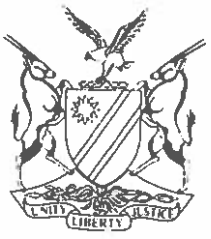

REPORTABLE

CASE NO: SA 140/2023

IN THE SUPREME COURT OF NAMIBIA

In the application between:

NAUTILUS FISHING INDUSTRIES (PTY) LTD	**Applicant**

and

SKELETON COAST TRAWLING (PTY) LTD	**Respondent**

In re:

The appeal between:

SKELETON COAST TRAWLING (PTY) LTD	**Appellant**

and

NAUTILUS FISHING INDUSTRIES (PTY) LTD	**First Respondent**
ANDREW CORBETT SC N.O.	**Second Respondent**
PROSECUTOR-GENERAL OF NAMIBIA	**Third Respondent**

Coram: SMUTS JA

Heard: **IN CHAMBERS**

Delivered: **31 January 2024**

JUDGMENT IN TERMS OF S 14(7)*(a)* OF ACT 15 OF 1990

SMUTS JA:

[1] This is an application under s 14(7) of the Supreme Court Act 15 of 1990 (the Act), read with rule 6 of the rules of this Court, by Nautilus Fishing Industries (Pty) Ltd (Nautilus), the first respondent in appeal No SA 140/2023, for the summary dismissal of the appellant's (Skeleton Coast Trawling (Pty) Ltd – SCT) appeal on the grounds that it is frivolous and vexatious or has no prospects of success. Nautilus also seeks costs of this application. (For the sake of convenience and clarity, the parties are referred to as Nautilus and SCT in this judgment).

[2] Section 14(7) of the Act provides:

> '(a) Where in any civil proceedings no leave to appeal to the Supreme Court is required in terms of any law, the Chief Justice or any other judge designated for that purpose by the Chief Justice –
>
> (i) may, in his or her discretion, summarily dismiss the appeal on the grounds that it is frivolous or vexatious or otherwise has no prospects of success; or
>
> (ii) shall, if the appeal is not so dismissed, direct that the appeal be proceeded with in accordance with the procedures prescribed by the rules of court.

(b) Where an order has been made dismissing the appeal on any of the grounds referred to in subparagraph (i) of paragraph (a) of this subsection, such order shall be deemed to be an order of the Supreme Court setting aside the appeal.

(c) Any decision or direction of the Chief Justice or such other judge in terms of paragraph (a) of this subsection, shall be communicated to the parties concerned by the registrar.'

[3] The procedure for bringing applications under s 14(7) is set out in rule 6 of the rules of this Court.

[4] Having been designated to determine the application under s 14(7) of the Act, I do so under rule 6(4)(a) in chambers on the notice of motion and founding affidavit and annexures, together comprising two volumes, and a lengthy answering affidavit filed by SCT running into 48 pages. The affidavits are extensive and largely argumentative, with reference to annexures which are attached to the founding affidavit and in the case of SCT's answering affidavit also includes reference to authority. This application is capable of being determined on the affidavits and annexures referred to as well as the authority cited.

[5] Shortly stated, the background facts are these.

Background facts

[6] The parties to this dispute are entities engaged in Namibia's fishing industry. Nautilus had been allocated fishing rights by the Ministry of Fisheries and Marine Resources. SCT is a subsidiary of Nova Nam Limited, part of a multinational fishing conglomerate which operates in Namibia. The parties entered into a joint venture

agreement in May 2007. A dispute arose between them concerning SCT's duty to account to Nautilus for the profits of the joint venture.

[7] The joint venture agreement (JV) provided that disputes are to be referred to arbitration. Protracted arbitration proceedings followed which were presided over by a senior member of the Society of Advocates of Namibia. At the conclusion, the arbitrator found in a detailed award that SCT was liable to Nautilus in the sum of N$14 705 062 together with interest at the prescribed rate from 22 August 2016 to date of payment as well as the costs of the arbitration proceedings.

[8] The arbitration award was made on 27 January 2022, some two years ago. The proceedings were protracted and included preliminary points being taken and, according to the award, spanned a period of nearly four years.

[9] The arbitration proceedings were, by agreement between the parties, regulated by the Standard Procedure Rules for the Conduct of Arbitrations (6th edition) and the Arbitration Act 42 of 1965. There was no provision for any appeal in the arbitration clause in the JV agreement and the final award was thus by agreement not appealable and binding upon them.

