NOT REPORTABLE

CASE NO. A 293/11

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ETALE HOLDINGS (PTY) LTD	**1st APPLICANT**
ETALE FISHING COMPANY (PTY) LTD	**2nd APPLICANT**
SILVANUS THIKAMENI KATHINDI N.O., in his capacity as trustee for the time being of the BOBBOH FAMILY TRUST	**3rd APPLICANT**
RICHARD TRAUGOTT DIETHELM MUELLER N.O., trustee for the time being of the BOBBOH FAMILY TRUST	**4th APPLICANT**

and

OZOHI FISHING COMPANY (PTY LTD	**1st RESPONDENT**
OMPAGONA FISHING COMPANY (PTY) LTD	**2nd RESPONDENT**
EHANGA HOLDINGS (PTY) LTD	**3rd RESPONDENT**

CORAM: CORBETT, A.J

Heard on: 18, 24 November 2011

Delivered on: 8 December 2011

JUDGMENT

CORBETT, A.J: .

[1] The first and second applicants brought an urgent application on 1 November 2011 seeking a *mandamus* in terms whereof the Minister of Fisheries and Marine Resources ("the Minister") be directed to determine, in terms of the Marine Resources Act, No. 27 of 2000, the applications lodged on 7 October 2011 by the applicants with the Minister for the licensing of fishing vessels. The applications had been lodged in terms of section 40(3) of the Act for the commercial catching of hake by the fishing vessels MFV *Etale Bounty* and the MFV *Twafika*, to be used by the quota holders, being the second and third respondents, during the fishing season which had commenced on 1 May 2011 and which would continue until 30 April 2012.

[2] In that matter I found that the applicants had no more than a derivative right to the relief sought and that the marine resources rights holders (the second and third respondents in this application) were the entities clothed with *locus standi* to bring the application for a *mandamus*, but chose not to do so. On this basis, I dismissed the application with costs.

[3] The problem that besets the first and second applicants is that the second and third respondents still do not wish to take action against the Minister to bring the *mandamus*. This is ostensibly the reason why the applicants have again

approached the Court on an urgent basis, together with Silvanus Kathindi and Richard Mueller, the latter in their capacities as trustees for the time being of the Bobboh Family Trust. The Bobboh Family Trust is a minority shareholder in the second respondent.

[4] In 1999 Northern Fisheries Industries (Pty) Ltd and the respondents concluded a written agreement. The purpose of the agreement was that these companies (referred to in the agreement as “concessionaries”) would pool their wet hake fish quotas so as to share in the economies scale and other benefits to be derived from the rationalization of their catching, processing and marketing efforts. In order to give effect to this purpose, the first applicant was incorporated in 2004. This company in turn holds all the shares in the second applicant. The first applicant authorizes the second applicant to conduct the fishing, processing and marketing of hake on behalf of itself and the respondents.

[5] The harvesting of marine resources in terms of section 39 of the Act is subject to a quota being granted by the Minister limiting the quantity of fish that may be harvested during the fishing season by any rights holder. Section 32 (3) of the Act provides that no person may use any vessel to harvest any marine resources for commercial purposes except in terms of a licence issued in terms of section 40 (3) of the Act.

[6] The relief sought in this application (expressed in somewhat tortuous terms) is premised upon two distinct causes of action. Firstly, the applicants seek orders directing the second and third respondents, at the behest of the first and second applicants, to give effect to the spirit, purpose and intent of the pooling agreement by taking the necessary steps to have the fishing licences for the vessels *Etale Bounty* and *Twafika* issued by the Minister. Secondly, the third and fourth applicants, as members of the second respondent, seek in terms of section 260 of the Companies Act, No. 28 of 2004 an order that the second respondent take the necessary steps to have a fishing licence issued by the Minister in respect of the *Etale Bounty*.

[7] The second and third respondents ("the respondents"), in opposing the application, raise several defences. *In limine*, it is contended on their behalf that the relief sought in prayers 2.2, 2.6, 3.2 and 3.6 of the notice of motion involves matters which are *res judicata*, the Court having made a ruling in respect thereof in the earlier urgent application. Non-joinder is raised as a further objection to the relief sought in that the Minister is not cited as a party, it being contended that the relief sought in several of the prayers contained in the notice of motion "*affects*" the Minister. The respondents also challenge the urgency of the application and suggest (although this is not explicitly spelt out) that reliance is placed on the *exceptio non adimpleti contractus* disentitling the applicants to the relief sought. Further reliance is placed on the contention that a case is not been made out in terms of section 260 of the Companies Act such as to entitle the third and fourth applicants, as minority shareholders, to obtain the relief sought. I will deal with

these issues in turn.

