fishermen's widows', which remained outstanding had been resolved.

[3] Aggrieved by the minister's decision, the applicant launched review proceedings in which it sought an order to review and set aside minister's decision. The minister filed a notice to oppose but did not file an answering affidavit as the parties reached an agreement whereby the minister 'concedes to the relief sought in terms of para 1 of the applicant's notice of motion'. The settlement agreement which was embodied in the parties' joint status report was, by agreement between the parties, made an order of court on 5 May 2020.

[4] Subsequent to the aforesaid settlement, and on 19 May 2020, the minister addressed a letter to the applicant, informing that it has been allocated fishing quotas

amounting to 716, 494 Mt of horse mackerel for the fishing season ending 31 December 2020. By letter dated 26 May 2020 the applicant formally accepted the fishing quotas allocation.

[5] Thereafter the applicant adopted the position that on a proper interpretation of the court order of 5 May 2020, in addition to directing the minister to allocate to the applicant fishing quotas for the year 2020, it also ordered the minister to allocate to the applicant the fishing quotas for the year 2018/2019 held in reserve by the minister. The minister disputed the interpretation of the court order contented for by the applicant. This prompted the applicant to launch the present application for contempt of that court order.

Issue for determination

[6] The crisp issue for determination is whether on a proper interpretation of the 5 May 2020 court order, the minister was ordered to allocate to the applicant, the 2018/2019 quotas held in reserve. If the interpretation leads to the conclusion that the order covers the 2018/2019 quotas allocation then the next question for determination would be, whether the minister acted wilfully and *mala fide* in not complying with that court order and thus acted in contempt of that court order.

Applicable legal principles

Interpretation of a judgment or court order:

[7] The principles governing the interpretation of a judgment or a court order were succinctly outline by our Supreme Court in *Handl v Handl*¹ at para 15 as follows:

[16] It is a well-established rule of law that the principles involved in the interpretation of a judgment or order are essentially the same as those applicable to the construing of documents.² As it was further pointed out in *Firestone South Africa (Pty) Ltd v*

¹ *Handl v Handl* 2008 (2) NR 489 (SC).

² See *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A); *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (AD) at F-H; *Rössing Stone Crushers (Pty) Ltd v Commercial Bank of Namibia & Another* 1994 (2) SA 622 (Nm HC) at 631E-F and the other authorities there cited.

*Gentiruco AG*³:

"[T]he court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it. Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. [Reference to authorities omitted]."

Requirements for committal for contempt of a court order:

[8] The Supreme Court in *Teachers Union of Namibia v Namibia National Teachers Union*⁴, endorsed the approach which takes into account that civil contempt proceedings has the characteristics of both civil and criminal law and for that reason it should be fully compliant with the Constitutional provisions of protection of personal liberty and a fair trial. This approach requires that the crime of contempt in respect of a civil order be proved beyond reasonable doubt.

[9] The court proceeded to lay down the requirements for the committal for contempt of a court order: These are that; the applicant has the onus to prove beyond reasonable doubt that there is a court order issued by a competent court; that the order has been served on the respondent; that there has been non-compliance with the order by the respondent; and that such non-compliance is wilful

³ *Firestone South Africa (Pty) Ltd v Gentiruco AG* at 304D–H.

⁴ *Teachers Union of Namibia v Namibia National Teachers Union* (SA 26-2019) [2020] NASC (7 May 2020).

and *mala fide*. Once the applicant has proved the order, service or notice and non-compliance, the respondent bears the evidential burden in relation to wilfulness and *mala fide* requirements: Should the respondent fail to present evidence to establish beyond reasonable doubt that the non-compliance was not wilful and *mala fide*, contempt will have been established beyond reasonable doubt.⁵

2018/2019 quotas allocation to the applicant

[10] Before embarking on the interpretation of the court order, I deem it necessary to set out the origin of the 2018/2019 fishing quotas which are at the heart of the present dispute between the parties in this matter. It is clear that the 2019/2020 fishing quotas had been allocated by the minister, following the court order of 5 May 2020 and been accepted by the applicant. The 2019/2020 fishing quotas allocation is therefore not in dispute. The minister contends that he has complied with that court order.

[11] In considering the issue for determination it is necessary to first have regard to the relevant statutory provisions of the Marine Resources Act, Act No. 27 of 2000 ('the Act') which are, for the purpose of the present matter, ss 38, s 41 and the definition of 'reserve in s 1'. Section 38 gives power to the minister to determine a total allowable catch (TAC) 'in a given period' consisting of three categories, namely commercial harvesting, non-commercial harvesting; and reserve. Section 41 gives power to the minister to suspend, cancel or reduce the fishing rights, quotas or licences. Lastly, the 'reserve' is defined in s 1 as 'the part of the total allowable catch determined by the minister under s 38(2) for allocation as the minister may determine'. Having set out the relevant statutory provisions, I now turn to deal with the 2018/2019 fishing quotas allocation.

