THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

In the matter between : CASE NUMBER 129/03

THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM ***FIRST APPELLANT***

MONDE LATEGAN DU TOIT MAYEKISO NO ***SECOND APPELLANT***
and
PEPPER BAY FISHING (PTY) LTD ***RESPONDENT***

AND

CASE NUMBER 130/03

THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM ***FIRST APPELLANT***

THE CHIEF DIRECTOR: MARINE AND COASTAL MANAGEMENT ***SECOND APPELLANT***
and
ISAK SMITH ***RESPONDENT***

CORAM : HARMS, NAVSA, BRAND, CLOETE and HEHER JJA

HEARD : 20 AUGUST 2003
DELIVERED : 5 SEPTEMBER 2003

Marine Living Resources Act – applications for fishing rights – non-compliance with procedural requirements determined by General Notice under s 18(2) of the Act – whether Chief Director as Minister's delegate had discretion to condone such non-compliance – relevance of s 33 of the Constitution

JUDGMENT

BRAND JA/

BRAND JA :

[1] Although these two appeals were never formally consolidated, they were argued together, both in this Court and at some stage during the proceedings in the Court *a quo*. The appellants in both matters are the Minister of Environmental Affairs and Tourism ('the Minister') and the Chief Director: Marine and Coastal Management in the same Department ('the Chief Director').

[2] Both matters arose from unsuccessful applications by the respondents in the two appeals, Pepper Bay Fishing (Pty) Ltd ('Pepper Bay') and Mr Izak Smith ('Smith'), under s 18 of the Marine Living Resources Act no 18 of 1998 ('the MLR Act') for fishing rights, more particularly the right to catch West Coast rock lobster. The Chief Director, acting under delegated powers, took the view that both applications were defective in form and that consequently he was precluded from considering them on their merits. As a result both applications were rejected. Against these decisions, Pepper Bay and Smith lodged appeals to the Minister in terms of s 80 of the MLR Act. The Minister personally considered and thereafter dismissed both appeals.

[3] Pepper Bay and Smith thereupon launched separate proceedings in the Cape High Court seeking these decisions of the Chief Director and the Minister to be reviewed and set aside. Initially Pepper Bay's application was argued before Louw J while Smith's application was heard by Davis J. When it transpired that the issues involved in the two matters were substantially the same, the two judges, sitting together, heard further argument. Eventually separate judgments were handed down. (The judgment by Davis J has since been reported *sub nom Smith v Minister of Environmental Affairs* [2003] 1 All SA 628 (C).) Both applications were successful. Subsequently the Courts *a quo* granted leave to appeal to this Court.

[4] As to the background facts, a convenient starting point is to outline the legislative framework against which both appeals fall to be considered.

[5] Section 18(1) of the MRL Act provides, *inter alia*, that no person may undertake commercial fishing unless a right to do so has been granted to him or her by the Minister. In terms of s 79 these powers could be and were delegated to the Chief Director.

[6] Section 18(2) of the MLR Act provides that an application for any right referred to in s 18(1) must be submitted to the Minister in the manner determined by him or her. The Minister did so by means of General Notice 1771 of 2001 ('the General Notice') published in

Government Gazette No 22517 of 27 July 2001. The General Notice comprises three parts. The first part contains an invitation ('the Invitation') to apply for fishing rights for the 2002 to 2005 seasons in 22 sectors of the fishing industry, including West Coast rock lobster. The second part is a specimen application form which includes certain instructions for the completion of the form ('the Instructions'). The third part contains policy guidelines ('the Guidelines') which inform the prospective applicant of the policy considerations that the Minister - or his delegate – would to take into account when considering the application on its merits. The Guidelines deal with the merits of applications for fishing rights. Since neither of the applications concerned were considered on their merits, the contents of the Guidelines are not directly relevant.

[7] The General Notice makes reference to a Rights Verification Unit. The explanation for its existence is that thousands of applications across the 22 sectors were anticipated in response to the General Notice and this unit, comprised of individuals not employed by the State Department concerned, was appointed on contract in order to receive and verify the contents of this large number of applications.

