THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 298/2021

In the matter between:

A PENGLIDES (PTY) LTD **FIRST APPELLANT**

TUNA SOUTH AFRICA (PTY) LTD **SECOND APPELLANT**

and

MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES **FIRST RESPONDENT**

THE DEPUTY DIRECTOR GENERAL OF THE FISHERIES BRANCH OF THE DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES **SECOND RESPONDENT**

Neutral citation: *A Penglides (Pty) Ltd and Another v Minister of Agriculture, Forestry and Fisheries and Another* (Case no 298/2021) [2022] ZASCA 74 (26 May 2022)

Coram: PONNAN, DAMBUZA, SCHIPPERS, NICHOLLS and MOTHLE JJA

Heard: 16 May 2022

Delivered: 26 May 2022

Summary: Marine Living Resources Act 18 of 1998 – s 80(2) – appeal to Minister – when Department's offices closed on the last day of the 30-day period envisaged in Regulation 5 of the Marine Living Resources Regulations – the appeal will be served within the designated period if served on the next day on which the offices are open.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Francis AJ, sitting as court of first instance):

(1) The appeal is upheld with costs.

(2) The order of the high court dismissing the application under case no 20760/18 is set aside.

(3) The matter is remitted to the high court.

JUDGMENT

Ponnan JA (Dambuza, Schippers, Nicholls and Mothle JJA concurring)

[1] This appeal, which concerns a preliminary point of law, has its genesis in the use of foreign vessels in the large pelagic longline fishery. The fishery has long depended on such vessels for the successful exploitation of South Africa's regional allocation of tuna. The majority of foreign registered vessels that fish in South African waters have been built in either Japan, Korea or Taiwan, but mostly Japan. The typical Japanese super freezer long-liner is between 47 to 54 metres (overall length), between 400 to 500 tons (gross registered weight), steel-hulled, has a large catch capacity and is equipped with ultra-low freezers. South African vessels, by contrast, are typically only about 24 metres or less in length, weigh less than 100 tons, are constructed of fibreglass reinforced plastic (although some are steel-

hulled) and lack both ultra-low freezing capability and large hold capacities. Whilst Japanese vessels are equipped to freeze its catch to approximately -60°C, most South African vessels use ice or refrigerated seawater to store their catch at only about 0°C.

[2] The longer-range Japanese vessels allows them to undertake trips for Southern Bluefin Tuna (the most valuable species for sashimi) well beyond South Africa's 200 nautical mile exclusive economic zone. Because of their smaller size, South African vessels cannot venture as far south, where weather conditions are extreme and, given the inadequacy of their freezing capacity, each trip is usually restricted to 14 days or less. The sashimi-grade portion of each catch is air-freighted to Japanese and other foreign markets, while the non-sashimi grade portion is either sold in local markets, processed into fresh and frozen tuna products or frozen whole for export.

[3] On 1 September 1998, the Marine Living Resources Act 18 of 1998 (the Act) came into effect. The Act empowered the first respondent, the Minister of Agriculture, Forestry and Fisheries (the Minister), to grant access to South African fishing resources and to manage such access. In anticipation of the granting of the first large pelagic commercial fishing rights to South African fishing companies for a ten-year period, commencing in 2005 and expiring at the end of February 2015, the then Minister published a policy for the Management and Allocation of Commercial Fishing Rights in the Large Pelagics (Tuna and Longline) Fishery on 24 March 2004 (the 2004 policy). The 2004 policy recognised that South African participation in the longlining sector was 'fairly new', that the harvesting of tuna (and swordfish) by longline had 'historically been undertaken by Japanese and

Taiwanese fleets', and that there was a 'need to develop a performance history for the harvesting of tunas'.

[4] The 2004 policy stated that rights would only be granted to applicants who demonstrated 'ownership of or a right of access to a suitable vessel', which meant a vessel with a minimum length of 'approximately 24m' that preferably had 'onboard freezing facilities'. It recognised that 'due to South Africa's limited participation in the large pelagic longline fishery . . . there are a limited number of suitable South African flagged vessels'. It, accordingly, provided that foreign-flagged vessels would be considered as long as they are re-flagged as South African vessels within 12 months of the large pelagic longline fishing right being granted.

