THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 32/2003

Case No 40/2003

REPORTABLE

In the matter between

The Minister of Environmental Affairs and Tourism **First Appellant**

The Chief Director: Marine and Coastal Management **Second Appellant**

The Deputy Director-General: Environmental Affairs and Tourism **Third Appellant**

Certain Rights Holders In The Hake Deep Sea Trawl Fishery for 2002 to 2005
Fourth to Nineteenth
Appellants

and

Phambili Fisheries (Pty) Ltd
Respondent

Bato Star Fishing (Pty) Ltd
Respondent

Before: Howie P, Schutz, Mthiyane, Conradie JJA and Jones AJA

Heard: 2 and 5 May 2003

Delivered: 16 May 2003

Marine Living Resources Act – allocation of hake quotas – review of Chief Director's decision – numerous grounds – eg non-compliance with transformation goal – absence of reasons – arbitrariness – fair administrative action – legitimate expectation – all of the grounds bad – in truth an attempt to appeal to court against the allocation decisions – judicial deference – particularly in respect of administrative decisions of a technical nature involving policy elements – one third of costs of lengthy records disallowed for failure to insert new page numbers of exhibits – for not providing a core bundle – for repeating case headings in indexes – for repeating details of the attorneys in each volume – replying affidavits must be drastically curtailed.

JUDGMENT

SCHUTZ JA

[1] Up until 1978 our seas were increasingly being plundered by all and sundry. In that year, in order to prevent the further destruction of our fishing stocks and indeed to an extent to restore them, the notion of Total Allowable Catch ('TAC') was introduced. In respect of all the hake fishing sectors the TAC, once determined for a fishing season, then set a limit on the total tonnage that might be caught. Quotas for individual companies were introduced for the first time in the following year, 1979. Although there have been changes in detail over succeeding years, the limit imposed by the TAC and the quota or later allocation system still prevail. This case is concerned with the allocation of quotas for the 2002 season in the hake deep sea trawling sector, which accounts for the great bulk of the tonnage caught. The other hake sectors are inshore trawling, longlining and handlining. The principles upon which the 2002 allocations are based are intended to extend over the medium term, that is also to the 2003, 2004 and 2005 seasons.

[2] As the annual hake catch is a limited resource and as there is money to be made out of selling fish, it may be imagined that quotas are a much-coveted asset. Today's competition to acquire them is sharpened by the ownership patterns resulting from the history of the industry and by the deprivations imposed by the previous political system upon those whom are referred to in this case as historically disadvantaged persons or people ('hdp'). Inevitably there is tension between the large established companies (also the 'pioneer' companies) and the small new aspirants coming from the ranks of the hdp. There is a tendency to describe these two groups

stereotypically. As with most generalisations, stereotypes are apt to be misleading. Prosperous the established companies may be, but if one looks more closely into them one finds, in varying degrees, how they improve the lives of hdp as co-owners, shareholders, managers, skippers, crews, other sorts of employees, factory workers, consumers and the like. Also if one examines some of the hdp companies more closely one finds that they are not entirely composed of the archetypal necessitous fisherman. Appreciating these facts is but the starting point of a realisation that the person making the quota allocations, who is mindful of the call for fostering 'transformation' or 'reconstruction', has a difficult task before him. A task which is not made more easy by the fact that it is notorious in the industry that some applicants are not entirely frank as to who they are, or what exactly they intend doing. And his decision, however wise and reasonable, will satisfy no-one entirely. This by way of introduction.

[3] The respondents are two fishing companies, Phambili Fisheries (Pty) Ltd ('Phambili') and Bato Star Fishing (Pty) Ltd ('Bato'). They brought review applications in the Cape Provincial Division, which came before Ngwenya J and Potgieter AJ. The applications were heard together and succeeded, against the Minister of Environmental Affairs and Tourism ('the Minister'), the Chief Director: Marine Coastal Management ('the Chief Director'), the Deputy Director-General: Environmental Affairs and Tourism ('the Deputy Director-General'), (collectively 'the Government appellants') and 16 fishing companies which were successful in obtaining quotas and who opposed the applications ('the Industry appellants'). Among them are firms such as Irvin and Johnson Ltd and Sea Harvest Corporation Ltd, long-established fishing companies and the two largest. But among them are also wholly black-owned companies and companies with quotas considerably smaller than those of Phambili or Bato. There are also indications in the record that a further eleven of the smaller companies supported the opposition to the respondents' applications, even though they did not join as parties.

[4] The quota allocations were made by the Chief Director on 24 December 2001, under the powers vested in the Minister under s18 of the Marine Living Resources Act 18 of 1998 ('the MLRA') which had been delegated to him in terms of s79. At the time Phambili and Bato were existing quota-holders with quotas much smaller than those held by the large companies. For the 2002 season in respect of which they complain, they were again awarded quotas, slightly larger than they had had, being increases originally from 1069 to 1083 tons and 803 to 856 tons respectively. They had applied for considerably more than they were awarded. Their complaint is, essentially, that as hdp companies the increases in quotas should have been much larger, at the expense of the established companies, or even by the elimination of some of the small

quota holders. The deep sea trawling TAC for the season was 138 495 tons.

[5] The procedure adopted for the determination of allocations in the four hake sectors and the numerous other fishing sectors was a detailed and complex one. On 27 July 2001 a General Notice was published in the Government Gazette. It invited interested parties to apply for fishing allocations. Attached to it was a pro forma application form which required the insertion of numerous details. Among those that are relevant are the following: particulars of the shareholding of applicant companies, full details of hdp as owners, directors, shareholders, members, beneficiaries, or as placed in top, senior or middle management positions, and of the proportion of professional, skilled, semi-skilled and unskilled hdp workers, together with details of their earnings.

[6] Also forming part of the Government Notice were certain Policy Guidelines. The introduction stated:

'The Minister intends to allocate rights for a period not exceeding four years …, which will greatly enhance opportunities for investment and the promotion of *stability* in the fishing industry' (emphasis supplied).'

Under the heading 'Evaluation of Applications' the following, i.a., was stated:

'Applications will be evaluated *in accordance with the objectives and principles set out in section 2 of the Act* and with regard to the policy guidelines set out below. *No precedence, ranking or weighting is implied by the order or content of the policy guidelines.*

1. Business plan, fishing plan or operational and investment strategy

Cognisance has been taken of the fact that substantial investments have been made by many of the current rights holders. This factor, together with the need to create an environment that will promote *further long-term investment in human and material resources are important considerations*. Historical involvements, proof of investment and past performance are therefore important factors. Applicants that are able to demonstrate the creation of employment through the effective utilisation of their allocation will be viewed in a favourable light.