[8] The Chief Director rejected Pepper Bay's application because the application fee prescribed by the Invitation and the Instructions had not been paid timeously. He dismissed the application of Smith because it was not accompanied by the two copies required by the provisions of these two documents. As will shortly become apparent, the appeals turn largely on the proper construction of the contents of the Invitation and the Instructions. It is therefore necessary to quote from them more extensively than I would have preferred.

[9] At the outset, the Invitation sets out a table listing each fishing sector and indicates the opening and closing dates in each sector. According to this table the closing date for all sectors, including West Coast rock lobster, was 13 September 2001.

[10] Under the heading 'Application fees' the Invitation contains the following provisions:

'An application fee of R6 000.00 (six thousand rand) will be charged for lodging an application for a right to undertake commercial fishing, or to engage in mariculture or to operate a fish processing establishment.

An application fee of R500.00 (five hundred rand) will be charged for lodging an application for a [limited] right to undertake commercial fishing of:

1) No more than 60 000 oysters per annum using no more than four harvesters;

2) White mussels for bait purposes;

3) 850 kg or less Abalone;

4) 1.5 tonnes or less west coast rock lobster;

5) Linefish Traditional with no more than four crew members;

6) By means of small nets (beach seine for mixed shoal fish, drag, gill/drift, cast and shove).

All applicants are herewith informed that any application submitted without proof of proper and timeous payment of the stipulated fee at the time of lodgement will not be considered.

No money is to be sent with the Application Form. Application fees must be paid into the bank account of the Rights Verification Unit and proof of such deposit, by way of deposit slip, must be attached to each Application Form. Full details are given in the Application Form.

Application fees are not refundable. In exceptional circumstances, the Minister may refund application fees.'

[11] Under the heading 'Submission of Applications' the Invitation provides:

'Applications may only be made on the numbered Application Forms supplied by the Department. Applications submitted on any form other than the approved Application Form will not be considered.

An applicant must submit one original Application Form and two copies of the Application Form and all its annexures, per sector or fishery applied for.

…

No application received after 12:00 Friday 13 September 2001 will be accepted or considered …'

[12] In similar vein, the Instructions give the following explicit warnings to prospective applicants with regard to the manner in which the application should be made:

'IMPORTANT INFORMATION – YOU MUST READ THIS CAREFULLY BEFORE FILLING IN YOUR APPLICATION.

1. You must fill in the Application Form and attach the necessary documentation in the manner prescribed below.

2. The form is numbered and has been laid out in order to permit it to be scanned electronically. You may not submit the application in any other form. If you fail to comply with this requirement your application will be rejected.

3. The application form is issued together with a copy of the policy guidelines. The guidelines inform you of the policy considerations that the Minister, or his delegate, will take into account in considering the application. You are accordingly advised to read the Policy Guidelines carefully and to ensure that your application deals fully with issues raised in the guidelines. …

10. You must submit one (1) original and two (2) copies of the application. …

12. The Application Form must reach one of the following addresses before the stipulated closing date and time as set out in the Government Gazette Notice dated 27 July 2001. …

15. You must pay the application fee by direct deposit as follows:

Name of account holder:	Rights Verification Unit
Bank:	Absa
Account Number:	…

16. You must pay the application fee properly and timeously … Proof of payment (bank deposit slip) must accompany the application …

20. If you fail to comply with the requirements set out in the Government Gazette Notice Policy Guidelines and Application Form your Application may ***not*** be considered, or, if considered, refused. ' (Emphasis in the original.)