[5] The first appellant, A Penglides (Pty) Ltd, successfully applied for a long-term fishing right for the period 2005 to 2015 that entitled it to catch tuna. The second appellant, Tuna South Africa (Pty) Ltd, a joint venture company, sources Japanese longline fishing vessels and facilitates the partnering of its six members (including the first appellant), who are all large pelagic longline fishing rights holders, with Japanese vessel owners in charter arrangements.

[6] The re-flagging of foreign vessels provided for in the 2004 policy (which obliged vessels to reflag as South African after 12 months) proved too onerous. The foreign vessel owners were unable to re-flag as the economics of operating on the South African register were prohibitive. Thus, all of the foreign owners withdrew their vessels upon completion of the first year of the long-term fishing right. As a result, catches of tuna dropped drastically: from over 4500 tons in 2005 to approximately 1500 tons in 2006. This decline, because of the withdrawal of

foreign-flagged vessels, undermined one of the objectives of the 2004 policy, namely to improve catch history and to thus make South Africa more competitive when negotiating quotas at a regional level.

[7] In 2008, and after the under-catching of tuna in 2006, the regulatory authority for managing fishing - and marine resource - related activities, in particular the allocation, administration and management of fishing rights, the Fisheries Branch of the Department of Agriculture, Forestry and Fisheries (the Department), conducted a further review and published a further policy for the large pelagic fishery. The policy was adopted with effect from January 2009 (the 2009 policy).

[8] The 2009 policy removed the one-year reflagging requirement of the 2004 policy and instead adopted an approach of gradually phasing in reflagging. In 2013, and in anticipation of the expiry of the ten-year right, the Department invited applications for fishing rights for a period of fifteen years in a number of sectors, including the large pelagic longline sector. The allocation process was known as the Fishing Rights Application Process (Frap) 2013. The Frap 2013 allocation process, which appears to have been marred by corruption, was ultimately abandoned by the then Minister and replaced by Frap 2015/2016.

[9] On 12 June 2015, the Minister published a draft policy on the allocation and management of fishing rights in the large pelagic (Tuna and Swordfish Longline) sector for purposes of Frap 2015/2016 (the draft 2015 policy). The draft 2015 policy altered the 2009 policy in only one respect, by the addition of the following requirement in paragraph 7.3(b)(i) '. . . the foreign fishing vessel shall reflag within the first three years when operating as a joint venture'. The draft 2015 policy was

replaced by the final policy,[1] published on 16 November 2015 (the final policy). The final policy on foreign vessels is contained in paragraph 7.2(e). It accords with the draft 2015 policy, except that it also included the following paragraph: '[t]o prevent fronting each vessel and each right holder will only be considered once for the duration of the fishing right to enter into a joint venture'.

[10] The first appellant, and all of the other members of the second appellant, applied for 15-year large pelagic longline rights in terms of Frap 2015/2016. This, for a share in the total allowable effort in the sector, expressed as 'vessel units'. In its application, the first appellant applied for three units of effort and nominated three vessels (one vessel per unit of effort). Having sourced vessels from its Japanese correspondent, Japan Tuna International, those were allocated by the second appellant to five of its six members (the one member having chosen to use its own vessels). The vessel, Matsufuku Maru No. 28, was allocated to the first appellant, who entered into a chartering agreement with Kushikino Maguro Kabushiki Kaisha, the vessel's owner. That vessel was included by the first appellant in its application as a nominated vessel for purposes of one unit of effort. In terms of the chartering agreement, the vessel's owner reserved the right to substitute a different vessel for the Matsufuku No. 28. In its Frap 2015/2016 application, the first appellant applied for two further units of effort in respect of two South African-flagged vessels: the MFV Martin J and the MFV Elize, neither of which had the freezing capacity, equipment or capability of the foreign vessels.