[10] Nautilus' legal practitioners on 18 February 2022 addressed SCT's lawyers to ascertain when SCT would comply with the award. In response, SCT's practitioners stated that SCT considered the final award 'a nullity, illegal and *contra bonos mores*' and would not comply with it.

Application to make the award an order of court

[11] Nautilus then applied to the High Court to make the final award an order of that court under s 31(1) of the Arbitration Act. That application was opposed by SCT on essentially three grounds. The pleadings in that application were closed in May 2022 when Nautilus filed its replying affidavit.

[12] In June 2022, SCT then applied for the joinder of the Prosecutor-General to the application. Despite considering it a delaying tactic, Nautilus did not oppose it to avoid further delays and an order to that effect was made on an unopposed basis on 18 August 2022.

[13] In the course of judicial case management, SCT raised another preliminary point and sought the formal separation of issues in the main application which was opposed by Nautilus. This interlocutory issue was argued on 17 February 2023 and understandably brushed aside by the High Court on 6 March 2023 in a ruling of that date.

[14] After these delays, the main application was heard on 12 July 2023. The High Court on 26 October 2023 in a reasoned judgment granted Nautilus' application to have the final award made an order of court together with costs.

[15] Following the High Court judgment, Nautilus caused warrants of attachment to be issued against SCT's assets in order to execute the award made an order of court. Two shipping vessels were attached in Lüderitz and one in Walvis Bay, as well as factory equipment in Lüderitz, motor vehicles in Walvis Bay and two cranes in Lüderitz.

[16] It is stated in Nautilus' founding affidavit that the assistant deputy sheriff for Walvis Bay was informed by an identified representative of SCT that the money due under the writs around N$30 million had 'been put aside to pay the debt' already.

[17] It is also stated that the deputy sheriff for Keetmanshoop was informed by a different identified representative of SCT that it was 'attempting to secure the amount of N$30 million but that the matter was to be discussed between the directors and shareholders of SCT as that amount was not available to be paid immediately. In answer to these allegations, SCT's deponent (a director) firstly asserts that these issues are 'entirely irrelevant' as they do not concern the merits of the appeal. The deponent proceeds to contest the accuracy of these statements and their context with reference to what is attributed to the representations of SCT identified by the assistant deputy sheriff and deputy sheriff. SCT however fails to provide any confirmatory affidavits from either representative thus identified. What is attributed to these two representatives thus constitutes inadmissible hearsay and is to be disregarded. It follows that the statements attributed to those officers of the court and confirmed in affidavits are thus not properly contested. Whilst it is correct that their statements are not relevant to the question of the prospects of success of the appeal, their relevance may arise with reference to the nature of s 14(7)(a) proceedings being premised upon an exercise of jurisdiction to prevent an abuse of process.

[18] On 2 November 2023 SCT filed a notice of appeal against the High Court judgment and order.

[19] In order to assess whether the appeal is frivolous and vexatious or otherwise has no prospects of success, the dispute and final award are briefly referred to, as well as the opposition to the application to make it an order of court, the judgment of the High Court appealed against and the grounds raised in the notice of appeal.

The award

[20] Pursuant to the JV agreement between the parties, Nautilus contributed commercial fishing quotas granted to it by the Ministry and SCT contributed its expertise and capacity to exploit the quota for the benefit of the JV operated through a company set up for that purpose (the JV company). Under the JV agreement, SCT was responsible for the financial records and administration of the JV company which would receive a fixed 'transfer price' for fish caught from SCT.

[21] After the JV agreement terminated, a dispute arose between the parties concerning the alleged failure on the part of SCT to account for the profits and losses of the JV company. This dispute was referred to arbitration under clause 16 of the JV agreement.

[22] Nautilus claimed an award against SCT directing the latter to furnish a proper accounting in respect of the JV company for the duration of the JV. Whilst denying a duty to account, SCT however provided what it contended was a proper accounting which Nautilus asserted was materially defective.

[23] Nautilus claimed that SCT had failed to pay to the JV company what was due to it as the 'transfer price' for the duration of the JV. Nautilus further claimed that the parties were partners within an incorporated partnership and that it was under the

actio pro socio entitled to its half share of what SCT had failed to pay the JV company.