[13] The facts giving rise to the refusal of Pepper Bay's application are largely common cause. On 10 September 2001, some three days before the closing date for the submission of applications, Pepper Bay deposited a cheque in the sum of R6 000 in the account of the Rights Verification Unit ('the RVU') held at Absa Bank, Cape Town. This was done, so it was subsequently explained by Ms Gorka, the bookkeeper who wrote out the cheque on Pepper Bay's behalf, 'to ensure that payments would be done timeously and well before the deadline of 13 September 2001'. Absa stamped the deposit slip – indicating that the application fee had been deposited – and credited the account of the RVU with the amount of the cheque. On 11 September 2001 Absa noticed, however, that the cheque had been post-dated to 28 September

2001. Consequently it reversed the credit of Pepper Bay's deposit in the RVU account. Ms Gorka's explanation is that she intended to date the cheque on the day it was completed, i e 28 August 2001, but through a '*bona fide* administrative error' she mistakenly post-dated it to 28 September 2001.

[14] On 13 September 2001 Pepper Bay submitted its application form, together with the deposit slip reflecting that an amount of R6 000 had been deposited into the account of the RVU on 10 September. Receipt of this application was thereupon acknowledged by the RVU. On 17 September 2001, some four days after the closing date for applications, Absa sent the post-dated cheque to the RVU under cover of a standard letter which informed the addressee that, since the cheque deposited had been post-dated, the addressee's account had been 'adjusted accordingly'.

[15] The Chief Director considered Pepper Bay's application on 8 December 2001. He concluded that the application had been 'improperly lodged' in that the required application fee had not been paid timeously. His further view was that he had no discretion to condone non-compliance with the requirement of timeous payments. As a consequence he concluded that he had no authority to consider the application on its merits. In the event the application was rejected on purely procedural grounds. As I have already indicated, Pepper Bay's subsequent appeal to the Minister against the Chief Director's decision was refused. According to the Minister's stated reasons he did so because he agreed that the Chief Director had no discretion to condone non-compliance with the procedural requirements contained in the General Notice.

[16] The facts of the Smith appeal are somewhat more controversial in that many allegations relied upon by Smith in his founding papers were denied on behalf of the appellants. However, following the approach explained by this Court in *Plascon Evans Paints Ltd v Van Riebeeck Paints Ltd (Pty) Ltd* 1984 (3) SA 623 (A) 634G-635D, the essential facts upon which a decision can rightfully be based, are capable of fairly succinct description.

[17] Smith had been a subsistence fisherman at Lambert's Bay on the West Coast for twenty years. His livelihood was derived from fishing and particularly from the catching of rock lobster. In response to the Minister's invitation embodied in the General Notice, he, together with 28 other subsistence fishermen from Lambert's Bay, mandated a chartered accountant, Mr Elgar Bonthuys ('Bonthuys'), to assist them in preparing their applications for the right to undertake the commercial fishing of West Coast rock lobster. Bonthuys was specifically directed to ensure that their applications complied with the necessary formalities; that the relevant application fees were timeously paid; and that their applications

were submitted before the stated deadline of 12 noon on Thursday, 13 September 2001.

[18] During the morning of 13 September 2001, Bonthuys and those assisting him paid the 29 application fees of R500 each required in terms of the Invitation. They arrived at the Receiving Centre established by the RVU in Sea Point, Cape Town before 12 noon on that day. By that time a long queue had already formed. As a result they only gained entrance to the room where applications were received some five hours later. In the meantime persons who were in the queue before 12 were handed a 'time cut-off disc' indicating that they were present at the cut-off time and were therefore not be regarded as late applicants. The reason for the long queue was that thousands of applications were received on 13 September 2001.

[19] When Bonthuys and his assistants eventually entered the room where the applications were received, they realised that they were only in possession of the original application forms while the provisions of the General Notice required submission of the original form together with two copies. The copies had apparently been left in a vehicle that had already returned to Lambert's Bay. The officials involved refused to take receipt of the applications until such time as copies had been obtained. They also refused to allow Bonthuys to make copies and return to the Receiving Centre on the same day. On Friday, 14 September 2003, Bonthuys went back to the Receiving Centre with the 29 applications. On this occasion the applications were accompanied by two copies and the officials involved took receipt of these documents.