[11] On or about 25 January 2017, the second respondent, the Deputy Director General of the Department (the DDG), as the Minister's delegated authority in

[1] 'Policy on the Allocation and Management of Commercial Fishing Rights in the Large Pelagic Longline Fishery: 2015 GG 1128, 16 November 2015'.

terms of s 79(1) of the Act, decided on the allocation of fishing rights in the large pelagic longline sector. The first appellant, as well as the other members of the second appellant, were successful, the DDG having decided to allocate no more than two units of effort per applicant, irrespective of the allocation applied for. Successful applicants were required to confirm their two vessels within 90 days of the publication of the final decisions.

[12] The first appellant confirmed its nomination of the vessel Matsufuku Maru No. 28 in respect of one unit of effort and the MFV Elize in respect of the second unit of effort. On 6 February 2017, the Department wrote a letter to the first appellant, confirming the grant of its fishing right in the sector. Similar letters were issued to other successful applicants in the sector. Paragraph 8.3 of the Grant of Right Letter provided:

'8.3 Large Pelagic Longline Rights granted to Right Holders who have nominated access and have been granted the right to use a foreign flagged fishing vessel are subject to the following specific conditions:

8.3.1 The joint venture between the Right holder and the owner of the foreign-fIagged vessel shall be majority controlled and managed by the Right Holder.

8.3.2 The foreign-flagged fishing vessel shall have 3 years from the date of this letter to finalise its registration on the South African merchant fishing vessel register.

8.3.3 The Right Holder shall, on behalf of the Joint Venture, submit a comprehensive skills transfer programme and foreign vessel re-flagging timetable inclusive of milestones and targets. This submission shall be made by not later than 28 February 2018.

8.3.4 Where the Right Holder fails to provide the submissions mentioned in paragraph 8.3.3 above, alternatively, where the Department refuses to approve the skills transfer programme and/or the foreign vessel re-flagging timetable, the Right holder must nominate an alternative fishing vessel, which shall be a South African-flagged fishing vessel only.

8.3.5 No Right Holder will be permitted to nominate access to a foreign flagged fishing vessel to replace the current approved foreign flagged fishing vessel during the duration of the Right. Right Holders shall only be permitted to nominate a South African-flagged vessel to replace a nominated vessel.

8.3.6 Right Holders shall accommodate Fishery Observers nominated by the Department on all fishing voyages.

8.3.7 Prior to the commencement of fishing in terms of this Right, the Right Holder shall submit to the Department an official letter from the nominated Vessel's flag-state confirming that all catches harvested by the vessel while utilising the Right shall accrue to the South African catch registry.'

[13] Shortly after the allocation of the long-term rights, the first appellant was advised that the Matsufuku Maru No 28 would not be available to it, apparently because of catch-scheduling commitments that the vessel's owner had to fulfil elsewhere. On 28 April 2017 (being some three months after the allocation of the long-term rights), the first appellant applied to the Department to allow a temporary replacement vessel, the Koei Maru No. 1, to be employed on its behalf, in the stead of the Matsufuku No. 28. The application was rejected on 17 May 2017.

[14] On 19 June 2017, the first appellant lodged an appeal with the Minister challenging both the rejection of its vessel-change application and the conditions limiting the use of foreign vessels in the fishery. The first appellant pointed out that the basis on which the DDG had refused the vessel change application, namely paragraph 8.3.5 of the Grant of Rights Letter, had never formed part of any policy published in respect of Frap 2015/16 and its inclusion was administratively unfair. It further pointed out that paragraph 8.3.5, which had never been the subject of a

consultative process, was absurdly restrictive; undermined South Africa's tuna industry; was at odds with sound fisheries management and was irrational. It was submitted that the only possible rationale for paragraph 8.3.5 was a misguided attempt to prevent fronting, but that it did not achieve that purpose, accordingly, so it was contended, it should be set aside.