[24] At the conclusion of the detailed final award spanning some 77 pages, the arbitrator found that SCT owed a fiduciary duty to Nautilus to account to the latter for all income, expenditure and profits of the JV company. The arbitrator further found that SCT had breached this duty and 'had withheld relevant information from the arbitrator' which the arbitrator found amounted to a 'lack of transparency'. The arbitrator proceeded to find that, on a proper accounting, SCT had failed to pay the JV company N$29 410 125. Having found that the relationship between the parties had the attributes of a partnership, the arbitrator ruled that Nautilus was entitled to payment on the basis of the *actio pro socio* for its half share of that sum directly from SCT and in the award directed SCT to pay the sum of N$14 705 062 to Nautilus.

SCT's opposition to the application to make the award an order of court

[25] In addition to the preliminary points taken of non-joinder of the Prosecutor-General (who was thereafter joined to proceedings but did not oppose the application) and seeking a separation of issues (which was dismissed), SCT opposed the main application on the ground that the enforcement of the award would result in an illegality and be contrary to public policy. It was contended that in essence, the award amounted to the distribution of a dividend of the JV company and would be contrary to the Companies Act 29 of 2004 and would 'implicate' the Prevention of Organised Crime Act 28 of 2004 (POCA), the Anti-Corruption Act 28 of 2000 (ACA) and the rights of the Receiver of Revenue. SCT accordingly contended that to be compelled to make the directed payment would potentially amount to the commission of crimes.

[26] Two other grounds of opposition to the main application were also raised. It was contended that the award was a nullity because it concerned a matter of 'status' contrary to the prohibition contained in s 2(b) of the Arbitration Act which precludes an arbitrator from determining any matter relating to status. SCT contended that the arbitrator 'liquidated the JV company in the award' by treating its only two shareholders as partners, and/or liquidated the (JV company) by applying the *actio pro socio* to the only asset of the company in respect of which the shareholders of the (JV company) had any interest. It was contended that the making of the award amounted to the liquidation of the JV company and amounted to an order relating to its status which is precluded by s 2 of the Arbitration Act.

[27] A further ground of opposition was that the arbitrator breached the principle of *functus officio.* It is asserted that he had as a preliminary matter determined the limits of his equitable jurisdiction in an interim award but in the final award strayed beyond the confines of his jurisdiction as previously set and determined by him.

The approach of the High Court

[28] Before dealing with the grounds of opposition raised by SCT, the High Court, per Coleman J, emphasised that the court had a very narrow discretion to refuse to make the award an order of court and that the court was not concerned with possible errors of fact or law by the arbitrator but only with the propriety of lending the award the force of an order of court.

[29] The court considered the challenge mounted against the award on the basis that the arbitrator should not have treated the JV company as a partnership and

applied the *actio pro socio*, as an alleged error of law on the part of the arbitrator which would not arise in an application brought in terms of s 31 of the Arbitration Act.

[30] As to the point raised with reference to s 2 of the Act – that the award related to status by effectively changing the status of the JV company – the court found that liquidation was not an issue in the arbitration. Nor did the arbitrator in his award touch upon it. The court held that the fact that the arbitrator found that the JV company had the attributes of a partnership did not relate to the status of any corporate entity in conflict with s 2 of the Arbitration Act.

[31] The court further found that the order to make the payment of N$14 705 062 did not oblige any party to declare a dividend and would not of itself amount to the breach of any law.

[32] The court thus rejected the grounds of opposition and made the award an order of court. In order to assess whether the requisites of s 14(7) have been met, the notice of appeal is to be examined together with arguments raised by the parties in relation to these in this application.

SCT's notice of appeal and the parties' contentions in relation to it

[33] The notice of appeal raises the grounds of opposition rejected by the High Court as well as at least one ground not even raised in opposition to the application.

[34] The first ground of appeal is that the award is a nullity because it related to the 'status' of the JV company in conflict with the prohibition contained in s 2 of the Arbitration Act.

[35] SCT argues that the relief sought and granted in the arbitration (and made an order of court) related to the status of the JV company because the award effectively liquidated it by treating its only two shareholders as partners and/or by applying the *actio pro socio* to its only asset.

[36] Nautilus argues in this application that s 2 applies to matrimonial status or to the status of a natural person. It further argues that the award did not however liquidate the JV company or decide any matter concerning its status. Nautilus contends that this ground of appeal is without any basis and enjoys no prospect of success.

[37] The second ground concerns the arbitrator's equitable jurisdiction conferred upon the arbitrator under clause 16.5 of the JV agreement. That clause provides:

> 'The arbitrator shall decide upon the matter submitted to him according to what he considers just and equitable in the circumstances and thus the strict rules of law need not to be observed or taken into account by him in reaching his decision.'