2. Equity, transformation, restructuring and empowerment

The *transformation* of South Africa from an unequal society rooted in discrimination and disparity to a constitutional democracy founded upon freedom, dignity and equality poses particularly profound challenges for the fishing industry. It is here that there are acute imbalances in personal wealth, infrastructure and access to financial and other resources. While it is acknowledged that *transformation or restructuring of the fishing industry cannot be achieved overnight, it nevertheless is a primary objective to build a*

fishing industry that in its ownership and management, broadly reflects the demographics of South Africa today.
In determining the degree of transformation, the following factors will be taken into account:

- *ownership of, or equity within the applicant;*
- *the distribution of wealth created gained through access to marine living resources;*
- the extent to which the applicant *provides employment* to members of historically disadvantaged sectors of the community;

There is also a high degree of gender inequality throughout the fishing industry. The manner in which this is addressed, as well as racial and other historical imbalances in the context of contributing towards achieving equity, are important factors.

In the more *capital-intensive sectors of the fishing industry, a higher level of internal transformation of current rights holders rather than the introduction of new entrants is encouraged*.
To effectively address the injustices of the past in an orderly and just manner and to achieve equity in the fishing industry, it is the intention to allocate a notable proportion of the TAC/… to deserving applicants in order to encourage *transformation*, either through the *internal restructuring of current rights holders, or through the accommodation of new entrants*.
3. Impact on the resources, environment and the fishing industry
A key responsibility is the need to conserve the marine living resources for present and future generations, while at the same time achieving optimum utilisation and ecologically sustainable development. In order to achieve this, the following considerations will apply:
……
……

- The hake line sector (longline and handline) has been identified as a suitable vehicle for the promotion of [HDP] in the hake sector, more specifically small-and-medium-sized enterprises (SMME'S). In order to achieve the objectives contemplated in section 2 of the Act, particular regard will be paid to the need to grant access to new entrants, particularly those from historically disadvantaged sectors of society' (emphasis supplied).

[7] It is not in issue that the contemplated procedures were followed.

What is complained of is the ultimate decision of the Chief Director, as will be explained below.

[8] Leaving aside the procedures for the moment, I draw attention to what has been said in para [2] above as to transformation. To illustrate how internal transformation might take place, I take the example of Sea Harvest, which achieved the highest score for transformation. For all operations wholly owned by Sea Harvest, 96.3 % of the employees are from 'designated groups' as defined by the Employment Equity Act 55 of 1998 ('black people, women and people with disabilities'). 38 % of management comes from 'designated groups'. Of the board of nine, three (including the chairman) are hdp. 5.3 % of Sea Harvest's shares are in the hands of employees. 73.2 % of Sea Harvest is owned by Tiger Brands Ltd ('Tiger'). Tiger is owned as to 38 % by pension funds (13 % of this is owned by the Public Investment Commissioner. He invests, i.a., on behalf of government service retirement funds, the Unemployment Insurance Fund and the Workmens' Compensation Fund). I will not go into further detail. Mr. Penzhorn, the managing director of Sea Harvest, accordingly says 'It is therefore naïve and incorrect to categorise Sea Harvest as a "white-concerned entity"'. I & J also took meaningful transformation steps which it is unnecessary to detail.

[9] I return to the allocation process. There were 110 applications for quotas in the sector, 54 of them from existing rights holders and 56 from

new applicants. The two groups were separately evaluated, first by the Advisory Committee. This body acted in accordance with the Advisory Committee Guidelines and the Advisory Committee Instructions. Members of the first group were further evaluated in accordance with the Criteria for Existing Holders and of the second in accordance with the Criteria for New Entrants. Points were awarded to each applicant and the results were presented to the Chief Director. This committee evaluated each applicant as an applicant. The process was a detailed one and the committee was guided by expert advice. Overall hundreds of applications had to be processed, leading to a useful summary with recommendations to assist the Chief Director in his final decision. The committee played no role in regard to the ultimate quantum of any allocation.

[10] The Chief Director decided not to admit any new applicants and granted rights to 51 of the 54 existing rights holders. Of the TAC of 138 495 tons, 1487 tons were set aside for appeals. This decision was the subject of one of the complaints raised before the Court below. A further 803 tons were set aside for possible allocation to an applicant under investigation for his fitness. After the deduction of these amounts the remaining balance of the TAC was 136 205 tons.

[11] Then come the steps which were the main target of the attack in the review applications. The tonnages allocated in 2001 were used as the starting point for the 2002 allocations made to the 51 successful applicants.

Five percent was then deducted from each applicant's allocation and placed in an 'equity pool' totalling 6810 tons, which was distributed in proportion to their scores in the comparative balancing assessment. The manner in which this distribution was made was such that the holders of large allocations contributed more to the pool than they received back on the distribution. For instance, Sea Harvest contributed 1842.45 tons and received back only 152.66 tons. Correspondingly the holders of small allocations received back more than they had contributed. Although the tonnages of which the major companies have been deprived have been derided as 'piffling', they are not of themselves small. Irvin and Johnson's 2001 quota of 47 662 tons was reduced by 2231 tons (4.7 %) and Sea Harvest's 36 849 tons by 1690 (4.6 %).

[12] Proceeding from what has been set out above, we are presented with a large body of evidence, which has been lucidly summarized in the various heads of argument. Much of what is contained in them may be of interest to a future historian or a present participant in the industry, but I shall confine myself to those facts which are directly relevant to the issues so that my decision and the reasons therefor may be apparent.

[13] The attack on the Chief Director's decision is conducted by both respondents with some stridency. It ranges around most of the review grounds to be found in the books, and more, but the essential theme is a simple one. The central aim of the Chief Director should have been to bring about transformation in a drastic fashion, and in this he has failed miserably. He should have taken much more from the big companies and he should have altogether denied rights to many other, smaller applicants.

Consequently both Phambili and Bato should have received much larger allocations than they did. There is a tendency towards indifference as to what happens to other applicants, large and small. The tone of the attack is that the respondents know far better than the Chief Director does how he should do his job, but little appreciation is manifested of the complexity of his task or of the competing interests involved. We are not asked to replace his allocations with our own, but we are requested to set aside his allocations in their entirety, so that he may start again and make new allocations in the manner in which the respondents say they should have been made in the first place. A warning to us emerges out of the form of this attack. Are we indeed being asked to review the Chief Director's decisions, or are we being asked to do his job for him, not in the sense of substituting his allocations with our own, but in the sense of telling him how, in our opinion, he has erred, and how he should do his job properly, in our opinion, the second time round? But before I can answer that question I shall have to consider the detailed grounds of review. Leading up to that, some history.

Brief history of the hake deep sea industry and its transformation to date

[14] The hake industry is more than a century old in this country. It has come to be recognised as one of the best managed fisheries in the world. In 1979 the deep sea sector had only five 'pioneer' participants. The number of participants rose to seven in 1986 and 21 in 1992. Between 1992 and 2002 the number rose to 51. Phambili first gained a quota in 1997 and Bato in 1999. Also in 1999, after the MLRA had come into force, the decision in *Langklip See Produkte (Pty) Ltd and Others v Minister of Environmental Affairs and Tourism and Others* 1999 (4) SA 734 (C) frustrated the Minister's intention of awarding 10 000 tons to the new longlining sector, of which 6 000 tons were to have been deducted from the deep sea sector. The Minister then, in saving the situation, secured the agreement of the larger quota holders to give up 10 000 tons, of which 3 000 went to new

entrants to the deep sea sector, 3 000 as additional quota to existing smaller quota holders and 4 000 to the longlining sector. In 1979 one hundred percent of the deep sea trawling TAC of 135 000 tons was shared among the five ‘pioneers’. By 2002 their tonnage had dropped to 100 841, which was 72.8 % of a TAC of 138 495.