[12] As regards the 2018/2019 fishing quotas, it is common ground that by letter dated 24 August 2018 the Permanent Secretary of the Ministry of Marine Resources advised the second respondent, Mark Fishing (Pty) Ltd, that the minister had allocated 'the reserve horse mackerel quotas allocation to four companies in your group'; and that, 'This Allocation to the four companies in your group excludes the portion of Ehika Fishing (Pty) Ltd which is 260 Mt value addition quota as wet fish

⁵ *Namibia Financial Institutions v Christian and Another* 2011 (2) NR 537 HC.

and 606.856 Mt as freezer fish which is kept in reserve until all outstanding matters have been resolved.’ These are the fishing quotas reserve which the applicant contends ought to have been released by the minister pursuant to the court order of 5 May 2020.

[13] Counsel were *ad idem* that an allocated fishing quota is only valid ‘in a given period’ of its allocation which is normally a year commencing from beginning of January and terminating end December in that particular year, commonly referred to as ‘the fishing season’. Counsel were further in agreement that the minister is not authorised by the Act to grant quotas with retrospective effect. In other words, in this particular matter, the minister could not allocate to the applicant the 2018/2019 fishing quotas during the 2020 allocations out of 2020 total allowable catch.

[14] Mr Boesak for the applicant however argued that, the applicant’s 2018/2019 fishing quotas were not cancelled but were simply suspended in terms of s 41 of the Act, therefore when the suspension was uplifted the minister was bound to allocate the suspended fishing quotas to the applicant. Counsel further submitted that s 38(2) of the Act gives power to the minister to allocate fishing quotas to the reserve and therefor ‘there can be no legal prohibition for the first respondent (‘the minister’) to allocate such quotas to the applicant’.

[15] Mr Akweenda for the minister, argued contra-wise. Counsel pointed out that for the minister to accumulate or ‘bring forward’ the quotas allocated in the previous year to the following year would defeat and undermine the whole purpose of the system of the yearly total allowable catch. I agree with counsel’s submission in this regard. I am of the firm view that once it is accepted that fishing quotas are allocated valid for that particular fishing season it cannot be carried over to the following year’s fishing season even if it was held in reserve. This is because, if the quotas were to be carried forward from the previous year to the following year, that would mean that fishing rights holders would continue to have ‘accumulated quotas credits’ with the ministry in the event they could not manage to harvest the previous year’s allocated quotas. Such a practise would throw the whole system of total allowable catch into disarray. This is because TAC is determined by the minister ‘in a given period’ on the basis of the best scientific evidence available and having regard to the advice of the advisory council. In this regard, Mr Akweenda points out that it is the biomass of a

given fishing season which determines the TAC for which the fishing quotas are allocated. I agree with counsel's submission. If for instance the biomass is unfavourable in a particular fishing season the minister might not determine the TAC for that particular fishing season.

[16] To my mind, the foregoing view is reinforced by the fact that if a quotas' holder failed to harvest the fishing quotas allocated to him or her in a particular fishing season he or she is obliged to return the unharvested quotas to the ministry and is not allowed to keep it neither is he or she allowed to transfer such quota to another person except with the minister's consent.

[17] Section 38 of the Act authorises the minister to allocate three separate categories of quotas for harvesting namely commercial, non-commercial and reserve. By letter dated 28 November 2011, the minister advised the applicant that 'a right to harvest for commercial purpose, horse mackerel for a period of seven years' had been granted. That right was extended in February 2019 for a further period of three years terminating in December 2021. It is important to stress that the allocation was made for 'commercial purpose' and not to be kept in reserve.

[18] As indicated earlier the category 'reserve' is, part of the allowable catch determined by the minister under s 38(2) for allocation as the minister may determine. Notwithstanding the 'reserve' label placed on the applicant's 2018/2019 fishing quotas allocated by the minister, such quotas allocation did not qualify as 'reserve' within the meaning and intent of the Act. In my judgment, once the fishing quotas have been allocated to a holder of fishing rights for commercial harvesting, the minister is not authorised by the Act to keep the allocated fishing quotas in reserve. The minister has the power to allocate fishing quotas and the power to decline to make an allocation. Section 41, authorises the minister, in the event of stipulated contraventions, or conviction of a quota holder of an offence under the Act, to suspend, cancel or reduce fishing quotas so allocated.