[38] As already alluded to, the arbitrator had in an interim award made a ruling upon the jurisdiction conferred upon him in this clause and ruled that an equitable jurisdiction conferred under clause 16.5 conferred the power to depart from the application of the strict rules of law to the extent necessary to achieve substantial

justice between the partners, subject to the restrictions that the award is not illegal or contrary to public policy.

[39] SCT contends that, having made this ruling, the arbitrator was *functus officio* in determining the scope of clause 16.5 in the final award and thereupon breached that principle in making findings in the final award to the effect that nothing in the JV agreement precluded Nautilus from obtaining direct payment from SCT for Nautilus' share in the JV company's profits. He went on to state that in any event, even if he were wrong in reaching this conclusion, the facts and circumstances of the case called for him to exercise his equitable jurisdiction to grant the direct payment from SCT to Nautilus and that any relaxation of the strict rules of law in doing so would not entail a finding or award which is illegal or *contra bones mores.*

[40] SCT contends that, having made a ruling on the interpretation of clause 16.5 in respect of his equitable jurisdiction, it offended the *functus officio* principle by 'modifying' this earlier ruling by creating a new 'exception' to it which 'swallowed the entire rule'. As a consequence the final award could not have been granted and is a nullity, according to SCT.

[41] The third ground of appeal is SCT's contention that the enforcement of the award would result in an illegality in that would transgress the statutes referred to and be *contra bonos mores*, contending that it 'would leave the appellant open to POCA proceedings'. In support of this ground it is alleged that the award compelled the JV company to declare a dividend or pay a profit to a shareholder and in so doing, would by-pass the Receiver of Revenue. It is also contended that the award

compelled the JV company and/or the appellant to act unlawfully and 'open themselves up to POCA and ACA remedies'.

[42] Nautilus argues that the High Court was correct in sweeping this contention aside in the following trenchant terms:

> '[11] Finally, I understand the third ground of opposition on behalf of Skeleton Coast to be that if it makes payment in terms of the award it will potentially break a number of laws. In order to decide this point the nature of the payment should be pinpointed. The award states that defendant (Skeleton Coast) is ordered to make a payment to claimant (Nautilus Fishing) of the sum of N$14 705 062. This award does not oblige Skeleton Coast to declare a dividend. It creates a liability to Nautilus Fishing. Nothing more, nothing less. Furthermore, I do not see how this payment can cause Skeleton Coast to break any other law.'

[43] The fourth ground of appeal relates to the joinder of the Prosecutor-General. It is contended with reference to the Prosecutor-General's affidavit that, by reserving her right to employ POCA proceedings in the future, causes the judgment 'to leave the appellant in a sea of uncertainty where compliance with the order may lead to POCA and ACA proceedings'. It is argued that the court erred in not determining this issue as a preliminary matter and further erred in not determining the issue raised by the Prosecutor-General at all.

[44] Nautilus contends that this ground is farcical as the Prosecutor-General was joined to the main application at SCT's instance to support SCT's contention that the award would result in illegality. Nautilus argues that the High Court was correct in summarily rejecting SCT's claim that compliance with the award would risk transgressing any laws.

[45] The fifth ground of appeal is that the High Court 'erred in law by not limiting the interest awarded by the arbitrator to only the capital amount and ignored the *in duplum* rule'.

[46] Nautilus points out that SCT did not raise this point before the High Court and argues that it is precluded from doing so on appeal. Nautilus also points out that it was not necessary for the arbitrator to refer to the *in duplum* rule when making its final award as the rule operates as a matter of law.

[47] I turn to deal with the grounds of appeal raised in the notice of appeal as amplified in argument (together with reference to authority) in SCT's answering affidavit to this application in the context of s 14(7).

Have the requisites of s 14(7) been met?

[48] The purpose and scope of s 14(7) has been set out by the Deputy Chief Justice in *Permanent Secretary of the Judiciary v Somaeb*[1] in the context of this Court's powers to prevent an abuse of process:

> '[12] This is the first time that this court will exercise its jurisdiction under s 14(7)*(a)*. The question therefore arises, when is an appeal frivolous or vexatious or otherwise without any prospect of success? In a different context, it has been laid down that something is vexatious if its intent is to 'harass or annoy'. Hoff J in *Namibia Seaman and Allied Workers Union v Tunacor Group Ltd Namibia* had the following to say about the meaning of vexatious or frivolous proceedings:

[1] *Permanent Secretary of the Judiciary v Somaeb & another* 2018(3) NR 657 (SC).