[15] The ‘pioneer’ companies’ share has deteriorated even more in the hake industry as a whole, as the other sectors are more accessible to newcomers than the deep sea trawl sector and there has been a shift of quota to them. The inshore trawling sector’s catch has risen from 5 000 tons in 1979 to 10 165 tons in 2002. The longlining sector has risen from nil in 1993 to 10 840 tons in 2002. The handlining sector has increased from nil in 1997 to 5 500 tons in 2002. Overall then, the share of the ‘pioneer’ companies in the hake industry as a whole had dropped to 60.7 % in 2002.

[16] By contrast with the other sectors the deep sea trawl sector is highly capital intensive. Its current fixed capital investment amounts to some R5.4 billion at replacement values. It is labour intensive and currently employs 8 838 people (excluding those employed in distribution) with a further 1 300 people employed by intermediary hake and catch-buying processors. The large ‘pioneer’ participants play an important part in the industry’s success. They are largely responsible for the international demand for South Africa’s hake through having developed high quality products and effective international marketing and distribution. The industry generates sales of R1,45 billion annually and its exports are worth R750 million. Small quota holders and new entrants rely to a substantial extent on the ‘pioneers’ for the processing, marketing and distribution of their catches.

[17] Nor is transformation in the deep sea sector achieved only by increased quotas for small holders and the entry of new participants. As indicated in paras [2] and [8] of this judgment it is achieved also by internal transformation within the big companies. Much detail has been given in the papers as to who is actually who, both in the case of the large companies

and the small ones. No point would be served in repeating the detail but what is demonstrated is that the allocation of quotas to small companies is not the only way in which transformation is effected. And the generalisation that the issue is between large 'white' companies and small 'black' ones is simply not accurate.

[18] A further important fact stated by Mr Kleinschmidt, the Deputy Director-General and not disputed, is that transformation initiatives in the last few years have caused instability, which is manifested by decreased investment, with the result that the trawler fleet is ageing. Consequently the industry runs the risk of becoming less and less internationally competitive in the long term. This consideration played an important part in reaching the decision which is under attack. I have relied on certain of the Government evidence up to this point, but before I proceed further I have to deal with the respondents' contention that most of it is not admissible.

Admissibility of the Government's evidence

[19] The Government's case, in the view of the court *a quo*, was dead in the water from the start if regard be had to the following finding:

> '[T]here is no direct evidence before us as to how the Chief Director arrived at his decision. Neither is there direct evidence as to how the advisory committee went about its task. To this extent we would consider the applicants' arguments as being unchallenged to the extent that they may be factual or unanswered where they raise queries.'

[20] In the court *a quo* the Government's main answering affidavit was made by Mr Kleinschmidt, the Deputy Director-General. The Chief Director, the decision-maker, Dr Mayekiso, made only a confirmatory affidavit, in which he confirmed the facts in Kleinschmidt's affidavit 'insofar as they refer or relate to me'. Consequently, found the court *a quo*, it was left in the dark as to what reasons had motivated Mayekiso's decisions. The court *a quo* was quite wrong. Among other things, Mayekiso had made a supplementary affidavit in which he had said:

> ‘As regards Mr Kleinschmidt’s main answering affidavit, in addition to my general confirmation thereof insofar as it refers or relates to me (which I repeat), I specifically confirm the reasons given by Mr Kleinschmidt for the decision and his explanation of the information and factors which I took into account. I would add that during the medium term fishing rights allocations process and thereafter Mr Kleinschmidt and I often discussed issues relating to the process and resulting allocations, including the policy issues raised. Mr Kleinschmidt was the other person delegated by the [Minister] to make such allocations.’

Kleinschmidt added in a supplementary affidavit:

‘I would however emphasize that I and the [Chief Director] spent the better part of a day together working through the draft affidavit and that the final product carries his unconditional imprimatur.’

[21] Kleinschmidt also explained why only one main answer had been prepared. It was because of the volume of the papers and the number of issues raised that the legal advisers decided that it would facilitate the court’s understanding of the defence if a single answering affidavit were prepared, to be supported by confirmatory affidavits. The affidavits to which I have referred above were made in the Phambili matter but similar affidavits were also made in the Bato matter.

[22] For reasons that I find difficult to fathom the court *a quo* also held that the explanations for the allocations provided by Kleinschmidt were not within his personal knowledge and should have ‘no probative value’. The court *a quo* also commented adversely on the fact that no affidavit was put

forward on behalf of the Advisory Committee. As it did not make the decision, I do not see the need to have done so.

[23] I do not agree with these findings on admissibility. They were not supported by the respondents and I accept the Government affidavits as evidence.

I now turn to the MLRA, which is pivotal to the review.

The long title to and sections 2 and 18 of the MLRA

[24] The long title of the MLRA reads:

'To provide for the conservation of the marine ecosystem, the long-term sustainable utilisation of marine living resources and the orderly access to exploitation, utilisation and protection of certain marine living resources; and for these purposes to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa; and to provide for matters connected therewith.'

Section 2, which is headed 'Objectives and principles' reads:

'The Minister and any organ of state shall in exercising any power under this Act, have regard to the following objectives and principles:

(a) The need to achieve optimum utilisation and ecologically sustainable development of marine living resources;
(b) the need to conserve marine living resources for both present and future generations;
(c) the need to apply precautionary approaches in respect of the management and development of marine living resources;
(d) the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government;
(e) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;
(f) the need to preserve marine biodiversity;

(g) the need to minimise marine pollution;
(h) the need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act;
(i) any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law; and
(j) *the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry'* (emphasis supplied).

Section 18, which deals with the granting of rights, reads in part:

'(1) No person shall undertake commercial fishing or subsistence fishing, engage in mariculture or operate a fish processing establishment unless a right to undertake or engage in such an activity or to operate such an establishment has been granted to such a person by the Minister.

(2) ….
….
(5) *In granting any right referred to in subsection (1), the Minister shall, in order to achieve the objectives contemplated in section 2, have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society.*
(6) All rights granted in terms of this section shall be valid for the period determined by the Minister, which period shall not exceed 15 years, whereafter it (sic) shall automatically terminate and revert back to the State to be reallocated in terms of the provisions of this Act relating to the allocation of such rights' (emphasis supplied).

Were sections 2 and 18(5) properly understood and were they heeded?

[25] The judges *a quo* were of the opinion that s 2 had been ignored, so that the Chief Director's decision was fatally flawed. The finding that the Chief Director ignored the section is a remarkable one, which is repeatedly rebutted in the course of the extensive record. One reason for the court's view was that the Chief Director had not expressly said that he had had regard to it. Another reason articulated was that:

> 'It appears that there are strong nuances which seem to underlie the decision but what are not expressly articulated as part of the reasons. These are that there are a number of

existing rights holders who are *established in the hake industry*, that the industry is *capital intensive*, and that there must be *stability* in the industry' (emphasis supplied).