Res judicata

[8] The requirements for a successful reliance on the *exceptio rei judicatae vel litis finitae* are:

> "[2] … *idem actor, idem reus, eadem res* and *eadem causa petendi*. This means that the *exceptio* can be raised by a defendant in a later suit against a plaintiff who is 'demanding the same thing on the same ground' (*per* Steyn CJ in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562 A); or which comes to the same thing, ' on the same cause for the same relief' (*per* Van Winsen AJA in *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-B; see also the discussion in *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 664 C-E); or which also comes to the same thing, whether the 'same issue' had been adjudicated upon (see *Horowitz v Brock* 1988 (2) SA 160 (A) at 179A-H).
>
> [3] The fundamental question in the appeal is whether the same issue is involved in the two actions: in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause, or, to put it more succinctly, has the same issue now before the court been finally disposed of in the first action ?" [1]

[9] The findings of this Court in the earlier urgent application involved the first

1 National Sorghum Breweries v International Liquor Distributors, 2001 (2) SA 232 (SCA), at 239

and second applicants, and the second and third respondents, in this application. Additional to such respondents in the earlier application, were the Minister and the Permanent Secretary of the Ministry of Fisheries and Marine Resources. The relief sought was purely against the Minister. The earlier application was dismissed on the narrow basis that the applicants lacked *locus standi* to bring the application. That was the only issue dealt with.

[10] The relief sought by way of a mandamus relating to the applications for the fishing licenses was not considered in the judgment. In fact, what has transpired in this application is that the applicants have re-launched the application, on a different basis seeking no relief against the Minister, but rather seeking to enforce the pooling agreement, alternatively seeking relief under section 260 of the Companies Act. In my view this amounts to a different cause of action concerning issues that were not disposed of in the earlier application. I accordingly find that there is no merit in the defence of *res judicata* sought to be advanced by the respondents.

Non-joinder of the Minister

[11] A third party who has, or may have, a direct and substantial interest in any order the Court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the Court is satisfied that such

person has waived the right to be joined. [2] For joinder to be essential, the parties to be joined must have a direct and substantial interest not only in the subject-matter of the litigation, but also in the outcome of it. [3]

[12] It was contended by Mr Oosthuizen SC, who appeared together with Mr Phatela, that the relief sought in prayers 2.3, 2.4, 2.5, 3.3, 3.4 and 3.5 of the notice of motion affects the Minister, and for this reason the Minister should have been cited as party to the application. In essence, the relief sought in these prayers requires of the second and third respondents to take certain steps, which when taken, would impact upon the Minister. [4] In my view, the Minister's "*interest*" only arises should the order be given and steps are taken in terms of the order by the second and third respondents against the Minister. I am of the view that, whilst the Minister might ultimately have an indirect interest in the subject-matter of the litigation, prior to the steps taken by the second and third respondents such interest is not elevated to one which is direct and substantial enough to warrant the joinder of the Minister. It is self-evident that no order is sought directly against the Minister at this stage. In the circumstances, I am of the view that the issue of non-joinder raised by the respondents has no merit.

Specific performance and the pooling agreement

2 Amalgamated Engineering Union v Minister of Labour, 1949 (3) SA 637 (A), at 659
3 Haroun v Garlick [2007] 2 All SA 627 (C), at para [14]
4 Shixwameni & Others v Congress of Democrats and Others, 2008 (1) NR 134 (HC), at 161, para [61]

[13] Mr Barnard, on behalf of the applicants, contended that the relief set out in prayer 2 of the notice of motion is based upon the entitlement of the applicants to specific performance of the contractual obligations arising from the pooling agreement. These obligations are to be found in various provisions of the agreement, including that:

> "3.4 The Concessionaries each hold a right of exploitation to catch wet fish hake and wish to pool their quotas so as to share in the economies of scale and other benefits to be derived from the rationalisation of their catching, processing and marketing effort;
>
> 3.5.4 The Concessionaries will each grant Etale the right to utilise their respective concessions;
>
> 4.2 The sole purpose of Etale will be to conduct fish catching, processing and marketing operations pursuant to this agreement;
>
> 8.1 Each Concessionary irrevocably and *in rem suam* hereby authorizes Etale for as long as the Concessionary holds a concession or until the parties unanimously otherwise agree, to catch such fish as the Concessionary is from time to time entitled to catch in terms of its quotas;
>
> 18. The parties undertake at all times to do all such things, perform all such actions and to take such steps (including in any particular case the

> exercise of their voting rights in a company) and to procure the doing of all such things, the performance of all such actions and the taking of all such steps as may be open to them and necessary for or incidental to the putting into effect and maintaining of the provisions of this agreement. The parties further warrant and undertake that in the implementation of this agreement and in any other dealings with each other they shall observe the utmost good faith and they undertake to give full effect and intent to the purposes of this agreement and not to do anything or refrain from doing anything which might prejudice or detract from the rights, property or interests of the others of them."