> "In its legal sense, "vexatious" means "frivolous improper" instituted without sufficient ground, to serve solely as an annoyance to the defendant. . . ."

[13] The court has an inherent jurisdiction to prevent an abuse of its process. As was recognized in *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC) para 21:

> "Abuse connotes improper use, that is, use for ulterior motives. And the term abuse of process connotes that the process is employed for some purpose other than the attainment of the claim in the action."

[14] An appeal is liable to be summarily dismissed under s 14 (7)*(a)* either if it is (a) frivolous, (b) vexatious or (c) without any prospect of success. There is no prospect of success where the litigant, objectively viewed, has no reasonable chance of success. It is conceivable that an appeal which qualifies as one of the three jurisdictional alternatives will also fall under one or both of the other two criteria. In my view, there is no fine dividing line to be drawn between the three categories. The common denominator between the three categories is that the appeal to which they relate is so unmeritorious that no court can grant a remedy for it under the law.

[15] To illustrate, if an appeal is frivolous, it would be vexatious for a party to pursue it. An appeal without any prospects of success is an exercise in futility and therefore frivolous. Its only reason would be to annoy and in that sense, is vexatious.' (Footnotes excluded).

[49] The starting point in determining this application is the nature and context of the application brought by Nautilus to the High Court to enforce the award in its favour. In terms of s 31(1) of the Arbitration Act, a party in the position of Nautilus is entitled to apply to the High Court to have the arbitral award made an order of court.

[50] As the High Court correctly found, a court has a very narrow discretion to refuse to make an arbitral award an order of court. An applicant is required to

establish that it is 'in possession of an award that can properly form the subject of an order of court'.[2]

[51] Thus if it would appear *ex facie* the award (from the award itself) that it could not properly form the subject of an order of court, the application may be refused. The position was neatly summarised in *Peninsula Eye Clinic*:[3]

> '[10] This does not imply, however, that an unsuccessful party in arbitration proceedings may legitimately use its right to oppose an application by the successful party in terms of s 31(1) of the Act as a surrogate means to obtain an appeal to or review by a court. Save in cases in which evidence *dehors* the award might, as in *Vidavsky*,[3] demonstrate a fundamental failure of the arbitration process, the court's enquiry in a s 31(1) application will be limited to the award and any reasons given for it by the arbitrator if those reasons are furnished as part of the award. If the unsuccessful party should allege that what on its face might appear to be an unexceptionable award was obtained irregularly or improperly, then it would be incumbent on it, should it wish to avoid the effect, to make application in terms of s 33 of the Act for the setting aside of the award.
>
> [11] In considering an application in terms of s 31(1) of the Arbitration Act a court will not concern itself with possible errors of fact or law by the arbitrator in making the award, but only with the propriety of lending the award the force of an order of the court. This approach reflects the policy of the courts, not only in this country, but also internationally, to strike the balance between party autonomy and judicial control (or curial intervention) in a way that attaches considerable weight to party autonomy (see *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA) (2007 (5) BCLR 503; [2007] 2 All SA 243, at para 4 . . . .'[4]

[52] This approach also reflects the position in Namibia. The parties after all in the JV agreement chose arbitration as the means to resolve disputes between them, as

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[2] *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA) para 17; *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic & others* 2014 (1) SA 381 (WCC) para 9
[3] Para 10 and 11.
[4] *Ibid*, paras 10-11.

often occurs in a commercial setting like theirs. Parties often do so because of the advantages of informality, choice of the arbitrator, absence of potentially protracted litigation which can arise of appeals are otherwise involved and also by the privacy of arbitration proceedings.[5] The importance to be accorded to the principle of party autonomy in arbitration proceedings and the need to accord due deference to an arbitral award were rightly emphasised by Harms, JA in *Telcordia*.[6]

[53] This principle is reflected in s 28 of the Arbitration Act which provides:

> 'Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.'

[54] As was said by Goldstone, JA in *Veldspun*:

> 'When parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly, if not explicitly (and, subject to the limited power of the Supreme Court under s 3(2) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator. There are many reasons for commending such a course, and especially so in the labour field where it is frequently advantageous to all the parties and in the interests of good labour relations to have a binding decision speedily and finally made. In my opinion the courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith.'[7]

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[5] *West Tankers Inc (Respondents) v RAS Riunione Adriatica di Sicurta SpA & others* [2007] UKHL 4 para 17.
[6] *Telecordia Technologies Inc v Telcom SA Ltd* 2007 (3) SA 266 (SCA) para 4. See also *Amalgamated Clothing & Textile Workers' Union of South Africa v Veldspun (Pty) Ltd* 1994(1) SA 162 (A) at 169A-B and 169F-H.
[7] *Ibid* page 169F-H.