[20] During December 2001, the Chief Director considered the applications of Smith and his 28 co-applicants. He took the view that the applications had been submitted late; that the time periods fixed by the General Notice were peremptory; and that he had no discretion to condone the submission of late applications. As a consequence he refused the 29 applications without considering them on their merits. Smith's appeal to the Minister under s 80 of the MLR Act was unsuccessful essentially because the Minister shared the views of the Chief Director in all material respects.

[21] It is common cause that 13 September 2001 was a Thursday and that the reference towards the end of the Invitation to the deadline as '12:00 on ***Friday*** 13 September 2001' was a mistake. Smith did not suggest that he or his representatives were misled or in any way influenced by this mistake. In fact his clear instructions to Bonthuys, so he says, were to ensure that his application was delivered at the Receiving Centre by 12 noon on ***Thursday*** 13 September 2001. His contention is, however, that because of the mistake an official of the Department concerned, one Mr Robertson, had extended the deadline to 12 noon on the Friday and that because his application was lodged

before the extended deadline it cannot be considered late. In his answering affidavit Mr Robertson denies that he ever gave such extension. Moreover, he denies that he was an employee of the Department or that he had any authority to grant an extension of the deadline prescribed by the Minister in the General Notice.

[22] The grounds of review relied upon by both Pepper Bay and Smith are essentially twofold. Their first contention is that the Chief Director and the Minister, in both matters, erred in concluding that the applications were 'improperly lodged'. In any event, so they maintain, the Chief Director erred in not considering to condone that which he regarded as the defects in their applications because he was under the mistaken impression that the provisions of the General Notice afforded him no discretion to do so. The Minister's mistake, they contend, was his failure to rectify this on appeal.

[23] Pepper Bay's first argument as to why the Chief Director erred in concluding that it had failed to pay the application fee of R6 000 timeously is based on the fact that on 10 September 2001 the account of the RVU had been credited by Absa Bank with this amount. It matters not, so the argument went, that Absa Bank subsequently reversed this credit when it realised that Pepper Bay's cheque had been post-dated to 28 September 2001. In my view the short answer to this argument is that it is in direct conflict with the thus far unreported judgment of this Court in *Burg Trailers SA (Pty) Ltd and Another v Absa Bank Limited and Others* (delivered on 30 May 2003 under case number 145/02) to the effect that a credit which is provisional in the sense that it can still be reversed by the bank does not constitute payment. This must particularly be so when the credit is indeed subsequently reversed by the bank (cf *Erikson Motors (Welkom) Ltd v Protea Motors and Another* 1973 (3) SA 685 (A) 693G-H).

[24] The further argument by Pepper Bay as to why its application did in fact comply with the prescriptions of General Notice was that they do not require that proper and timeous payment be actually made but only that ***proof*** of proper and timeous payment be lodged with the application. Since the deposit slip duly stamped by the bank and annexed to its application constituted such proof, so the argument concluded, the application had been lodged properly. This argument, in my view, amounts to an elevation of the façade of proof over the substance of payment. What the General Notice requires is actual payment of the application fee before the application is lodged together with proper proof by way of a deposit slip that such payment had been made. The notion that incorrect or false proof of such payment would suffice, is quite untenable.

[25] Smith's contention in his founding papers as to why his application should be regarded as having been lodged timeously was initially based

on the allegation in his founding papers that the stipulated deadline had been extended by Mr Robertson to 12:00 on Friday 14 September 2001. This contention, however, became stranded on the pertinent denial by Robertson in his answering affidavit that such extension was ever given. In accordance with the approach to factual disputes in motion proceedings, as explained in the *Plascon Evans Paints Ltd* case *supra,* the matter is to be decided on Robertson's version, i e on the basis that the extension was not granted. In his replying affidavit Smith tried a somewhat different tack. At that stage his contention was that the provisions of the General Notice do not require the two copies to be filed ***together*** with the original application and that his application was therefore in proper form, despite the absence of copies, when he initially sought to lodge it on 13 September 2001. I cannot agree with the construction of the provisions of the General Notice which forms the basis of this argument. Upon my reading of these provisions an 'application' consists of (a) an original numbered application form supplied by the Department together with (b) all its annexures and (c) two copies of all these documents. And it is an application in this form – and no other – which was required to be lodged before the stated deadline.