[15] Almost a year later, on 9 May 2018, the Minister dismissed the appeal. In dismissing the appeal, the Minister relied on paragraph 8.3.5 of the Grant of Right Letter, as well as various other grounds, not all of which emerge from the record, because the Minister did not depose to an affidavit to explain his decision. The Minister also noted that the appeal had been submitted two days late.

[16] The first appellant, supported by the second appellant, then applied to the Western Cape Division of the High Court, Cape Town (the high court) for *inter alia* an order in the following terms:

'2. Reviewing and setting aside the decision of the First Respondent, dated 9 May 2018, in respect of the [first appellant's] appeal against a refusal to allow its application for a vessel change in the large pelagic longline fishery;

3. Remitting the appeal to the First Respondent for him to decide in accordance with law and such directions as the above Honourable Court deems appropriate;

4. Declaring paragraph 8.3 of the Grant of Right Letter issued to successful applicants in the large pelagic longline fishery to be unlawful;

5. Directing the First Respondent, when reconsidering the [first appellant's] appeal, to take account of the fact that paragraph 8.3 of the Grant of Right Letter, and specifically paragraph 8.3.5 thereof, is unlawful.'

[17] The high court (per Francis AJ) approached the application as follows:

'[17] . . . The court was cognisant of the decision of the Supreme Court of Appeal in *Fischer and Another v Ramahlele and Others* where it was held that it is not for a court to determine an

application on legal points not emerging from the papers and not raised by the parties. However, the situation in this matter is somewhat different because the issue of the late filing of the appeal was expressly raised as a ground of refusal in the first respondent's decision and this fact was common cause between the parties on the papers before me. The court would be placed in an intolerable position if it were to be precluded from giving the right decision on accepted facts merely because a party failed to raise a legal point in argument, whether by design or due to an oversight (cf. the comments of the then Appellate Division in *Paddock Motors (Pty) Ltd v Igesund*).

[18] In addition, and depending on the parties' response to the issue of the late filing of the appeal, the court directed the parties to make further written submissions on whether the declaratory relief in paragraph 4 of the Notice of Motion – to declare condition 8.3 of the Grant of Right letter to be unlawful – was a stand-alone form of relief which could be determined on the papers before the court without further elaboration.

[19] From the papers before this court, including the response of the parties to the invitation to furnish supplementary written argument on the legal consequences of what appeared to be common cause facts, it is possible to distill the following broad areas which require determination:

[19.1] Was the appeal lodged timeously? If it was, does the decision of the first respondent to refuse the [first appellant's] appeal fall to be set aside?

[19.2] If the appeal was lodged late, and has lapsed, can this court determine on the papers before it, and without elaboration, the relief sought in the Notice of Motion to declare condition 8.3 in the Grant of Right letter to be unlawful?

. . .

[39] In light of the foregoing, I am of the view that the first respondent correctly found that the appeal was lodged out of time. Given the peremptory language used in the relevant statutory enactments, the first respondent did not, and does not, have the discretion to entertain the [first appellant's] appeal which was lodged late. Accordingly, in the circumstances, the relief sought by the [appellants] to review, set aside, and remit, the appeal, must fail.

[40] . . . The first respondent cannot reconsider the appeal because it has lapsed. Since the appeal has lapsed, it stands to reason that the substantive relief claimed in paragraph 4 of the

Notice of Motion – to declare the conditions unlawful – cannot be determined by this court since the relief claimed is contingent on the appeal which has lapsed.

. . .

[42] In the circumstances, I am not persuaded that this court is in a position to consider the relief sought by the [appellants] in paragraph 4 of the Notice of Motion as a separate, self-standing, ground of review.'