[26] As will appear later the basis of the court's finding on this aspect of the case was that the Chief Director had ignored the goal that the Act had sought to achieve (transformation), whilst relying on 'extraneous criteria such as stability or capital intensity'. The restoration of historical imbalances was said to be the 'mischief' that the Act was designed to remedy. Various of the subsections of s 2 were said to be merely a replay of the past. I have difficulty with this reasoning. No doubt s 2(j) was intended to remedy the 'mischief' of past discrimination, but that does not mean that it overmasters the other subsections merely because they lack novelty.

[27] The argument for the respondents is not capable of being stated precisely, no doubt because it is not a precise argument. Contained within it is the proposition that s 2(j) must be given effect to each time; also that that subsection has a predominating force. The argument becomes particularly hazy when it is asked, 'but how much exactly should have been allocated to you through the proper application of s 2(j) and at whose expense'? Perhaps an even more difficult question to answer would be whether the respondents, among other existing rights holders, should not be made to give up some part of their quota in favour of new entrants. The difficulty in answering questions of this kind again points to the possible conclusion that we are dealing with a discretionary administrative decision which in the

view of the respondents lacked appropriate generosity.

[28] Safer by far it is to start with the Act itself and learn from it what its manifold objects are – see for instance, *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) at 810D-812H paras [16-23] and *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) at 586I-587F paras [9-11]. If one reads the Act it is apparent that it introduces a mandatory requirement to have regard to the redress of certain wrongs of the past. And if the Chief Director were to fail to heed this injunction he would fail in his duty and his decision would be open to attack. But that does not mean that the subsection swamps the rest of the Act. Nor does the Act suggest as much. It would be absurd to suggest, for instance, that transformation should be hastened by increasing the TAC drastically, as this would subvert the injunction to conserve marine living resources for both present and future generations, as required by s 2(b) and would result ultimately in everybody being the loser.

[29] It is true that sections 2 and 18 do contain two imperative words – ‘shall’ in s 2 and again in s 18(5) – and two compelling phrases – ‘the need to restructure’ in s 2(j) – and ‘have particular regard to the need to permit’ in s 18(5). However, it should be noticed that in the English version each

subsection of s 2 (other than s 2(i)) commences with the phrase ‘the need’, whereas in the Afrikaans version only subsections 2 (a) and 2 (b) commence with the phrase ‘die noodsaak’, whereas subsections 2 (c) to (h) and (j) commence with the less pressing phrase ‘die behoefte’. But even taking the two relevant ‘shalls’ to be shalls, their object is not that each of subsections (a) to (j) shall be given operative effect each time but only that the functionary shall ‘have regard to’ or ‘have particular regard to’ them. As to the meaning of this phrase, Ludorf J explained in *Joffin and Another v Commissioner of Child Welfare, Springs, and Another* 1964 (2) SA 506 (T) at 508F-H:

> ‘The words “have regard to” in their ordinary meaning simply mean “bear in mind”or “do not overlook”.
>
> In *Illingworth v Walmsey* [1900] 2 QB 142, the words “regard shall be had to” the difference were held to mean the tribunal must bear the difference in mind and that it had a discretion.
>
> In *Perry v Wright* [1908] 1 KB 441, similar words were said to be “a guide, not a fetter”.
>
> I quote these two cases if authority in the use of the English language be necessary but to my mind the section obviously enjoins the Commissioner to bear these matters in mind and to exercise a discretion in regard thereto.’

[30] A conclusion that the subsections are there to guide and not to fetter functionaries is reinforced by the fact that the considerations listed in s 2 are ‘objectives and principles’. According to the SOED, an objective is ‘a thing aimed at or sought; a target, a goal, an aim’; and a principle is ‘a

general law or rule adopted or professed as a guide to action; a fundamental motive or reason for action'.

[31] Moreover the various functionaries concerned, with many and diverse powers, must have regard to a wide range of objectives and principles. Those objectives and principles will often be in tension and may even be irreconcilable with one another. Accordingly it would be impractical if not impossible to give effect to every one of them on every occasion. Nor does the section say that a functionary must have regard to each consideration in each case, nor what weight is to be accorded it, nor how the various considerations are to be balanced against one another, nor when or how fast transformation is to take place, nor that the listed considerations are the only ones to be had regard to. These matters are left to the discretion of the Chief Director.

[32] I would add, with regard to the applicability of s 18(5) which deals with new entrants, that neither of the respondents is a new entrant.

[33] Accordingly I am of the view that the court *a quo* erred in its interpretation of the sections. And in any event I consider that the court also erred in holding that the Chief Director did not in fact have regard to the sections.

[34] The record reveals a constant reiteration, in detail at times, of the need to take transformation into account. These reiterations are contained in the guidelines and policy directions levelled at functionaries forming part

of the chain of decision making. No purpose would be served in setting out the detail. The Advisory Committee, having been so instructed, acted in accordance with the instructions and the Chief Director accepted the consequent recommendations of the Committee in leading up to making his decision.

[35] I have the Chief Director's word that he did have regard to the need for transformation. It would be difficult to believe that he did not. Moreover the reasons given for the decisions on the various allotments demonstrate that he did:

'7. **Chief Director's Decision on Allocation of Rights**

7.1 In coming to his decision, the CD decided not to take the scoring in respect of by-catch and offal strategies into account. During the process of considering the applications in the light of the scoring, the DDG concluded that the information provided by the applicants and the percentages upon which the scores were determined were not sufficiently reliable to warrant a distinction being drawn based on these criteria.

7.2 After considering each application and having regard to the assessments of the Advisory Committee, the CD decided –

- that no new entrants could be accommodated;
- that fifty one (51) of the 2001 rights holder applicants be granted rights;
- not to make a decision in respect of application #17595 (Houtbay Fishing Industries (Pty) Ltd). A decision will be made on this application once the section 28 enquiry into alleged breaches of that applicant's permit conditions and its alleged contraventions of the Marine Living Resources Act 18 of 1998, have been finalised.

7.3 The decision not to grant rights to new entrants was based on the following reasons–

- The Hake Long-line and Hand-line (which is soon to be regulated) sectors provided a more suitable vehicle for the promotion of SMME's and the admission of new entrants than the Hake Deep Sea Trawl sector does.
- The Hake Deep Sea Trawl sector is highly capital intensive and is already over subscribed. As a result, the amounts allocated to smaller right-holders in the 2001 season were not economically viable.
- The TAC for the Hake Deep Sea Trawl sector remains at 138 495 tons.
- All but one of the 2001 right-holders applied for rights.
- The inclusion of a new entrant in this environment could destabilise the industry, threaten the investment in the industry, discourage future investment and may lead to job losses.

8. **Quantum Allocated**

8.1 A TAC of 138 495 tons is available for allocation to hake deep sea trawl right-holders.

8.2 An amount of 1487 tons is set aside for appeals. A further amount of 803 tons is set aside for possible allocation to Houtbay Fisheries (Pty) Ltd. This leaves 136 205 tons for immediate allocation to successful applicants. Any residue from the amounts set aside will be distributed proportionally to right-holders.