[55] There are furthermore very narrow grounds to challenge an award by review under s 33 of that Act which must also be brought within six weeks of the publication of the award to the parties.

[56] SCT has not sought to review the award upon those narrow grounds but instead opposed the application on the grounds that the award is void and unenforceable.

[57] I turn to deal with the grounds of appeal raised by SCT.

Conflict with s 2 of the Arbitration Act

[58] Section 2 of the Arbitration excludes certain types of matters which cannot form the subject of an arbitration. It does so in these terms:

> 'A reference to arbitration shall not be permissible in respect of -
> (a) any matrimonial cause or any matter incidental to any such cause; or
> (b) any matter relating to status.'

[59] SCT contends that the arbitration is a nullity because it concerned the 'status' of the JV company. SCT asserts that the arbitrator liquidated the JV company by treating its only two shareholders as partners and/or by applying the *actio pro socio* to the only asset of that company.

[60] Nautilus argues that 'status' in s 2(b) concerns a person's matrimonial status or the status of a natural person.

[61] It is certainly not necessary for the purpose of this judgment to determine whether the term 'status' employed in s 2(b) is confined to status questions of natural persons. It is however clear that sequestration or liquidation orders are not capable of being given in arbitration proceedings.

[62] The dispute between the parties was however not a matter relating to status in any sense at all. The claimant Nautilus in its amended claim essentially sought an order compelling SCT to account to it and pay over to it what was owing to it as a consequence of such accounting. That was the subject of the arbitration. SCT did not raise a defence that the claim related to a matter of status of the JV company.

[63] Nautilus could not and did not apply to the arbitrator to liquidate the JV company in the arbitration proceedings. Nautilus ultimately sought to compel SCT to account to it for its operation of the JV account and pay what was due to it. Nor did the arbitrator in any form whatever order its liquidation. His interpretation of the JV agreement as having the hallmarks of a partnership agreement between the parties for the purpose of applying the *actio pro socios* in making an award of what was owing by SCT to Nautilus as a consequence of a proper accounting process did not remotely amount to a liquidation.

[64] This ground of opposition, raised in opposition to make the award an order of court and persisted with in the notice of appeal, is so contrived and baseless that it can certainly be summarily rejected. It is entirely without any merit at all.

Functus officio on equitable jurisdiction

[65] As is already pointed out, SCT sought a preliminary ruling concerning the arbitrator's equitable jurisdiction and the meaning of clause 16.5 of the JV agreement.

[66] The arbitrator made an interim award and ruled on that issue. He concluded that interim award thus:

> '19. With this caution in mind, I find that on a proper interpretation of the wording of clause 16.5 the nature of the arbitral powers and discretion is that of an "*amiable compositeur*" rather than those of an arbitrator deciding "*ex aequo et bono*". A significant public policy consideration is that the courts will not enforce an award which is contrary to public policy or illegal. It follows that should an arbitrator attempt to apply clause 16.5 in a way which ignores the peremptory provisions of an applicable statute, it would be unlikely that a Namibian court would enforce it.
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> 20. In practice, I understand this to mean that I may not disregard mandatory provisions and simply adhere to moral principle, subject to the constraints of public policy. Rather the exercise of such arbitral discretion would be subject to applicable peremptory legal provisions, but would entitle me to "*modify the unfair outcome of non-mandatory legal provisions*". It thus follows that the starting point is to establish the legal position by applying the strict rules of law to the matter. Should the result be unjust or inequitable, I may depart from the strict rules to the extent necessary to achieve justice between the parties, subject to the restrictions that the award not be illegal or contrary to public policy.'[8]

[67] In the final award, the arbitrator expressly referred to his approach set out in the interim award and prefaced his approach in the final award in the following terms:

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[8] Page 179 of vol. 2 of 2 of the 'first respondent's notice of application in terms of rule 6(1)'.