[14] The applicants' contention can be summarized as follows: the purpose of the pooling agreement is to catch hake. In order to catch hake fishing vessels have to be licensed in terms of section 32 (3), read together with section 40 (3) of the Marine Resources Act. Without a licence hake cannot be caught in Namibian waters, and in the absence of hake being caught, the purpose and intent of the pooling agreement cannot be fulfilled. Should the second and third respondents fail to take the necessary administrative steps to ensure that the quotas allocated to them can be fished, such failure on their part would amount to a negation of their obligations in terms of the pooling agreement. By failing to take steps to require that the Minister determine the applications in respect of the vessels *Etale Bounty* and *Twafika* the respondents are in breach of the pooling agreement. The applicants then seek in terms of prayer 2 of the notice of motion an order of specific performance of the second and third respondent's

aforementioned obligations in terms of the pooling agreement.

[15] The sanctity of contract was stressed in argument. In *Knox D'Arcy Ltd and Another v Shaw and Another* Van Schalkwyk J said [5]:

> "The principle *pacta sunt servanda* has, as was argued by counsel for the applicant a well established pedigree. C Visser in (1984) 101 *SALJ* 641, at 660 says:
>
> 'It is clear that it was generally accepted by the Roman-Dutch authorities, both writers and the courts, that the principle of sanctity of contract was of universal application in Roman-Dutch law and practice. …
>
> On a theoretical level it would seem to follow that where a system of contract is based on consensus, a necessary corollary would be the principle of sanctity of contract as a result of the underlying notion of good faith…The only basis on which a person can be bound in a consensual system of contract is simply that he has given his word. In such a system sanctity of contract would logically seem to take pride of place.'
>
> This is the principle which was adopted by the Appellate Division in the *Magna Alloys* case.
>
> It must be understood that there is a moral dimension to a promise which is seriously given and accepted. It is generally regarded as immoral and dishonourable for a promissor to breach his trust and, even if he does so to escape the consequences of a poorly considered bargain, there is no principle that inheres in an open and democratic society, based upon freedom and equality, which would justify his repudiation of his obligations. On the other hand, the enforcement of a bargain (even one which was ill-considered) gives

5 1996 (2) SA 651 (W), at 660 F – 661 A

> recognition to the important constitutional principle of the autonomy of the individual."

[16] Reliance was placed by the applicants on the principle that a Court should come to the assistance of a party seeking enforcement of a contract. Davidson J in *Industrial and Mercantile v Anastassiou Bros* stated:

> "It seems to me that a Court should avoid becoming supine and spineless in dealing with the offending contract breaker, by giving him the benefit of paying damages rather than being compelled to perform that which he had undertaken to perform and which, when he was called upon to perform by summons, and he chose to defy the claim of the plaintiff." [6]

[17] The applicants contend, on the principles of *pacta sunt servanda*, that the second and third respondents should be required to comply with their obligations in terms of the pooling agreement. Damages for non-compliance would not suffice. The applicants accordingly should be ordered to ratify the steps already taken to apply for fishing licences for the vessels *Etale Bounty* and *Twafika*, and furthermore, should be directed to put pressure on the Minister to issue the licences, failing which the respondents must institute urgent legal proceedings for a *mandamus* to require that the Minister determine the applications.

The *exceptio non adimpleti contractus* and reciprocity

6 1973 (2) SA 601 (W) at 609 A - C

[18] The respondents refer in their opposing papers to the first and second applicants being in material breach of the provisions of the pooling agreement. This is based upon the failure by the first and second applicants to pay the quota fees levied in terms of the Marine Resources Act, and furthermore, their failure to pay the usage fees to the respondents as required by the pooling agreement. In the opposing papers Mr De Gouveia claims that the catching rights which the first and second applicants are seeking to enforce "*come with corresponding obligations to pay usage fees and levies*". It is contended on behalf of the respondents that the failure to pay these fees and levies disentitles the applicants to the relief sought. The ground of opposition to be derived from these allegations (although not expressly stated but more fully advanced by Mr Oosthuizen in argument) is the reliance by the respondents upon the defence of the *exceptio non adimpleti contractus*. The further defence raised is that the relief sought is not competent due to the first and second applicants' failure to pay quota fees as required by the Marine Resources Act. These defences will be dealt with in turn.

[19] A claim for specific performance is only competent if the plaintiff or the applicant has performed or is ready or willing to perform any obligations resting upon him or her which are due and reciprocal. In considering the issue of reciprocity, this Court per Maritz J (as he then was) in *Du Plessis v Ndjavera*

stated: [7]

> "The *exceptio non adimpleti contractus* as a defence in an action for specific performance is inextricably linked to the principle of reciprocity under a bilateral contract – as Jansen JA remarked after an extensive analysis of the Roman law and the Roman Dutch common law in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*, 1979 (1) SA 391 (A), at 417 H, the *exceptio* is a 'meeganger' ('companion') (literally translated) of the principle of reciprocity. It is only if and when there are reciprocal obligations contemplated in a contract (irrespective of whether they are to be discharged concurrently or consecutively) that the *exceptio* may have afforded a defence to a claim for specific performance."