[26] For these reasons I hold that the Chief Director and the Minister cannot be criticised for their view that neither the application of Pepper Bay nor that of Smith complied with the requirements of the General Notice.

[27] This brings me to the second review ground which is based on the supposition that the General Notice afforded the Chief Director a discretion to condone these procedural defects. This is the ground upon which both review applications were upheld in the Court *a quo*. It is conceded by the Minister and the Chief Director that the latter never professed to exercise any such discretion because he thought he had none. As a consequence they also conceded, quite rightly in my view, that if such discretion should be held to exist, the review applications were correctly upheld.

[28] The keystone to the decision of both Louw J and Davis J was that the Chief Director was indeed afforded a discretion to condone procedural defects, in para 20 of the Instructions. It will be remembered that this paragraph informed the prospective applicant that:

'if you fail to comply with the requirements set out in the Government Gazette [i e the Invitation] the policy guidelines [the Guidelines] and the application form [the Instructions] your application may ***not*** be considered or, if considered, refused'.

Based on the wording of this paragraph the reasoning of Louw J (with which Davis J found himself in agreement) proceeded as follows:

'There is no reason why these words should not be held to mean what they clearly say, *viz* that non-compliance with the requirements ***may*** result in the application not being considered at all. The body or person charged with considering and deciding

on the application, may (not must) therefore decide not to consider the application at all. Once, however, it is decided to consider the application despite its non-compliance with the requirements laid down, the application may (not must) nevertheless be refused. This can mean nothing else than that the decision maker does have the discretion to consider the application and if it is decided to consider the application, either to reject or to grant the application.
…

It would make no sense for the decision maker to be given the discretion to consider an application under clause 20, but then to be bound nevertheless to refuse the application for non-compliance once it is considered.'

[29] Louw J then made reference to the explicit warning in the Invitation to the effect that 'any application submitted without proof of proper and timeous payment of the stipulated fee at the time of lodgement will not be considered'. With regard to this provision he said the following:

'This provision is set out in the body of the General Notice [the Invitation] and is not part of the directions set out in the application form itself [i e the Instructions]. To the extent that it is to be read to admit of no discretion, it is in conflict with clause 20 of the latter. I think the proposition that the provision contained in the body of the General Notice should take preference to and override the conflicting provision contained in the application form itself, needs only be stated to be rejected. Although the information sheet [the Instructions] may be directed primarily at the prospective applicants, it is in my view not open to the decision maker to deal with the applications on another basis. To do so would offend against the right to procedurally fair administrative action. A provision set out in the General Notice [the Invitation] which many of the potential applicants may never have seen cannot fairly be held to override the provision contained in the application form which all applicants are told specifically contained "important information" which they must "read … carefully before filling out your application".'

[30] Essential to this line of reasoning is the notion that the Instructions somehow outrank the Invitation. That notion has no validity. This renders the whole line of reasoning fundamentally flawed. The stated rationale for the underlying notion is that the prospective applicant may not even have seen the Invitation whereas the relevant provisions of the Instruction were foisted upon him under the boldly printed heading of 'important information'. As a matter of fact the assumption that the individual prospective applicant may only have seen the Instructions and not the Invitation might or might not be true. As a matter of law it is entirely irrelevant. The Minister was empowered to issue the General Notice under s 18(2) of the MRL Act. Its publication in the Government Gazette was authorised by s 15 of the Interpretation Act 33 of 1957. Since the General Notice owes both its existence and authority to an empowering original law (the MRL Act) it should be regarded as subordinate or delegated legislation and interpreted accordingly. Thus

understood the General Notice, though consisting of three constituent documents, must be read as one enactment. The fact (if it be one) that a prospective reader has read only one of the constituent parts of the enactment and not the other is of no legal consequence.