[19] Mr Akweenda, correctly in my view, pointed out that just because the minister chose to label the quotas allocation 'reserve' such quotas allocation does not constitute a 'reserve' within the meaning of the Act.

[20] It has been held in this connection that the doctrine of legality demands that the exercise of any public power must be authorised by law. If a public functionary purports to exercise power or performs functions outside the parameters of his or her legal authority, he or she usurps powers of State constitutionally entrusted to legislative authorities and other functionaries.⁶ Applying the principle of legality to the action by the minister of keeping the applicant's allocated fishing quotas in reserve, while they were allocated for commercial harvesting, I am of the view that such act is not valid in law and lacks legality as it is not authorised by the Act. The minister is only authorised by the Act to allocate quotas reserve for allocation as the 'minister may determine'. This means, to my understanding, that the fishing quotas in reserve have not yet been allocated. It follows therefore, in my considered view that, by purporting to keep the allocated fishing quotas in reserve, the minister acted outside the power vested upon him by the Act and that such purported action amounts to a nullity in law.

[21] There can be no doubt, that the 2018/2019 fishing quotas allocated to the applicant were allocated for the purpose of harvesting and selling by the applicant in the ordinary course of its business and thus for a commercial purpose. The fishing quotas were never and could never have been allocated as 'reserve' allocation 'as the minister may determine'. In addition, as pointed out earlier, on proper reading of the provisions of the Act the purpose and objectives of the system of declaration of a yearly 'total allowable catch', it is not permissible for the minister to have carried forward the 2018/2019 fishing quotas previously allocated to the applicant, to the year 2020 total allowable catch. Conversely, the minister is not authorised by the Act to allocate to the applicant from the year 2020 total allowable catch with retrospective effect to 2018/2019 fishing year. For those reasons Mr Boesak's first leg of argument stands to be rejected.

[22] As regards to Mr Boesak's second leg of argument to the effect that the 2018/2019 fishing quotas were not cancelled but were only suspended in terms of s 41 of the Act, this argument stands to be rejected for two reasons: Firstly, it is not supported by the facts pleaded in the papers before court. The Acting Permanent Secretary's letter of 24 August 2018 clearly informed the applicant that the quota

⁶ *Rally for Democracy v Electoral Commission* 2010 (2) NR 487 para 23.

allocated to the applicant would 'be kept in reserve until all outstanding matters have been resolved'. The letter did not say that the allocation was suspended.

[23] Secondly, the applicant invoked reliance on s 41 of the Act, in its replying affidavit claiming that the fishing quotas were suspended. This constitutes a new cause of action. This is not permissible. This allegation should have been pleaded in the founding affidavit. If the court were to permit the applicant to raise this new cause of action, the minister would be prejudiced in that he would not be able to respond to the new allegation belatedly raised in the replying affidavit.⁷ In other words the minister would not be in position to admit or deny whether the allocation was indeed suspended or not.

[24] To the extent that I may have erred in my conclusion on the 2018/2019 fishing quotas allocated to the applicant as not still being kept in the reserve, I proceed to consider whether (if it still in existence) it was covered or ordered to be released by the court order of 5 May 2020.

[25] The starting point is to consider the relief sought by the applicant in the review application. This is so because a court order will ordinarily mirror the relief sought by the applicant in the notice of motion. This approach is based on the well-established principle that a court is not permitted to issue an order which was never applied for by any of the litigants before court⁸.

[26] The notice of motion in respect of the review proceedings reads:

'TAKE NOTICE that EHIKA FISHING (PROPRIETARY) LIMITED (herein after called the applicant) intends to make an application to this court for an order –

1. Reviewing and correcting or setting aside the decision by the first Respondent to withhold the allocation of fishing quotas to the Applicant of its existing right;
2. Granting such further or alternative relief as the above Honourable Court may deem fit.'

(Underlining supplied for emphasis)

⁷ *Nelumbu and Others v Hikumwah and Others* 2017 (2) NR 433 (SC).

⁸ *Namibia Airports Co Ltd v Fire Tech Systems CC and Another* 2019 (3) NR 605 (SC).

[27] It is common ground that the review application did not proceed to court but the dispute was settled between the parties by way of a settlement agreement which was recorded in a Joint Status Report signed by the legal practitioners for the parties which was submitted to the court to make that agreement an order of court. The settlement read thus:

‘The First Respondent concedes to the relief sought in paragraph 1 of the notice of motion and the parties have agreed to each carry the burden of their own costs.’