8.3 The distribution of quantum amongst the right-holders is calculated and determined in the "General Reasons" Document attached hereto as Annexure "B". The starting point for the calculation is the allocation made to right-holders in the 2001 season. Five percent of this amount was then deducted from each applicant, amounting to 6 810.25 tons in total. This amount was distributed amongst the right-holders in proportion to their scoring in the comparative balancing assessment.'

In an annexed document the following is also said about an earlier stage in the process:

'Of the 54 applications from 2001 right-holders, 51 were successful. The 2001 right-holders were comparatively balanced against one another in accordance with assessment criteria based on –

- the degree of transformation;
- the degree of involvement and investment in the industry;
- past performance;
- legislative compliance;
- degree of paper quota risk.'

[36] On a fair reading of these passages it is plain, in my opinion, that transformation was taken into account. Para 7.3 of the first document sets out the reason for not granting any rights to new entrants. The longline and handline sectors were more appropriate. The deep sea sector was highly capital intensive and over-subscribed. And the inclusion of new entrants in the sector could destabilise the industry, threaten investment in it and discourage future investment, which might lead to job losses.

[37] What was done in the deep sea sector is set out in para 8.3. The starting point was the allocations in the previous season. So, at that point no new allowance had yet been made for transformation. But in the next step further allowance certainly was made. The quotas of the holders of larger allocations were reduced and the smaller rights holders were the beneficiaries of that reduction.

[38] Accordingly I am of the view that under this head of attack the court *a quo* was wrong both on the law and on the facts. The passages quoted will be revisited under other heads, such as the suggestions that the decisions were not expressed with reasons, or were capricious, or were influenced by extraneous criteria, or were too vague to be understood; but the argument that s 2(j) of the MLRA was ignored must fail.

Vagueness? Absence of reasons?

[39] The much-reiterated argument for the respondents is that what the appellants call reasons are not reasons at all. Alternatively, they are said to be vague as to *why* the allocations were made as they were and particularly they are said not to constitute 'adequate' reasons within the meaning of s 5(3) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) because they do not answer two questions; *why choose the 2001 allocations as a starting point*, and *why five percent* and not some larger percentage? The appellants do not challenge that there was a constitutional duty resting on the Chief Director to give reasons for his administrative actions but they do say that quite adequate reasons were given.

[40] What constitutes adequate reasons has been aptly described by Woodward J, sitting in the Federal Court of Australia, in the case of *Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others* (1983) 48 ALR 500 at 507 (23-41), as follows:

'The passages from judgments which are conveniently brought together in *Re Palmer*

and Minister for the Capital Territory (1978) 23 ALR 196 at 206-7; 1 ALD 183 at 193-4, serve to confirm my view that s 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging."

This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.'

To the same effect, but more brief, is Hoexter *The New Constitutional and Administrative Law Vol 2* 244:

'[I]t is apparent that reasons are not really reasons unless they are properly informative. They must explain *why* action was taken or not taken; otherwise they are better described as findings or other information.'

See also *Nkondo, Gumede and Others v Minister of Law and Order and Another* 1986 (2) SA 756 (A) at 772I-773A.

[41] Detailed reasons were spelt out for not granting entry to any new applicants. Among the considerations were high capital investments, the danger of destabilising the industry and the discouragement of investment,

with accompanying job losses. These considerations having been stated as facts or motivating opinions did not go away when procession was made to the next stage, what to do among the existing rights holders. The first criticism is that there is no explanation for why the 2001 allocations were used as a starting point.

[42] Counsel for the respondents declined to commit themselves to what the starting point should have been, largely confining themselves to saying that it should not have been the 2001 allocations, which reflected the *status quo*. This unreadiness for commitment is unsurprising as it is difficult to see what else could have been used, given that, already, consequent upon those allocations and their predecessors, there was a whole complicated structure of employment, vessels, skills, developed markets and so forth. The respondents argue as if it were incumbent upon the Chief Director to approach the allocations, on each occasion, as if there were no existing fisheries, no existing participants, no existing investments and no track record of expertise and of involvement in the industry in its various aspects. That cannot be so. To my mind the respondents' approach is an approach so unreasonable that it leads to a person embracing it to be forced to seek an explanation for that which needs no explanation. Transformation should have been taken into account at this stage already, it is implicitly suggested. Further implicit is the suggestion that the *status quo* should have been altered to allow for transformation. Why this should have been done when

transformation was going to be allowed for at the next stage is obscure. Why the decision could not be understood is itself not understood. Incomprehensibility is perceived where there is none.

[43] The second main criticism is, why five percent? Again a question arises, if not five per cent, then how many per cent? This unanswerable question also is not answered. This is also not surprising. There comes a time in quantification decision making when a discretionally chosen number has to be adopted to reflect an allowance which, although expressed as a percentage figure, is intended as an expression of degree, eg large, moderate, small – as the case may be. This happens when a judge determines that the apportionment of fault is 60:40, when the contingency allowance for remarriage is determined at 20 %, or where the general damages are fixed at R120 000. There are moments when the fixing of a number is not capable of exact rationalisation or explanation. To my mind, a fair reading of the reasons makes it clear that the Chief Director, suitably assisted, in the exercise of his discretion, decided that an appropriate percentage for the diminution of quotas at the end of 2001 was five per cent. I also consider it to be plain that in doing so he took into account the immediate need for transformation as well as the potential for creating instability in the industry, possibly leading to inadequate investment and job losses.

[44] It should be added that what reasons are to be given for is *the*

decision of the decision-maker. The decision in this case is the allotment of certain tonnages to particular applicants. The reasons for that decision, in my opinion are set out, and are chiefly that there will be no new entrants, that 51 of the existing holders are to be allotted quotas, that the allocations for the previous year will be used as a starting point, save that five per cent will be deducted for redistribution to further transformation. Further it is made plain that the need to achieve stability has been taken into account. These are reasons enough for dissatisfied applicants to attack the decision should they so choose.

My conclusion is that reasons were given, that they were reasonably clear and that they were adequate.

[45] Before proceeding to the next heading (arbitrariness) it should be noticed that in the course of the second step transformation was taken into account at two levels. The first was the five percent reduction in quotas followed by a reallocation which favoured smaller quota holders as a class. But the reallocations also favoured individual smallest quota holders who had scored well on transformation. For instance, the allotment to Mayibuye Fishing CC went up by 30 %, that of Combined Fishing Enterprises by 37 % and Khoi-Qwa Fishing Development Corporation by 57 %. The scoring criteria set out in the passage quoted at the end of para [35] above has the degree of internal transformation by applicants as the first criterion. Four points out of ten were allotted to transformation. Thus one finds, for

instance, when all the criteria had been taken into account, that applicants having the same 2001 allocations did not achieve identical increases in quotas in 2002. As an example, five applicants enjoying quotas of 599 tons in 2001, received in 2002 quotas of 772, 611, 628, 772 and 654 respectively. A few applicants with small quotas actually lost quota when compared with 2001.

Were the decisions capricious or based upon arbitrary or irrelevant considerations?