[20] This point is explained by Corbett J (as he then was) in *Ese Financial Services (Pty) Ltd v Cramer* as follows:[8]

> "In a bilateral contract certain obligations may be reciprocal in the sense that the performance of the one may be conditional upon the performance, or tender of performance, of the other. This reciprocity may itself be bilateral in the sense that the performance, or tender of performance, of them represent concurrent conditions; that is, each is conditional upon the other. A ready example of this would be delivery of the *res vendita* and payment of the purchase price under a cash sale. (See *Crispette and Candy Co Ltd v Oscar Michaelis NO and Another* 1947 (4) SA 521 (A) at 537.) Alternatively, the reciprocity may be one-sided in

7 2002 NR 40 (HC), at 43 F - H
8 1973 (2) SA 805 (C) at 808H – 809D

that the complete performance of his contractual obligation by one party may be a condition precedent to the performance of his reciprocal obligation by the other party. In other words the obligations, though inter-dependent, fall to be performed consecutively. An example of this would be a *locatio conductio operis* whereunder the *conductor operis* is normally obliged to carry out the work which he is engaged to do before the contract money can be claimed. In such a case the obligation to pay the money is conditional on the preperformance of the obligation to carry out the work, but, of course, the converse does not apply (see, eg. *Kamaludin v Gihwala* 1956 (2) SA 323 (C) at 326, De Wet and Yeats *Kontraktereg* 3rd ed at 139)."

[21] In *Minister of Public Works and Land Affairs and Another v Group Five Building Ltd* Marais JA said: [9]

"Reciprocity of debt in law does not exist merely because the obligations which are claimed to be reciprocal arise from the same contract and each party is indebted in some way to the other. A far closer, and more immediate correlation than that is required. See *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 415H-418C. The contractor's right [*under a building construction contract*] to claim damages for a breach of contract is not matched by any *particular* obligation towards appellants on its part. It is not required to have performed or to tender performance of any reciprocal obligation in asserting such a claim."

9 1996 (4) SA 280 (A), at 288 E - G

[22] The general principles governing the determination whether obligations of parties to a contract are reciprocal, such that the *exceptio* may be raised, have been set out in *Grand Mines (Pty) Ltd v Giddey NO* where Smalberger JA, delivering the judgment of the majority of the court (Schutz JA dissenting on the facts), stated[10]:

> "Where the common intention of parties to a contract is that there should be a reciprocal performance of all or certain of their respective obligations the *exceptio* operates as a defence for a defendant sued on a contract by a plaintiff who has not performed, or tendered to perform, such of his obligations as are reciprocal to the performance sought from the defendant. Interdependence of obligations does not necessarily make them reciprocal. The mere non-performance of an obligation would not *per se* permit of the *exceptio*; it is only justified where the obligation is reciprocal to the performance required from the other party. The *exceptio* therefore presupposes the existence of mutual obligations which are intended to be performed reciprocally, the one being the intended exchange for the other…"

[23] As a starting point, an interpretation of the pooling agreement is necessary to decide whether reciprocity applies. In *MAN Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd t/a Dorbyl Transport Products and Busaf* Cloete JA held[11]:

> "In contracts which create rights and obligations on each side, it is basically a

10 1999 (1) SA 960 (SCA) at 965E- G, quoted with approval in Ndjavera v Du Plessis, 2010 (1) NR 122 (SC) at 131 I – 133C
11 2004 (5) SA 226 (SCA) at 233 para [12]

> question of interpretation whether the obligations are so close connected that the principle of reciprocity applies: *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 418B and the authorities there quoted. Where a contract is bilateral the obligations on the two sides are *prima facie* reciprocal unless the contrary indication clearly appears from a consideration of the terms of the contract: *Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 761 *in fine*-762 A; *Grand Mines (Pty) Ltd v Giddey NO* 1999 (1) SA 960 (SCA) at 971 C-D.

'For reciprocity to exist' Corbett J (as he then was) explained in *Ese Financial Services (Pty) Ltd v Cramer –* [12]

> "there must be such a relationship between the obligation to be performed by the one party and that due by the other party as to indicate that one was undertaken in exchange for the performance of the other and, in cases where the 'obligations are not consecutive, *vice versa*."