[18] The approach of the high court is regrettable. How an issue that was, at best, only somewhat obliquely raised on the papers, assumed centre stage, is far from clear. Despite having intimated that it 'was cognisant of the decision . . . in *Fischer and Another v Ramahlele and Others*',[2] the high court promptly proceeded to ignore the note of caution sounded by this Court in that matter. And, having decided that the first appellant's appeal to the Minister was lodged out of time, it declined to enter into the substantive merits of the application. Nor, can we. This, because we do not have the benefit of a judgment from the high court on the merits of the appellant's application. Were we to enter into the merits, without the benefit of the high court's view on the subject, we would, in effect, be sitting both as a

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2 In *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) (*Fischer*), it was stated:

'[13] Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

[14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

[15] This last point is of great importance because it calls for judicial restraint.'

court of first, and (likely) final, instance. The unfortunate consequence is that if we incline to a contrary view to the high court on the preliminary question, which was held by the high court to be decisive, then the matter would have to be remitted to it for consideration and adjudication of the substantive relief sought by the appellant, in particular paragraph 4 of the notice of the motion. Because of the approach followed by the high court, the very issue that compelled the application and brought the parties to court, remains unresolved. What is more, the approach of the high court has opened the door to a fractional disposal of issues and the proliferation of piecemeal hearings and possible appeals. Thus, the parties, through no fault of their own, have been put to the trouble and expense of having to follow this rather convoluted and circuitous route, as a result of the high court's failure to appreciate, as *Fischer* made plain '. . . that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone'.[3]

[19] With that perambulation, I now turn to consider whether the high court was correct in concluding that appellant's appeal to the Minister was lodged out of time. When considering an appeal from a person affected by a decision of the DDG, the Minister acts in terms of s 80(1) of the Act, which provides: '[a]ny affected person may appeal to the Minister against a decision taken by any person acting under a power delegated in terms of this Act or section 238 of the Constitution'. According to s 80(2), '[a]n appeal under subsection (1) must be noted and shall be dealt with in the manner and in accordance with the procedure prescribed by the Minister'. Regulation 5 of the Marine Living Resources Regulations prescribes the procedure envisaged in s 80(2) of the Act. It provides:

[3] *Fischer* fn 2 above para 13.

‘(1) An appeal by any person in terms of section 80 of the Act shall be submitted in writing to the Minister within 30 days after the appellant has been notified of the decision against which he or she is appealing.
(2) An appeal shall set out all the relevant facts as well as the grounds of appeal and shall be accompanied by any relevant document or a copy thereof certified as true by a Commissioner of Oaths.
(3) The appeal contemplated in subregulation (2) shall be served by the appellant on the person against whose decision the appeal is made, and that person shall submit a report on the appeal to the Minister within 30 days after the appeal had been served on him or her.’[4]

[20] The decision by the DDG to refuse the first appellant’s vessel-substitution application was made on 17 May 2017. The next day, 18 May 2017, was what may be described as ‘day 1’. Thursday 15 June 2017 was day 29. The day thereafter, namely Friday 16 June 2017, was a public holiday and not a ‘day’ for purposes of the Interpretation Act 33 of 1957 (the Interpretation Act).[5] Nor was Sunday 18 June 2017.[6] The appeal was served on the Department on 19 June 2017. It was not in dispute that the Department’s offices had been closed on that Saturday, as they generally were over weekends. The Interpretation Act does not deal with the situation where the last day, not being a public holiday or a Sunday, is a day on which the accomplishment of the task cannot be achieved because the offices where the task is to be performed are closed.

[4] ‘Regulations in terms of the Marine Living Resources Act GN R1111, 2 September 1998’.
[5] The Interpretation Act 33 of 1957 does not define ‘day’, consequently the reference to day there is a reference to ‘calendar day’. The effect of s 4 (read with s 1) of the Interpretation Act is that its provisions govern the calculation of days prescribed for any purpose in other legislation which contains nothing to indicate that a different method was meant to be employed (*Mooi River Valley Seed Potato Growers’ Association v Steyn* 1975 (3) SA 642 (N) at 647).
[6] Section 4 of the Interpretation Act provides: ‘When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday’.

[21] Accordingly, the question facing the high court (as recognised by it) was whether Saturday, 17 June 2017, was the last 'day' of the defined period. If it was, then that would mean that the appeal was served one day late. The effect of regarding Saturday, 17 June 2017, as a 'day', would be to interpret regulation 5(1) as requiring the first appellant to have served its appeal on 15 June 2017 (because service on the Saturday was impossible). This would have the effect of abridging the right given by regulation 5(1) and would mean that the appellant had only 29 days to submit its appeal.