[46] The court *a quo* was of the view that the Chief Director had taken extraneous criteria into account (as already stated) and that the decision to use the 2001 allocations as a starting point was arbitrary and capricious.

Section 33(1) of the Constitution enjoins that all administrative action must be 'lawful, reasonable and procedurally fair'. The common law and sections 3 to 6 of PAJA elaborate and give content to these standards. They are not new. As was stated by Chaskalson CJ in *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) at 292, para [87]:

> 'The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation.'

[47] From what has already been said as to the interpretation of sections 2 and 18 of the MLRA, it is apparent that the Chief Director, as the delegate of

the Minister, has a wide discretion to strike a balance, in furtherance of the objectives and principles of the Act. To a large extent he gives effect to government economic policies. In such a case a judicial review of the exercise of powers calls for deference, in the sense stated in *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at 471A-D paras [21] and [22], that:

'… a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'

(This passage is a quotation from Hoexter's *The Future of Judicial Review in South African Administrative Law* (2000) 117 SALJ 484 at 501-502.)

[48] See also Sachs J in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at 931J-932B para 180:

'The matter is not simply one of abstract constitutional theory. The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative/enforcement capacities,

implementation strategies and budgetary priority decisions which appropriate decision-making on social, economic, and political questions requires. Nor does it permit the kinds of pluralistic public interventions, press scrutiny, periods for reflection and the possibility of later amendments, which are part and parcel of Parliamentary procedure. How best to achieve the realisation of the values articulated by the Constitution is something far better left in the hands of those elected by and accountable to the general public than placed in the lap of the Courts.'

[49] Similarly Chaskalson P in *S v Lawrence* 1997 (4) SA 1176 (CC) at 1195G-1196E para [42]:

'To apply that test to economic regulation would require Courts to sit in judgment on legislative policies on economic issues. Courts are ill equipped to do this and in a democratic society it is not their role to do so. In discussing legislative purpose Professor Hogg says:

"While a court must reach a definite conclusion on the adjudicative facts which are relevant to the disposition of litigation, the court need not be so definite in respect of legislative facts in constitutional cases. The most that the court can ask in respect of legislative facts is whether there is a rational basis for the legislative judgment that the facts exist.

The rational-basis test involves restraint on the part of the court in finding legislative facts. Restraint is often compelled by the nature of the issue: for example, an issue of economics which is disputed by professional economists can hardly be definitively resolved by a court staffed by lawyers. The most that can realistically be expected of a court is a finding that there is, or is not, a rational basis for a particular position on the disputed issue.

The more important reason for restraint, however, is related to the respective roles of court and Legislature. A Legislature acts not merely on the basis of findings of fact, but upon its

> judgment as to the public perceptions of a situation and its judgments as to the appropriate policy to meet the situation. These judgments are political, and they often do not coincide with the views of social scientists or other experts. It is not for the court to disturb political judgments, much less to substitute the opinions of experts. In a democracy it would be a serious distortion of the political process if appointed officials (the Judges) could veto the policies of elected officials." '

[50] Judicial deferrence does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary.

[51] The respondents' complaint is that in reaching his decisions the Chief Director acted arbitrarily, capriciously or irrationally. But in pressing for what would be to the advantage of the respondents they show little concern for the interests of others, or the benefit of the public as a whole. That is not an approach that should or may be adopted by the Chief Director. He is obliged to have regard to a broad band of considerations and the interests of all that may be affected. If the Chief Director had indeed acted in accordance with the respondents' prescriptions one may imagine the fate of a review application brought by the 'pioneer' companies, they pointing to the trawlers rusting by the quayside, the one-time crewmen lounging in the streets and the fishing nets, like the regimental colours, laid up in the cathedral; the 'pioneers' in consequence complaining of capricious action. The Chief-Director's, decision is indeed a polycentric one. And in deciding

whether his decision is reviewable it should be remembered that even if the respondents had succeeded in proposing what to my mind would be a better solution than that adopted by him (they did not attempt to do so), it would not be open to me to adopt it, for the reason stated by Chaskalson P in *Bel Porto* above at 282F-G para [45]:

> 'The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable.'
>
> See also *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at 709D-H para [90].

[52] During the course of the argument for Phambili we were frequently told that something that the Chief Director had done was 'wrong'. This is the language of appeal, not review. I do not think that the word was misused, because time and again it appears that what is really under attack is the substance of the decision, not the procedure by means of which it was arrived at. That is not our job. I agree with what is said by Hoexter (op cit) at 185:

> 'The important thing is that judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision, and thus obliterate the distinction between review and appeal.'

[53] Judicial deference is particularly appropriate where the subject matter of an administrative action is very technical or of a kind in which a court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds. That I cannot say. Accordingly I am of the view that the attack based on capriciousness must also fail.

[54] Nor do I think that there is merit in the suggestion that he was swayed by considerations, particularly stability, that he should have regarded as extraneous, or that he was too much swayed by them (the argument against stability as a consideration weakened as the case proceeded). I do not think that considerations such as instability in the industry, under capitalisation and loss of jobs were extraneous to the proper making of allocations. Some of the objectives or principles named in s 2(d) are the achievement of economic growth, human resource development, capacity building and employment creation. It would have been irresponsible of the Chief Director to have deprived the industry to any marked extent of the obvious benefits of the large fleets of trawlers, the existing skills and the secure employment offered by the ‘pioneer’ companies. In the latter connection it is to be noted that the labour unions consider that those companies tend to be more labour intensive and provide a variety of side benefits that go with

secure employment. Ignoring stability would also not have been consonant with the need to have regard to achieving optimum utilisation in terms of s 2(a).

[55] In my opinion the rationality and reasonableness of the Chief Director's decision is further demonstrated by what has been said already, at some length, in paras [41] to [43] and [45] above under the heading 'Vagueness? Absence of reasons?'

[56] It should also be observed that the Policy Guidelines quoted in paragraph [6] above made it perfectly clear that stability was a factor much in the mind of the Department. An applicant participating in the allocation process was therefore fully alerted to the fact that stability was likely be taken into account, to a greater or lesser but to an unknown extent, so that it simply did not lie in its mouth to complain when it was taken into account.

[57] It remains to say that the court *a quo* erred, again, in regarding stability and the need for investment as extraneous matters.

<u>The tonnage set aside for appeals</u>

[58] It will be remembered that before allocating the deep sea TAC the Chief Director 'set aside' 1 487 tons to allow for the possibility of appeals. Section 80 of the MLRA provides for an appeal to the Minister against a decision of one of his subordinates. Phambili contended that the Chief Director was not entitled to set aside a part of the TAC for this purpose and, secondly, that by acting as he did he had 'impermissibly fettered' and

'rendered nugatory' the Minister's powers on appeal. The court *a quo* did not uphold these two contentions.

[59] They seem to contradict each other. The first (no right to set aside) suggests that no part of the TAC should have been reserved. The second (impermissibly fettered) suggests that even more should have been set aside. Be that as it may, neither the MLRA, nor the Minister in delegating his powers enjoined the Chief Director to allocate the entire TAC at one time. So much for the first contention.