[24] It can be that an agreement, although bilateral, reflects that the applicant's obligation is collateral and the respondent's performance is not conditional upon performance by the applicants. In the matter of *Wynns Car Care Products (Pty) Ltd v First National Industrial Bank Ltd* Hefer JA stated the following: [13]

> "It is not inappropriate to be reminded that the *exceptio non adimpleti contractus*

12 At 809D - E
13 1991 (2) SA 754 (A), at 757 E – G (approved in Miloc Financial Solutions v Logistic Technologies, 2008 (4) SA 325 (SCA), at 340, para [51])

> – which is essentially the appellant's defence – presupposes the existence of mutual obligations which the parties intended to perform reciprocally, the one being the intended exchange for the other. …Since their intention is to be sought primarily in the terms of the agreement *(Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 761 *in fin*) the enquiry turns in any particular case on the interpretation of the agreement *(BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 418B)."

[25] What is required, is to ascertain the common intention of the parties from the provisions of the pooling agreement as a whole. [14] No express provisions relating to reciprocity are provided for in the pooling agreement. The respondents do not expressly allege any reciprocal obligations. In any event, in this regard the parol evidence rule would preclude the Court from relying upon such secondary evidence in the absence of the recognized exceptions to the rule. [15] In its broadest terms the pooling agreement obliges the respondents to pool their wet fish hake quotas with the second applicant to share in economies of scale and other benefits to be derived from the rationalisation of their catching, processing and marketing efforts. It also requires in clause 18 under the heading "*co-operation*" that the parties to the agreement "*do all such things, perform all such actions and take all such steps … and to procure the doing of all such things, the performance of all such actions and the taking of all such steps as may be open to them and necessary and incidental to the putting into*

14 Du Plessis v Ndjevera *supra*, at 45 F. See also: Cape Provincial Administration v Clifford Harris (Pty) Ltd, 1997 (1) SA 439 (A), at 445 G; Swart en 'n Ander v Cape Fabrics (Pty) Ltd, 1979 (1) SA 195 (A), at 202 C

15 Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd, 1941 AD 43, at 47

effect and maintaining of the provisions of …" the pooling agreement. The applicants contend that it is these obligations which form the *causa* in respect of the relief sought in regard to specific performance. Such actions would, so it is contended by the applicants, include the taking of all necessary steps by the respondents to ensure that the Minister issue fishing licences in respect of the vessels *Etale Bounty* and the *Twafika.*

[26] The crux of the defence then revolves around the question as to whether the obligations imposed upon the second applicant to pay quota levies and usage fees amount to reciprocal obligations to those owed by the second and third respondents to cause the vessels to be licenced, which if not complied with, entitle the respondents to raise the *exceptio*. Clause 18 amounts to bilateral obligations imposed on the parties, but that factor is not determinant of reciprocity. [16]

[27] As far as quota levies are concerned, the pooling agreement provides that:

> "8.3 Etale shall be responsible for the payment of all costs attendant upon the catching of the fish permitted in terms of the concessions but excluding any quota levies payable to the State in respect of specific quotas which shall remain the responsibility of the Concessionaries themselves. To the extent that such levies are payable prior to the Concessionaries receiving payment in terms of this agreement Etale will pay the levies as and when

16 Du Plessis v Ndjevera *supra,* at 44E - F

> due and set-off such payments against the amounts payable to the Concessionaries in terms of 11.2 (*in fact clause 12.2*). Etale shall be responsible for all by-catch, research and other levies that the Minister of Fisheries and Marine Resources may impose from time to time (other than the quota levies referred to above)."

Due to financial constraints usage fees were not paid to the respondents and accordingly in terms of the clause 8.3 of the agreement the obligation to pay them rests on the second applicant. It is self-evident that the quota levies are to be paid to the Ministry of Fisheries and Marine Resources by the second applicant on behalf of the respondents as and when they are due. The applicants admit that they are in arrears with the payment of quota levies, but allege that they have come to an agreement with the Minister with regard to paying off the arrears. This is denied by the respondents who contend that there is no provision in the Marine Resources Act authorising the Minister to agree to this. It is not necessary to decide this disputed issue, for the reasons set out below.

[28] The second applicant's and the respondents' obligations in terms of clause 18 of the pooling agreement are bilateral, which would suggest that they are *prima facie* reciprocal. The bilateral nature thereof, and the interdependence of clause 18 with clause 8.3 does, however, not necessarily make them reciprocal, nor does the fact that the obligations are contained in the same agreement. Critical to whether reciprocal obligations are owed, is a consideration of whether the performance of one may be conditional upon performance, or the

tender of performance, of the other. There is nothing in clause 18 or elsewhere in the pooling agreement which drives me to conclude that there is indeed this close connection. The respective obligations are to be found in separate clauses of the agreement each under its own heading. The two obligations are severable. [17] They are independent in regard to contents, each serving its own purpose. The clauses are accordingly not so closely connected as to evidence reciprocity.