[22] In *Road Accident Fund v Masindi,* this Court had to consider how a five-year prescriptive period applicable to the respondent's claim should be computed, in circumstances where the last day of that period fell on a day when the court is closed so that the summons could not be issued and served. It stated:

'The principle set out in [*Pritam Kaur v S Russel & Sons Ltd*[7] and *Nottingham City Council v Calverton Parish Council*[8]] provides the answer which ties in with the protection afforded to the respondent in s 34 and, in general, the interpretation provided in s 39(1)*(b)* and *(c)* and (2) of the Constitution. Applying this approach to the facts of this matter, the respondent could not have issued the summons on 16 June 2014, as it was a public holiday. It was therefore a question of an impossibility to perform. The impossibility was not of her own doing nor created by her but by law; the court was closed on the public holiday. To interpret the law with the result that the respondent fails to enjoy the full benefit of the five-year period — as she is entitled to — would result in an injustice and prejudice to her.'[9]

[23] The facts in *Pritam Kaur v S Russel & Sons Ltd* were these: On 5 September 1967, Mr Bikar Singh was killed at his place of employment. On 7 September

[7] *Pritam Kaur v S Russel & Sons Ltd* [1973] 1 QB 336; [1973] 2 WLR 147; [1973] 1 All ER 617 (*Pritam Kaur*).
[8] *Nottingham City Council v Calverton Parish Council* [2015] EWHC 503 [2015] WLR (D) 99; [2015] PTSR 1130.
[9] *Road Accident Fund v Masindi* [2018] ZASCA 94; 2018 (6) SA 481 (SCA) para 19.

1970, his widow, Ms Pritam Kaur, issued a writ against his employers, claiming damages for breach of statutory duty and for negligence. The court was required to decide, as a preliminary point of law, whether the action was commenced within the period of 3 years allowed by the statute or whether it was statute-barred. As Lord Denning MR put it: 'the first thing to notice is that, in computing the three years, you do not count the first day, September 5, 1967, on which the accident occurred. . . If you count three years from September 5, 1967, you get the last day as September 5, 1970. The writ here was issued on September 7, 1970. If you looked at the dates, therefore, and nothing else, the action would appear to be two days out of time. But when you look at the days of the week, you see that September 5, 1970, was a Saturday, and September 6, 1970, was a Sunday. On both those days the offices of the court were closed. As soon as they reopened on Monday, September 7, 1970, the plaintiff issued the writ'.[10]

[24] Lord Denning then proceeded to state:

'The arguments on each side are evenly balanced. The defendants can say: "The plaintiff has three years in which to bring his action. If the last day is a Saturday or Sunday, or other dies non, he ought not to leave it till the last day. He ought to make sure and issue it the day before when the offices are open.". . .

The plaintiff can say: "The statute gives me three years in which I can bring my action. If I go in to the offices on the last day, and find them closed, I ought not to be defeated on that account. I should be allowed to go next day when the offices are open. Otherwise, I should be deprived of three years which the statute allows me." . . .

Those arguments are so evenly balanced that we can come down either way. The important thing is to lay down a rule for the future so that people can know how they stand. In laying down a rule, we can look to parallel fields of law to see the rule there. The nearest parallel is the case where a time is prescribed by the Rules of Court for doing any act. The rule prescribed in both

[10] *Pritam Kaur* fn 7 above at 619.

the county court and the High Court is this: If the time expires on a Sunday or any other day on which the court office is closed, the act is done in time if it is done on the next day on which the court office is open. I think we should apply a similar rule when the time is prescribed by statute. By so doing, we make the law consistent in itself: and we avoid confusion to practitioners. So I am prepared to hold that when a time is prescribed by statute for doing any act, and that act can only be done if the court office is open on the day when the time expires, then, if it turns out in any particular case that the day is a Sunday or other dies non, the time is extended until the next day on which the court office is open.'[11]