[28] On 5 May 2020 the court made the order in the following terms:

- ‘1. The decision of the First Respondent [Minister] to withhold the allocation of the fishing quotas to the applicant in terms of its existing fishing rights, is hereby reviewed and set aside.
2. Each party pays its own costs.
3. The matter is removed from the roll: Case Finalised.’

[29] It is to be noted that the applicant sought to review and set aside a ‘decision’ and not ‘decisions’. This is an important consideration for the reason that the decision by the minister to keep in reserve the fishing quotas allocated to the applicant for the fishing season 2018/2019 and the minister’s decision in 2020 to withhold the allocation of fishing quotas to the applicant, constituted two separate and independent decisions. I think it is fair to say that if the applicant intended to have both decisions reviewed and set aside, it would have framed its relief accordingly. In other words, it would have sought an order reviewing and setting aside the minister’s ‘decisions’ and not only the minister’s ‘decision’ made in 2020.

[30] Furthermore, the applicant sought an order to review and set aside the minister’s decision ‘to withhold the allocation’ of the applicants fishing quotas. It is common cause that the applicant’s quotas for the fishing season 2018/2019 were not withheld but were allocated and then subsequently kept in reserve. This much is clear from the letter by the Acting Permanent Secretary dated 24 August 2018

addressed to the third respondent which is part of the group of the applicant's companies. The letter reads in part as follows:

'This allocation to the four companies in your group excludes the portion of Ehika Fishing (Pty) Ltd which is 260 mt value addition quotas as wet fish and 606.856 mt as freezer fish which is kept in reserve until all outstanding matters have been resolved.'
(Underlining supplied for emphasis)

[31] It is thus clear from that letter that the fishing season's 2018/2019 fishing quotas allocation were not withheld but were 'allocated' and were then simply held in reserve whereas in respect of the year 2020 fishing quotas, the allocation of the quotas was totally withheld. The minister categorically stated that 'No fishing quotas will be allocated'. The fishing season 2018/2019 fishing quota allocation was not mentioned in the notice of motion which sought to review and set aside the minister's 2020 decision to withhold fishing quota allocation to the applicant. I therefore hold that the fishing season 2018/2019 quota allocation was not part of the relief sought in the review application and was also not embraced in the court order of 5 May 2020.

[32] As can be noted from the reading of the court order of 5 May 2020, it merely repeated prayer one of the notice of motion by stating 'that the decision of the first respondent to withhold the allocation of the fishing quotas to the applicant in terms of its existing fishing rights, is hereby reviewed and set aside.'

[33] Mr Boesak reluctantly conceded that the court order of 2 May 2020 was not wrong but counsel contended that the order could have been better formulated. He did not however indicate in what way it was inelegantly drafted or in what way it could be improved upon. Mr Akweenda, on the other hand pointed out that there was nothing wrong with the manner in which the order was drafted as it merely repeated or restated prayer one of the notice of motion which was conceded to by the minister and which the parties by agreement asked the court to make an order of court.

[34] I agree with Mr Akweenda's submission. The court order is clear and unambiguous and does not require any interpretation. Order number one is made up of one long sentence with one comma. The second order is about costs. It is not in dispute. All that order number one requires is a plain reading and understanding of

the English language and for the words to be given their ordinary meaning. If one reads prayer one of the notice of motion with order number one of the court order, side by side, they constitute a mirror image of each other, word for word.

Conclusion

[35] I have therefore arrived at the conclusion that the applicant has failed to make out a case that the 5 May 2020 court order commanded the minister to allocate to the applicant the 2018/2019 fishing quotas allegedly kept in reserve. For this reason, I hold that the applicant has failed to prove that the minister has not complied and is in contempt of the court order of 5 May 2020. On the contrary the minister has fully complied with that order by allocating fishing quotas to the applicant as per that court order. He cannot therefor be held to be in contempt of that order.

[36] In so far as might be necessary to state and for avoidance of doubt, in view of the conclusion that I have reached with regard to the ambit and extent of the court order of 5 May 2020 to the effect that it did not extend or include the 2018/2019 fishing quotas, it became unnecessary to consider whether the minister is liable for committal for contempt of that court order.

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

1. The application for committal of the first respondent for contempt of a court order is dismissed.
2. The applicant is to pay the first respondent's costs, such costs to include the costs of one instructed counsel and one instructing counsel.
3. The matter is removed from the roll and is regarded as finalized.

H Angula
Deputy Judge-President

APPEARANCES:

APPLICANT:

A W BOESAK (with him E E COETZEE)

Instructed by Tjitemisa & Partners, Windhoek

FIRST and SECOND

RESPONDENTS:

S AKWEENDA (with him F KADHILA)

Instructed by Office of the Government Attorney,
Windhoek