[29] The enquiry does not end there. The respondents rely further on the second applicant's obligation in terms of the pooling agreement to pay usage fees to them. Clause 12.3 of the pooling agreement provides as follows:

> "Etale shall annually distribute half of its after-tax profits as a dividend in accordance with shareholdings, the balance of the net profits to be retained in the company to fund future capital purchases, reduce borrowings or such other purposes as the directors may decide, unless the board at any time otherwise decides."

Clause 12 of the pooling agreement was amended in August 2001, to provide in clause 12.7 that:

> "The usage fees payable by Etale to each concessionaire as stipulated in 12.2 and 12.3 are agreed to in good faith and upon the expectation that the various

17 Cash Converters Southern Africa v Rosebud WP Franchise, 2002 (5) SA 494 (SCA), at 501 para [21]

factors which may influence the future profitability of Etale, as presently perceived by the parties, will enable Etale to turn a profit from its business after payment of such usage fees.

In the event that any extraneous factors which may influence the business of Etale change adversely and Etale consequently faces the possibility of making a loss during any quota year, the parties to this agreement undertake to renegotiate the usage fees payable to each concessionaire in respect of that and subsequent quota years in order to establish the fair and reasonable rate at which usage fees should so be paid.

Failing agreement upon such renegotiation, such reasonable rate of usage fees to be paid by Etale should be determined in terms of clause 16 (*the dispute resolution clause*)."

[30] The obligation to pay usage fees is thus itself conditional upon the second applicant deriving a profit from fishing and, furthermore, subject to Board approval in terms clause 12.3 of the pooling agreement. In this regard the Board of the second applicant resolved at its meeting on 8 August 2005 to place a moratorium on the payment of usage fees to the respondents due to financial constraints and as recommended by its audit committee. Accordingly, even if reciprocity was to apply, in the light of the moratorium, the respondents could not on the facts presented rely on the *exceptio*. In any event, I am of the view that clause 12, as amended, suffers the same fate as clause 8.3. Based on the considerations set out earlier, clause 12, when considered in conjunction with clause 18, does not give rise to reciprocity.

[31] In the circumstances, I find that even though the pooling agreement imposes bilateral obligations upon the parties which have a degree of interdependence, the mere non-performance of clauses 8.3 and 12.3 read together with the amended clause 12.7 in fact militate against the notion of reciprocity. It follows then that the defences raised by the respondents based upon the *exceptio* are without merit.

[32] Counsel for the respondents further contended that the vessel *Twafika* is not a fishing vessel contemplated by the pooling agreement. It is true that the pooling agreement itself does not expressly refer to the *Twafika*. The vessels referred to in the agreement are those which the second applicant purchased from Northern Fishing Industries (Pty) Ltd. Clause 8 of the pooling agreement which deals with the utilisation of the hake concessions granted by the Minister does not require that the hake quota be fished by particular vessels. There is thus no contractual constraint on the use of the *Twafika* to catch fish. The further contention that the utilisation by the second applicant of the *Twafika* would be financially disadvantageous to the respondents is disputed by the applicants. The respondents also state that the remaining quota can be fished by the *Etale Bounty* and two other vessels owned by the second applicant. This statement is not placed in issue by the applicants. For this reason, and applying the *Stellenvale* rule, I am constrained to accept that requiring the respondents to pursue the application for a fishing licence for the *Twafika* would not, on the facts before me, constitute an enforceable obligation in terms section 18 of the pooling

agreement. Should I be persuaded to grant an order for specific performance, any such order would accordingly not be in respect of the *Twafika*.

The competency of the relief sought by virtue of the provisions of the Marine Resources Act

[33] The remaining question to be answered is whether the provisions of the Marine Resources Act are a bar to the relief sought. It was vigorously contended on behalf of the respondents that due to the non-payment of quota fees, the Minister could not grant the applications for the licencing of the *Etale Bounty* and the *Twafika*.

[34] In terms of section 44 of the Act the Minister, with the approval of the Minister of Finance determined, by way of Government Notice No. 134 published in Government Gazette No. 3227 of 30 June 2004, fees which shall be payable to the Ministry in respect of the harvesting of marine resources. These fees in respect of hake, otherwise known as quota levies, are payable in terms of the quotas granted to the second and third respondents. As has already been indicated, in terms of the pooling agreement these quotas were to be paid over to the Ministry by the second applicant. It is common cause that the outstanding quota levies payable by the second and third respondents is currently in excess of N$6 million and N$7 million respectively. This issue was addressed in letters sent to the respondents from the Acting Permanent Secretary in the Ministry of

Fisheries and Marine Resources dated 19 October 2011, where it was stated that –

> "Right holders are urged to provide payment on their outstanding quota fees in order for vessel/s to return to the fishing grounds comes 1st November 2011; failure will result in vessel/s not being allowed to return to sea." (sic)

It is contended by the respondents that the failure by the second applicant to pay the quota levies to the Ministry also exposes the respondents to the risk of the suspension of their quotas by the Minister. The further contention is that such failure would have a significant negative impact on the defaulting right holder's ability to successfully participate in a future allocation of quotas to be granted by the Minister.