[31] As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so (see e g *Le Roux and Another v Grigg*-Spall 1946 AD 244 252; *SA Co-operative Citrus Exchange Ltd v Director General Trade and Industry and* Another 1997 (3) SA 236 (SCA) 241). The Chief Director derives all his (delegated) powers and authority from the enactment constituted by the General Notice. If the General Notice therefore affords him no discretion, he has none. The question whether he had a discretion is therefore entirely dependent on a proper construction of the General Notice.

[32] Once it is appreciated that the key to the question lies in the General Notice as a whole, the obvious starting point is to construe the special provisions of the Invitation and the Instructions that Pepper Bay and Smith had failed to comply with. In the performance of this exercise it is to be borne in mind that both the Invitation and the Instructions are drafted in what is described in *SA Co-operative Citrus Exchange Ltd v Director General: Trade & Industry and Another supra* 240A-B as 'narrative form' in contrast with 'familiar statutory language'. The obvious purpose is to render it easier to understand. Unfortunately this method of drafting has, as it often does, the exact opposite result. Time honoured canons of construction applicable to 'familiar statutory language' are to be applied with circumspection. Nevertheless, it cannot be ignored that the provisions of the Invitation pertinent to the Pepper Bay case, on their plain wording, clearly state that the application fee ***must*** be paid at the time that the application is lodged. Paragraph 15 and 16 of the Instructions are similarly couched in peremptory terms. An applicant '***must*** pay' the application fee and '***must*** pay the application fee promptly and timeously'. The general principle is, of course, that language of a predominantly imperative nature such as 'must' is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction (see e g *Sutter v Scheepers* 1932 AD 165 at 173-174). Even though the provisions under consideration are drafted in narrative form, common sense dictates that this principle be afforded some weight. An even more significant indication that timeous payment of the application fee is peremptory is that the Invitation contains an explicit sanction for non-compliance with the provision – an application submitted without proof of proper and timeous payment will not be considered (cf *Sutter v Scheepers supra* 174). There is also the more general consideration that where, as in the

present case, a statute provides for the ***acquisition*** of a right or privilege – as opposed to the ***infringement*** of an ***existing*** right or privilege – compliance with formalities that are prescribed for such acquisition, should be regarded as imperative. (See e g *R v Noorbhai* 1945 AD 58 at 64; *SA Citrus Exchange Ltd v Director General: Trade and Industry supra* 241E-I.) In the end, these considerations leave no room for any construction of the specific provisions that Pepper Bay had failed to comply with, which allows for a discretion on the part of the Chief Director to condone such non-compliance.

[33] The same holds true of the provisions which are relevant in the case of Smith. Again the Instructions inform the prospective applicant (in para 1) that 'you ***must*** fill in the application form and attach the necessary documents in the manner described below' and (in para 10) that 'you ***must*** submit one (1) original and two (2) copies the application'. It is true that the Instructions do not contain an express sanction for non-compliance with these provisions. Such a sanction is however provided for in the Invitation which warns the prospective applicant that no application (consisting *inter alia* of an original application form together with two copies) received after the stated deadline of midday on 13 September 2001 'will be accepted or considered'.

[34] In view of the conclusion that the directly relevant provisions of the Invitation and the Instructions are of a peremptory nature, the remaining enquiry is whether para 20 must be understood to reverse or cancel their clear meaning so as to introduce a discretion to condone non-compliance where formerly there was none. The Courts *a quo* found that they did. As appears from the quoted passage from the judgment of Louw J, he arrived at this conclusion primarily on the basis of the word 'may' which he obviously understood to be used in the paragraph in a permissive sense, i e to mean that the Chief Director is permitted to consider the application despite the non-compliance with procedural requirements. That is not how I understand the word 'may' in para 20. Having regard to the context of the statutory scheme of the General Notice as a whole, i e in its three constituent parts, I understand the word 'may' in para 20 to serve what can be described as a purely predictive function, to predict or indicate what 'may' possibly happen in particular circumstances (cf Black's *Law Dictionary* (1999) 993 and Garner *Dictionary of Modern Legal Usage* (1995) 552-553). Thus understood para 20 does no more than to indicate that if there is non-compliance with the stated requirements, one of the two hypothetical possibilities – non-consideration of an application, or its refusal – could result. The word 'may' is not permissive, so creating a discretion (as found by the Court *a quo*) any more than, in combination with the word 'not', it is prescriptive (in the sense of 'cannot'). Para 20 therefore alerts an applicant that non-compliance with the requirements of the Invitation, the