'It bears repeating that this means that the point of departure is the application of the strict rules of law to establish the legal position. Should the legal position so established be fair, then it would be unnecessary to consider the extent to which, if any, the rules of substantive law should be relaxed. However, should the application of the strict rules of substantive law result in substantial injustice, I may on an equitable basis depart therefrom or from the terms of any applicable contract to the extent necessary to achieve justice between the parties: provided that the result would not be illegal or *contra bonos mores*.'[9]

[68] The arbitrator concluded on the question as to whether an award of direct payment is or is not contrary to the JV agreement or shareholders' agreement:

'124. In any event, my view is that an award of direct payment is not contrary to the JVA or the Shareholders' Agreement. The fact that the JVA contemplates an order of preference for the appropriation of the income of the JV is not relevant. I agree with the claimant's submission that this cannot defeat the claimant's claim since the defendant has not put up any evidence whatsoever that the JVC is owed any interest, that it has any loan claims, that any management fees are owing, or that dividends are payable. In fact, no evidence was led that the JV has any other creditors with claims against the JVC. These provisions can therefore not serve as a disbarment to payment.

125. Should I be wrong in so concluding, and insofar as any of the provisions of the JVA or the Shareholders Agreement (which is linked to the JVA) were not adhered to in the claimant pursuing the action directly against the defendant, I find that the circumstances justify not strictly applying their provisions in order to ensure substantial justice between the parties. In so doing, I cannot see any injustice being visited upon the defendant. After all the defendant is a 50% shareholder in the JVC and the claim brought by the claimant acknowledges this. Claimant only seeks its half share of the profits of the JV.

126. However, this is not the end of the enquiry. In the exercise of my equitable jurisdiction, I am constrained to have regard to the impact of peremptory statutory

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[9] Page 30, para 19 of vol. 1 of the 'first respondent's notice of application in terms of rule 6(1)'.

provisions where my findings might depart from the strict rules of law embodied in them.

. . .

130. To sum up: I am constrained to conclude that it would lead to substantial injustice should the claimant not be entitled to claim its share of the profits directly from the defendant by way of *actio pro socio*. This is particularly so, in circumstances where the defendant had breached its fiduciary duty to properly account, and furthermore had breached the provisions of the partnership agreement by refusing to pay the JV what was owing in terms of the JVA on a proper accounting. My conclusion is premised upon the reasons stated in this award, and insofar as it is necessary, on the relaxation of the strict rules of law applicable to the matter. In my view, there is nothing illegal or *contra bonos mores* about making such a finding, and handing down an award on this basis.'[10]

[69] SCT contends that the arbitrator breached the principle of *functus officio* by finding in the interim award 'that he had no discretion to depart from mandatory or statutory provisions of the law' and then in the final award determining that 'there was an exception to the rule'. The resultant award, so contends SCT, is a nullity in breaching principles relating to jurisdiction and the *functus officio* principle.

[70] This point also fails to get out of the starting blocks.

[71] SCT's approach furthermore completely overlooks the tenor of the final award. The arbitrator in fact concluded that an award of direct payment by SCT to Nautilus was not contrary to the JV agreement or shareholders' agreement. He concluded that neither the contractual or statutory provisions raised stood in the way

[10] Pages 39-40 of vol. 1 of 2 of the 'first respondent's notice of application in terms of rule 6(1)'.

of an order of direct payment by SCT to Nautilus. That was his main finding in that regard and did not even engage the issue of equitable jurisdiction.

[72] This point must fail on that basis alone.

[73] The arbitrator then added that even if he were wrong in reaching that conclusion, it would do justice between the parties and not be against the statutory provisions raised (ss 294, 305 and 309 of the Company's Act)[11] or the Income Tax Act)[12] and the contractual provisions, to order a direct payment and would do so in so far as a relaxation of strict rules was necessary to achieve that. The approach adopted on this alternative basis is in any event in accordance with his interpretation of his equitable jurisdiction as set out in the interim award quoted above and om essence reiterated in the final award.

[74] An examination of the interim ruling and the approach in the final award furthermore does not support SCT's contention and strongly demonstrates the contrary. It is clear from the interim award that the arbitrator found that his equitable jurisdiction afforded to him by agreement in clause 16.5 of the JV agreement entailed the power to depart from the strict application of strict rules of law if necessary in order to achieve justice between the parties provided that the award is not illegal or contrary to public policy.

[75] I also want to make it plain that this point of *functus officio* is on its face in any event unsustainable. It does not arise even on the alternative reasoning of the

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[11] Companies Act 28 of 2004.
[12] Income Tax Act 24 of 1981.

arbitrator. The final award of the arbitrator in referring to his equitable jurisdiction did not thus offend against the *functus officio* principle in any tenable sense at all – and would of course not remotely arise on the primary approach set out in the award.