[35] Mr Barnard contends that the Act does not make provision for a suspension or prohibition of this kind sought to be imposed by the Minister on defaulting quota holders. Section 41 (1) of the Act limits the Minister's discretion to suspend, cancel or reduce quotas and licences, to the following situations:

> "41. (1) Where the holder of a right, an exploratory right, a quota or a licence –
>
> a) has furnished information which is untrue or incomplete in connection with his or her application for the right, the exploratory right, the quota or the licence;
>
> b) contravenes or fails to comply with a condition imposed under this Act in

respect of the right, the exploratory right, the quota or the licence;

c) contravenes or fails to comply with the provision of this Act, or

d) is convicted of an offence under this Act,

the Permanent Secretary shall, by written notice to the holder of such right, exploratory right, quota or licence or sent by registered post to the holder's last known address, request the holder to show cause, in writing, within a period of 21 days from the date of the notice, why such right, exploratory right, quota or licence should not be suspended, cancelled or reduced.

Whilst the Minister may have sought to rely upon sections 41 (b) or (c) in the context of the non-payment of quota levies, there is no indication in the letter of 19 October 2011 that the Minister indeed places reliance thereon. The letter is simply silent as to the purported statutory basis for the decision. In any event, there has been no compliance with the provisions of section 41 (1) requiring that the rights holder or licencee first be put on notice to comply with any such condition or provision of the Act prior to the purported cancellation or suspension. I am thus persuaded that section 41 of the Act does not constitute a bar to the relief sought.

[36] Since the Minister has yet to make a decision on the applications for fishing licences lodged with his Ministry in respect of the vessels *Etale Bounty*

and *Twafika*, there can be no suggestion that the basis upon which the vessels would not be allowed to return to sea, is that such applications have been turned down. In any event, the Minister's discretion to refuse a licence in terms of section 40 (4) of the Act is limited to the following circumstances:

"(a) the information furnished in the application is incorrect or incomplete;

b) the vessel in question is not intended for use as a fishing vessel;

c) the approval of the application will not be in the interest of the sector of the fishing industry harvesting a particular resource;

d) the issue of the licence would be inconsistent with an international agreement to which Namibia is a party or;

e) the approval might threaten the sustainability of a particular marine resource."

I am inclined to the view that none of the grounds set out in section 40 (4) would find application in this matter. It follows then that the failure by the second and third respondents, or the second applicant on their behalf, to pay the quota levies could not form the basis for the Minister refusing to grant the second and third respondents licences for the vessels *Etale Bounty* and *Twafika* to catch hake during the current fishing season. Whilst the proper application of the provisions

of the Marine Resources Act might still impact upon the applicants' rights to fish the quota, for the purposes of the relief sought herein it provides no bar to the relief sought.

Urgency

[37] It is contended on behalf of the respondents that this application should not be entertained on an urgent basis. In the earlier judgment I referred to the trite proposition that if an applicant has no *locus standi* to bring the application, urgency is not shown. [18] The merits of the prayer in terms of Rule 6 (12) were not considered. It is accordingly open to this Court to consider the issue of urgency afresh. These issues were also referred to in the earlier application which is annexed to this application. The applicants contend that the matter is urgent since the quota of the first respondent was probably to run out by 19 November 2011. On 10 November 2011, the legal practitioner of the applicants addressed a letter to the legal practitioners of the second and third respondents in which they called for the support of the second and third respondents to take all such steps, on an urgent basis, to ensure that the licence applications currently before the Minister would be decided upon as a matter of urgency. The response received from the respondents' legal practitioners indicated simply that they would revert to the applicants' legal practitioners as soon as instructions had been received from their clients. No indication was given that the respondents would deal with

18 Moleko v Minister of Plural Relations and Development and Another, 1979 (1) SA 125 (T), at 129 H – 130 A, quoted with approval in Clear Channel Independent Advertising (Pty) Ltd and Another v TransNamib Holdings Ltd and Others, 2006 (1) NR 121 (HC), at 140, para [52]

the matter expeditiously.

[38] In exercising a discretion in terms of Rule 6 (12) of the High Court Rules, the Court recognizes that there are varying degrees of urgency. [19] The urgency of commercial matters was recognized in the matter of *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd*. [20] It would be required of the applicants with reference to the facts of this matter to demonstrate that they are unable to receive redress in the normal course and that the facts justified the degree of urgency with which the application has been brought.