Instructions or the Guidelines may, depending on the particular requirement, have one of the two stated consequences. The paragraph does not in itself create a mechanism to deal with those consequences. What those consequences are, must be sought elsewhere. They depend on the requirement itself. If the requirement is peremptory, failure to comply will result in the application not being considered. If, on the other hand, the requirement is directory the application will be considered but, depending on its merits, may be refused.

[35] I therefore conclude that the Chief Director and the Minister were correct when they understood the General Notice read as a whole not to confer a discretion on the Chief Director to condone the defects in either of the two applications concerned.

[36] On behalf of Pepper Bay it was argued in the alternative that even if the Chief Director had no discretion to condone these procedural defects in its application, the Minister was at fault in failing to exercise the independent discretion conferred upon him by s 81(1) of the MRL Act. In terms of this section 'the Minister may exempt any person from a provision of the Act' if in his opinion 'there are sound reasons for doing so'. The simple answer to this argument is in my view that the Minister was never asked to exercise his discretion under this section. What the Minister was asked to do, in an appeal under s 80, was to consider, the correctness of a decision by the Chief Director. Moreover, the only relief sought against the Minister in the Court *a quo* was to set aside his refusal to uphold an appeal against the Chief Director's decision. In the circumstances an endorsement of Pepper Bay's alternative argument would amount to a review which was never sought of a decision that was never taken – a position that can hardly be sustained.

[37] This brings me to a different topic. In his judgment, Davis J found further support for the case of Smith in the provisions of s 33 of the Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution'). This section provides the constitutional guarantee of administrative action which is lawful, reasonable and fair. His conclusion with reference to this guarantee is stated as follows (at 638i-j):

'Given the importance of procedural fairness as a constitutional value, a decision which refused to consider an application where the only defect was the omission of copies of the application form, cannot be justified as complying with a constitutionally mandated standard of fairness. In all the circumstances of this particular case, an inflexible policy offends the principal of procedural fairness.'

From the learned Judge's reasons for this conclusion it is however not entirely clear to me where, in his view, the conflict with the constitutional value of administrative fairness lies. In the course of his reasoning he refers (at 636b-g), *inter alia*, to authorities supporting the proposition that an administrative body endowed with a discretionary power is not entitled to adopt a policy which allows it to dispose of a case without considering the merits of the particular case. That proposition is

undoubtedly true but inapposite. Its whole underlying supposition is that the administrative authority has a discretion. After all, any attempt at the exercise of an unauthorised discretion by an administrative authority would simply be *ultra vires* and invalid. Once it is found that the Chief Director was never afforded a discretion, the stated proposition therefore does not apply.

[38] The learned Judge also seems to have been of the view that if the Chief Director had been endowed with a discretion to condone, he should in the interest of administrative fairness have exercised that discretion in favour of Smith and his 28 fellow subsistence fishermen. This appears from the following statement (at 636g-i):

'[T]he idea that an official should be entitled to reject an application which was properly completed and where payment was timeously lodged so that the only difficulty with the entire application concerned copies delivered a day late offends an elementary application of the value of justice. That value dictates that an application generated by a person whose very livelihood might depend upon the successful outcome thereof is entitled to have his or her case considered even if the final decision might be adverse. It is this value which informs the very principle of procedural fairness enshrined in s 33 of the Constitution.'

On a personal level I obviously share the learned Judge's sympathy for these unfortunate subsistence fishermen. I can only hope they have some remedy against the chartered accountant who, on the available evidence, appears to be responsible for their plight. However, the reasoning that transpires from the quotation again begs the question. It again presupposes a discretion on the part of the Chief Director where he has been found to have none.