[76] It would appear that this point like the point on 'status' stems from SCT's vehement criticism of the arbitrator's legal conclusion in finding that the JV agreement had the attributes of a partnership and by applying the *actio pro socio* in ordering a direct payment by SCT to Nautilus. Much of SCT's opposing affidavit in this application is devoted to criticising that legal conclusion reached by the arbitrator. The High Court correctly found that this legal issue was at the heart of SCT's opposition. It remains so in this application. The High Court also correctly found in the absence of an appeal procedure by agreement or a review under s 33 of the Arbitration Act, the court was not concerned with errors of fact or law contended for in an application under s 31 but only with the propriety of lending the award the force of an order of court. That approach is sound.

Illegality, public policy and joinder of the Prosecutor-General

[77] Both of these grounds are essentially premised on the contention that the enforcement of the award would result in an illegality and be contrary to public policy.

[78] This point is based on SCT's contention that the final award entails the distribution of a dividend in conflict with the Companies Act 29 of 2004 and contravenes other provision of that Act and would 'implicate' POCA and ACA and be in conflict with the Income Tax Act 24 of 1981.

[79] An examination of the arbitrator's finding that a direct payment from SCT to Nautilus was the justified remedy, in the context of a dispute relating to a JV, and to account to the other and making an award for the amount found to be owing, plainly does not amount to the declaration of a dividend by any stretch of the imagination. The basis to this point is clearly without any substance whatsoever. It is entirely contrived.

[80] The award does not remotely entail an order directing that a dividend be paid. Nor does it purport in any sense to do so.

[81] Quite how an order for payment of a contractual liability in the circumstances of the JV agreement as set out in the award can conceivably 'implicate' POCA or ACA is understandably not explained. Nor is it explained how this can be in conflict with the Income Tax Act. If the award in part or in whole attracts tax, it would be a matter for Nautilus to declare that and for the Receiver of Revenue to determine its extent.

[82] In as much as no infringement of legislation is remotely shown to arise, the ground raised with reference to the joinder of the Prosecutor-General is equally without substance.

In duplum rule

[83] In the notice of appeal it is raised for the first time that the High Court 'erred by not limiting the interest awarded by the arbitrator to only double of the capital amount' and thus ignored the *in duplum* rule. As is pointed out by Nautilus, this point was not raised in the High Court.

[84] The court was merely asked to make the award an order of court. It was not necessary for the arbitrator to make reference to that rule. Nor was it necessary for the High Court to do so, especially in the absence of SCT raising the matter. The rule operates as a matter of law.

[85] The raising of this point in this manner does not for these reasons clothe this utterly meritless appeal with any prospects of success.

Conclusion

[86] Objectively viewed, this appeal is entirely without merit and without any prospects of success whatsoever. As was held in *Somaeb*, an appeal with no prospects of success is an exercise in futility and therefore frivolous. Its only reason is to annoy, frustrate or delay the respondent in enjoying the fruits of the award. The delaying tactics employed by SCT in the High Court proceedings as well as the statements to the officers of the court when seeking to execute the court's order tend to demonstrate that the appeal is vexatious. That inference is inescapable in the context of an utterly unmeritorious appeal preceded by delaying tactics in the High Court proceedings with a meritless preliminary point and interlocutory application made to separate issues.

[87] It follows that the requisites for an application in terms of s 14(7)*(a)* have been emphatically established in this matter.

[88] Even though the purpose of s 14(7)*(a)* is the exercise of jurisdiction to prevent an abuse of process, Nautilus has not sought a special cost order against SCT. In

the absence of SCT being afforded notice and an opportunity to address such an order, it would not be appropriate to further consider making such an order. The order as sought as to costs is to be granted.

[89] The following order is made:

1. The appeal in case no SA 140/2023 is summarily dismissed as contemplated by s 14(7)*(a)(i)* of Act 15 of 1990.

2. The respondent in this application (appellant in appeal no SA 140/2023) is directed to pay the applicant's costs of this application which are to include the costs of one instructing and two instructed legal practitioners.

3. The registrar must comply with the provisions of rule 14(7)*(c)*.

SMUTS JA

REPRESENTATION

APPLICANT/FIRST RESPONDENT IN APPEAL SA 140/2023	Koep & Partners, Windhoek
RESPONDENT/APPELLANT IN APPEAL SA 140/2023	Engling, Stritter & Partners, Windhoek