[39] In the light of the principles I have referred to, and on the facts of this matter – principally the fact that the quota for the first respondent has seemingly run out and the further circumstances that the fishing season is due to terminate in April 2012 – I am of the view that the applicants have made out a case for urgency as envisaged by Rule 6 (12). I accordingly grant condonation in respect of the applicants' non-compliance with Rule 6 and grant leave for the application to be heard on an urgent basis.

Conclusion

[40] As a result, I am satisfied that the applicants have made out a case for the relief sought in prayer 2 of the notice of motion pertaining to specific performance

19 Luna Meubelvervaardigers (Edms) Bpk v Makin and Another, 1977 (4) SA 135 (W). Cited with approval in, amongst others, Clear Channel Independent Advertising (Namibia) (Pty) Ltd v TransNamib Holdings Ltd, *supra*, and Bergmann v Commercial Bank Namibia Ltd, 2001 NR 48 (HC)
20 1982 (3) SA 582 (W), at 586 G

of the pooling agreement by the respondents, subject to the modifications I make in the light of the reasons underpinning this judgment. It is thus not necessary for me to consider the alternative relief sought in terms of the Companies Act, as well as the further arguments advanced by counsel. As I have indicated, I am not persuaded that case is made out for including the vessel *Twafika* in the order I propose to make. No order is made against the third respondent, although the third respondent associated itself fully with the defences raised by the second respondent, including the points *in limine* which I dismissed. The costs order will take this into account. There is no reason why the costs should not follow the result. I accordingly make the following order:

1. The forms and service provided for in the Rules of Court are dispensed with and this application is heard as one of urgency.

2.1 Second respondent is ordered, at the behest of first and/or second applicant, to give effect to the spirit, purpose and intent of the agreement annexed as annexure “SK2” to the papers in the application of 8 November 2011 (hereafter “the pooling agreement”), as supplemented and/or varied by annexures “SK3”, “SK4” and “SK5” to such papers, by doing what is set out below.

2.2 Second respondent is ordered to confirm in writing that

the application to the Minister of Fisheries and Marine Resources and/or the Permanent Secretary of such Ministry dated 7 October 2011 for a fishing license for the MFV Etale Bounty to be used by second respondent:

2.2.1 was an application on second respondent's behalf; alternatively that

2.2.2 despite any shortcomings or defects in regard to the authority to have made such application on behalf of the second respondent, second respondent has now accepted and ratified, with retroactive effect, such application as valid and duly made on its behalf.

2.3 Second respondent is ordered to effect such written confirmation by no later than one business day after the handing down of this order, by a letter telefaxed or hand delivered to the Minister of Fisheries and Marine

Resources and/or the Permanent Secretary of such Ministry, in which the Minister and/or the Permanent Secretary of the Ministry is/are requested to determine such application within three business days after receipt of such letter, and in which letter the Ministry is informed that, unless the application for the license is determined upon as requested, an urgent application by or on behalf of second respondent would follow to compel the determination of such application.

2.4 Second respondent is ordered, in the event that the Minister of Fisheries and Marine Resources and/or the Permanent Secretary of such Ministry may fail and/or refuse to determine the application in the manner as demanded above:

2.4.1 to institute urgent legal proceedings against the Minister and/or the Permanent Secretary for such relief, within three business days of the failure and/or refusal of such persons to do what was demanded from

them;

2.4.2 to pursue such legal proceedings diligently, reasonably and responsibly with all the means at its disposal.

2.5 Second respondent is ordered, in the event that the Minister of Fisheries and Marine Resources and/or the Permanent Secretary of such Ministry refusing the application for the fishing licenses, to cede, within two business days of the refusal of the application for the fishing license, its rights to the applicants to institute urgent review proceedings against the Minister and/or Permanent Secretary.

2.6 The first and second applicants are ordered to indemnify the second respondent against any costs order that may be made against it in the proceedings contemplated by prayers 2.4 and 2.5 above. In relation to the proceedings contemplated by prayer 2.4 such indemnity shall only be enforceable if the second respondent fully complies with the provisions of prayer 2.4.2.

2.7 In the event that the second respondent fails or refuses to take the above action, or to comply with any component of this order, the first and/or second applicant is/are authorized to, in their own names and *in rem suam*, to take any action that was to be taken by the second respondent, as contemplated by the aforegoing orders, read in conjunction with clause 8.1 of the pooling agreement, for purposes of giving effect to this order.

3. Second respondent and third respondent are ordered to pay the costs of this application jointly and severally (such costs in respect of the third respondent to be restricted to 50% of such costs), to include the costs of one instructing and one instructed counsel, the one paying the other to be absolved.

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CORBETT, A.J

ON BEHALF OF THE APPLICANTS:

Adv T Barnard

Instructed by Koep & Partners

ON BEHALF OF THE RESPONDENTS:

Adv. H. Oosthuizen SC

and with him Adv. T Phatela

Instructed by Engling Stritter & Partners