[39] The learned Judge was also swayed by the consideration which appears from the following further statement (at 638e-g):

'The ambiguities in the documentation generated by the respondents designed to inform prospective applicants of the correct procedure, coupled with a blanket refusal to even consider the applications of applicant and the other 28 fishermen offends the very basis of the value of justice upon which the foundational principle of procedural fairness is predicated.'

For the reasons that I have given I am of the view that the General Notice read as a whole is not ambiguous. On more than one occasion it is explained in the Invitation and the Instructions that an application form accompanied by two copies should be lodged by the stated deadline. In the Invitation this explanation is accompanied by the explicit warning that

failure to comply with these requirements will result in the application not being considered. The Instructions then contain a further general warning in para 20 which was maybe unnecessary and, like most unnecessary statements, unwise. But, be that as it may, read in the context of the General Notice as a whole, para 20 could hardly create any confusion and, more particularly, there is no suggestion that the chartered accountant who represented Smith was in any way confused. In fact, his notice of appeal to the Minister shows conclusively that he was not.

[40] Ultimately Davis J seems to have been influenced by his – unexpressed – view that the General Notice ***should*** have afforded the Chief Director a discretion to condone non-compliance with procedural requirements. That, however, amounts to an attack on the validity of the General Notice issued by the Minister as opposed to an attack on the Chief Director's refusal to exercise a perceived discretion. The problem with considering such an attack is that it was simply never raised. The only decision by the Minister which both Pepper Bay and Smith sought to be reviewed was his dismissal of their appeals against the adverse decisions of the Chief Director. Nowhere on the papers is there even a suggestion that the General Notice may be unconstitutional or in conflict with the principle of legality (cf *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)). Had such an attack on the validity of the General Notice been made, the Minister would have been afforded the opportunity to explain why he thought it necessary not to bestow a discretion upon the Chief Director to condone non-compliance. Absent such an opportunity it would, in my view, be

inappropriate for this Court to pronounce on issues which were never raised.

[41] The only remaining questions relate to the matter of costs. First, the appellants were represented by two counsel in both matters in this Court as well as in the Court *a quo*. They seek an order for their costs thus incurred. Despite arguments to the contrary on behalf of both Pepper Bay and Smith, I believe that in all the circumstances the engagement of two counsel by the appellants cannot be said to be unjustified. I therefore propose to grant the costs order sought. Secondly, there is the matter of the record in the Pepper Bay appeal. As has happened in *The Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* (unreported judgment of this Court in case number 32/2003 and case number 40/2003 delivered on 16 May 2003) the parties to the Pepper Bay appeal initially failed to comply with the provisions of Rule 8(7) and 8(9) of this Court. A record of 23 volumes was filed, of which less than half eventually proved to be relevant. Fortunately, as a direct result of the admonitions by this Court in the *Phambili Fisheries* case, the parties, by agreement, indicated to the Registrar at an early stage which part of the record should be ignored. They thereby avoided any inconvenience and

prejudice to the Court. In the circumstances the Minister and the Chief Director quite rightly conceded that they were not entitled to recover the costs occasioned by the preparation of that part of the record which they later agreed to be irrelevant. Pepper Bay, on the other hand, did not insist on any costs order in its favour with reference to the irrelevant part of the record. In the circumstances I consider a costs order in accordance with the appellants' concession to be an appropriate one.

[42] In the matter of Pepper Bay (case number 129/03):

(a) The appeal is upheld with costs including the costs consequent upon the employment of two counsel; save that the appellants are not entitled to recover the costs of preparing that part of the record which the parties subsequently agreed to be irrelevant.

(b) The order by the Court *a quo* is set aside and replaced by an order in the following terms:

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

[43] In the matter of Smith (case number 130/03)

(a) The appeal is upheld with costs including the costs consequent upon the employment of two counsel.

(b) The order by the Court *a quo* is set aside and replaced by an order in the following terms:

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

…….
F D J BRAND
JUDGE OF APPEAL

Concur:
HARMS JA
NAVSA JA

CLOETE JA

HEHER JA