[60] As to the second, it is inappropriate to consider it at this stage. The objection could become relevant only if an applicant should succeed on appeal but not receive the tonnage to which it was entitled, because there was too little left to allocate, or if it failed in its appeal for the same reason. Then there might be talk of an unfair appeal. But we are dealing with a review of the original allotment decision. Both respondents have in fact appealed to the Minister and we now know (as the result of further evidence tendered by Bato which I consider should be admitted – the appellants not objecting) that as a result of their appeals, Phambili has been awarded a further 43 tons and Bato an additional 17. There has been no suggestion that they have not received what they were awarded on appeal to the Minister. There is no logic in setting aside all the allotments because too much or too little was, in the opinion of the respondents, set aside for appeals.

<u>The Chief Director did not consider the tonnages applied for</u>

[61] Bato raises a further argument – that the Chief Director did not apply his mind to its allocation, in that he did not give consideration to the tonnage sought by Bato or to its ability to fish that tonnage. Notwithstanding the Chief Director's uncontroverted statement that he did consider each application separately, the argument is that there is no trace in the record that he considered the two points raised. What the purpose would have been in considering them when it was manifest that the aggregate of all the tonnages sought exceeded the TAC is not clear. On examination this argument is revealed as an oblique attack on two other stages leading up to the decision. The first is that the quota holders would 'retain' 95 % of their former quotas come what may. This limited the tonnage available to assuage Bato's demands. The permissibility of the 95-5 split has been considered above. The further complaint is that certain 'paper quota' holders were allowed to 'retain' their old quotas (or rather 95 % of them). The result was, again, that there was less tonnage available for Bato than there should have been. This decision, also, was one based on policy, which according to Bato was 'wrong'. Failing a permissible ground of review, the fact that we may consider a decision not to be the wisest (I do not say that I hold that view) is not a matter for review.

Minimum viable quota

[62] A further ground of review raised by Bato, not dealt with by the court *a quo*, is that the director did not have regard to the notion of minimum

viable quota (MVQ), by which is conveyed the belief that there is some determinable level below which a quota is too small to be operated profitably. The short answer to this contention is that the Economic Sectoral Fishery Profile Study ('ESS'), an investigation and report commissioned by the Department from Rhodes University, rejected the concept of the MVQ. It has not been adopted by the Department. Nor does it form part of the MLRA. The concept has been disregarded by scientists as of no scientific value. Consequently there is no basis on which Bato may foist it on the Director-General.

[63] In any event the fact is that small quotas are capable of successful exploitation. Experience shows that some holders of small quotas have put them to fruitful use by forming joint ventures, or concluding co-operative arrangements, or by buying additional quota from other holders. One of the hopes of the Department was that over the medium period, 2002 to 2005, market forces would operate so that small quota holders would make better use of their quotas by merging, co-operating and so forth.

Legitimate Expectation

[64] Phambili claimed that it had a legitimate expectation of a 'substantial allocation and increase' in the allocation to it, in that it 'believed that the application for a right to catch 5 000 tons would be favourably considered'. Both Phambili and Bato relied on the Policy Guidelines and a Ministry media statement, each dating from 2001. In addition Phambili relied on the

Minister's speech in the National Assembly in May 2001 and a further Ministerial media statement. Bato further relied on a white paper in 1997 and two draft discussion documents. The general tenor of these documents was that the government intended doing something positive about transformation in the fishing industry. Phambili's case was based on the doctrine of legitimate expectation. Bato's case, which will be explained below, had a different basis.

[65] Dealing first with legitimate expectation, the test to be applied has recently been restated in this court in *South African Veterinary Council and Another v Szymanski*, unreported, SCA. The judgment was delivered on 14 March 2003, by Cameron JA who stated at para [19]:

> 'The requirements relating to the legitimacy of the expectation upon which an applicant may seek to rely have been most pertinently drawn together by Heher J in *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) para 28. He said:
>
> "The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include the following:
>
> (i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, Woolf and Jowell (op cit [*Judicial Review of Administrative Action* 5th ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair

to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

(ii) The expectation must be reasonable*: Administrator, Transvaal v Traub* (supra [1989 4) SA 731 (A)] at 756I-757B); De Smith, Woolf and Jowell (supra at 417 para 8-037).

(iii) The representation must have been induced by the decision-maker: De Smith, Woolf and Jowell (op cit at 422 para 8-050); *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at 350h-j.

(iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 59E-G." '

[66] The numerous and disparate statements, by different persons, on which the respondents rely, cannot amount to a representation that is 'clear, unambiguous and devoid of relevant qualification' – for instance statements such as 'broadening future participation'; 'a system which ensures greater access to the resources by those who have been denied access previously'; 'the achievement of equity in the fishing industry in addressing the historical imbalances'; 'broadening future participation'; 'an end product … which differs radically from the situation that obtains today'; 'the beginning of a fundamental change in the fishing industry in South Africa'; the achievement of the twin objectives of 'stability and black economic empowerment'; and 'Up to 25 % of the "remaining" [remaining after what?] TAC will be set aside and will be allocated to deserving applicants in order to encourage transformation and restructuring, *either through the*

> *internal restructuring of current rights holders*, or through the accommodation of new entrants' (emphasis supplied). How are the tonnages apparently expected by Phambili reasonably to be extracted from such statements? To arrive at tonnages is made even more difficult by the respondents' counsel's understandable unreadiness to suggest a percentage to replace 5 % or a different starting point. They confine themselves to generalisations. The percentage should be considerably higher and the starting point should be different (with some tentative suggestions as to where it should be). That is the argument.

[67] It should also be borne in mind that some of the documents and statements arose during discussions as to the future. To hold politicians and bureaucrats to every word uttered in the course of negotiation might hamstring open discussion. Moreover, nothing that they say can alter the meaning of the MLRA, which does not always reflect earlier thinking which must be taken to have been abandoned.

[68] Nor, to apply the second test in the *Phillips* case (above), was Phambili's reliance on what it thought had been represented reasonable.

[69] It is unnecessary to probe legitimate expectation further. Enough has been said to demonstrate that there is no substance in this ground of review.

Fair administrative action

[70] As I have indicated Bato does not rely on legitimate expectation but presents an argument that is much akin to it and which is based on much

the same material. The argument relies on s 33(1) of the Constitution, which entitles everyone to 'administrative action that is lawful, reasonable and procedurally fair'. The complaint is that when the allocations were made there was an unheralded change in policy, which was procedurally unfair to applicants who had earlier relied on previous and oft-repeated statements as to how transformation would be treated in the allocation process. Reliance is placed on *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at 110 C-D para [41]:

> 'Citizens are entitled to expect that government policy will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker.'

[71] The right that is relied upon is the right to be fairly treated. That an applicant has such a right is clear (see eg *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) at 871F-G paras [11-12]). This is so even though it had no right to receive an allocation. But was the right violated? In order to answer this question one needs to ask what was it in the decision-maker's mind of which an applicant was not aware and which conflicted with earlier policy statements.

[72] In this connection reference needs to be made to the 'Evaluation of Applicants' section of the Policy Guidelines quoted in para [6] above.

There applicants for quotas were expressly warned that s 2 of the Act would be applied. That Act makes no mention of MVQ. Yet the first alleged subject of ignorance is said to be that applicants were not aware that that concept had been jettisoned. Not only did the Act not mention MVQ but applicants were expressly warned that no precedence, weighting or ranking was to be derived from the Guidelines themselves. Those Guidelines made it clear that the Minister or his delegate was going to use his discretion, within the parameters of the Act. The second subject of which applicants were said to have been ignorant was that the decision-maker had abandoned the intention to award a 'notable proportion' of the TAC to hdp, as had been stated in para 2 of the relevant section of the Guidelines – see para [6] above. The reference to 'notable proportion' is said to be to the percentage that was to be placed in the 'equity pool', but I do not think that that is the correct interpretation of what was said. The true meaning is that a notable proportion of the total TAC would be allotted to the hdp. The fact is that 23.86 % of the hake deep sea quantum for 2002 was allocated to rights holders which were 50 % or more owned by hdp. More than 80 % of the quantum in the longline sector was awarded to concerns similarly owned. Surely these are 'notable proportions'. And in any event, what constitutes a notable proportion is largely a matter of opinion and I do not think that Bato has succeeded in showing that there was a departure from what had been previously foreshadowed. The third subject of ignorance was said to

be that applicants did not know that the ‘pioneers’ would not lose tonnage, or a substantial tonnage. The fact is that they did. The fourth subject is that the decision-maker was claimed to have misunderstood the law. In the light of what I have said earlier he understood the law very well. The fifth subject was that it was not known that the Department hoped that there would be consolidation, co-operation and so forth among smaller quota holders. I fail to see how the Department’s failure to proclaim its hopes for the future (if indeed it did not so proclaim) can be presented as some form of trap for supposedly ignorant applicants. In sum I do not consider that there is any substance in any part of the argument that prospective quota-holders were led into the dark and left there until it was too late.

[73] In any event, I am at a loss to see where the argument would lead if there were any substance to it. Bato concedes that if it was brought under a misapprehension, that in itself did not entitle it to receive a particular larger quota. But, it says, it should have been given a hearing on the intention to change the policy. In other words the whole cumbersome procedure would have had to be brought to a halt while representations were made as to why the Department’s formerly stated policies (whatever they actually were) were better than the Department’s more recent thinking as to how its discretion should best be exercised having regard to what the MLRA required of it. This would, on the facts in this case, be taking the right to fair procedural action over the brink. I conclude that there is no substance in

this point either.

[74] In the result I am of the view that there is not any merit in any of the respondents' review grounds. The court *a quo* should not have upheld the review. These huge reviews, running to some 45 volumes, were based upon a preconception that was not sustained by evidence and lacked all substance. The essential message of this judgment is that it is not the function of a court to sit in appeal on decisions to grant fishing allocations, or to constitute itself as an authority as to how to make such allocations. That, however much it is denied, is what the respondents are asking us to do.

[75] This conclusion makes it unnecessary to deal with two matters raised by the Industry appellants in defence. The first was that in terms of s 7(2) of PAJA an action is not to be reviewed unless any internal remedy provided for has first been exhausted. Section 80 provides for an internal appeal to the Minister and although the respondents had appealed, the Minister had not reached his decision when the reviews were brought. In the light of the appellants' successful opposition to the reviews on other grounds it is unnecessary to deal with this point. Similarly with the Industry appellants' request to admit the evidence of one Rory Williams.

Costs of the record

[76] A request that the two appeals now before us be treated as urgent was acceded to and they were set down for hearing on 2 and 5 May 2003. The

heads of the appellants were to be filed by 31 March and those of the respondents by 15 April. That meant that the judges had to commence work on a combined record of 45 volumes without both sides' heads. This made it particularly imperative to comply with SCA Rules 8(6)(d)(ii) and 8(7). The former provides that all references in the record to page numbers of exhibits shall be transposed to reflect the page numbers of such exhibits in the appeal record. This rule was not complied with. Nor was the position alleviated by reflecting the old numbers in the index. That was also not done. Rule 8(7) requires that where it is appropriate a core bundle must be prepared. Before us are appeals in which it was peculiarly appropriate to prepare a core bundle. The effects of its absence until a late stage were aggravated by the records being cluttered with large numbers of documents that were not relevant to the appeal. The combined effect of these lapses was that five appeal judges wasted a great deal of time trying to find their way through the record. Failure to comply with these rules is a serious matter at any time, but especially so when an appeal is urgent and the record long. Urgency is not an excuse for remissness. It is the more reason for compliance. There is no excuse for the failure to comply with these two rules. This Court has spoken often enough about the frequency and flagrancy of the flouting of the Rules. In some cases it has made punitive costs orders. These appeals call for such an order. It is accepted that all the appellants are jointly responsible for the state of the record.

[77] I have mentioned already that there are many unnecessary documents contained in the records. There has not been a sufficient compliance with Rule 8(9). The reason given for this state of affairs is, again, urgency. I have some sympathy for that resort in this particular respect. The process of accurate winnowing of chaff is not made more easy by the need for haste. By agreement some parts of the record *a quo* were not included in the appeal record. The final state of that record bears the agreement of all parties. Accordingly, in these special circumstances I do not consider that a punitive order is warranted for this breach of the Rules.

[78] There is further ground for complaint about the record. The indexes in the index volume and in the volumes following volume one, in each case contain a repetition of the full heading of the case, and the names of all the attorneys, which take up a page and a half. It was made clear a long time ago that such a practice with regard to indexes should not be followed and that the adoption of it will lead to an appropriate disallowance of costs. Nor is it only a matter of costs. It wastes everybody's time having to plough through these pages and other totally unnecessary pages in the record. It is not uncommon to find page after page on each of the index pages of which the only substantive item is, for instance, 'Smith. Evidence in chief (continued)'. This is a sloppy, cost-inflating practice not to be endured and attorneys should make it clear to those who prepare records that they will not pay for a defective product (this comment is not intended to be confined

to indexes). In the appeals before us this unnecessary repetition will also be taken into account in determining on a punitive order.

[79] Taking together the failure to insert the new numbers, the absence of a core bundle and the inflated indexes and lists of attorneys, I consider that the appropriate order would be to disallow the recovery by the appellants' attorneys from the respondents on their clients' behalf, or from their own clients, the appellants, one third of the cost of preparing the record.

Replying affidavits

[80] There is one other matter that I am compelled to mention – replying affidavits. In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest – and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them.

Result

[81] The appeal is upheld with costs including the costs consequent upon the employment of two counsel; save that the appellants' attorneys are forbidden to recover one third of the cost of preparing the record, either from the respondents or from their own clients, the appellants.

[82] The orders numbered 2, 3 and 4 in the judgment in each of case no 1171/02 and case no 1417/02 in the court *a quo* are set aside and replaced by an order in the following terms:

'The application is dismissed with costs including the costs of two counsel.'

W P SCHUTZ

JUDGE OF APPEAL

CONCUR

HOWIE P
MTHIYANE JA

CONRADIE JA

JONES AJA

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