[25] In a separate concurring judgment in *Pritam Kaur*, Megarry J put it thus:

'. . . There are a number of cases which support the general rule that a statutory period of time, whether general or special, will, in the absence of any contrary provision, normally be construed as ending at the expiration of the last day of the period. The rule remains; but there is a limited but important exception or qualification to it . . . If the act to be done by the person concerned is one for which some action by the court is requisite, such as issuing a writ, and it is impossible to do that act on the last day of the period because the offices of the court are closed for the whole of that day, the period will prima facie be construed as ending not on that day but at the expiration of the next day upon which the offices of the court are open and it becomes possible to do the act.'

[26] *Nottingham City Council v Calverton Parish Council,* was concerned with an application to quash a development plan document, which had to be made no later than the end of the period of six weeks starting with the date of the adoption of the document. The development plan document had been adopted on 8 September 2014. The application to quash was made on Monday 20 October 2014. The court office was closed on Sunday 19 October 2014 and an application could not be made on that day. Lewis J had this to say:

[11] *Pritam Kaur* fn 7 above at 619-620.

'In my judgment, the approach set out in *Kaur* and approved and followed in other cases, sets out a general approach to the interpretation of statutory provisions prescribing periods within which proceedings must be brought. I recognise that the precise provisions of a particular statute may be such that a different approach is called for in relation to that particular statute. In general terms however, where a statutory provision provides that proceedings must be brought no later than the end of a specified period, and the bringing of proceedings requires that the court office be functioning, and the last day of the prescribed period falls on a day when the court office is closed, then the statutory provision is to be interpreted as permitting the proceedings to be brought on the next day when the court office is open.'[12]

[27] To those two English authorities may be added a third, which went somewhat further, namely *Mucelli v Government of Albania* (*Mucelli*).[13] In *Mucelli,* Lord Neuberger, after having expressly approved the dictum of Lord Denning in *Pritam Kaur*, added:

'. . . I can see no reason not to apply the same principle to service on a respondent in relation to the respondent's office. The fact that fax transmission can be effected at any time does not cause me to reconsider that conclusion.'

In the matter here under consideration, the high court ignored the extension of the *Pritam Kaur* principle to service by fax (or likewise email), in finding that 'the appeals could be lodged by email'.

[28] The principle laid down in *Pritam Kaur* resonates with the approach adopted by our courts. Over a century ago, in *National Bank of South Africa v Leon Levson Studios* (*Leon Levson*), Innes J stated:

'Now, I am in entire agreement with the learned Judge that where rent is payable at a Bank or business place, that implies that the payment is to be made on a day when offices or banks are open, and that the lessee, therefore, is only called upon to pay on a business day.

[12] *Nottingham City Council v Calverton Parish Council* fn 8 above para 33.
[13] *Mucelli v Government of Albania* [2009] UKHL 2; [2009] 1 WLR 276; [2009] 3 All ER 1035 para 84.

Indeed, that exact point was decided in *Davis v Pretorius* (1909, T.S. 868), where the court held that the parties must, under such circumstances, be taken to have contemplated that the payment would not be due at the office or the bank on a Sunday or a public holiday when that place either ought, or in the ordinary course of business might be expected, to be closed. The obligation becomes due upon the days in question, but its discharge having been stipulated to be performed at a place not open on those days, the debtor is excused from then tendering performance, and is in time on the next succeeding business day.'[14]

[29] In *Davis v Pretorius*, which was cited with approval by Innes J in *Leon Levson*, Mason J (Bristowe J concurring) had this to say:

'It seems to me that a contract of that kind necessarily implies that the payment shall be made on a day when offices or banks are open; and I think the parties must be taken to have contemplated that the payment would not be due at the office of the attorney or at the bank on a day which was either a Sunday or a public holiday, when both either ought to be closed or might in the ordinary course of business be expected to be closed. The decision which we give, therefore, falls exactly in line with that in *Lawley and Others v Van Dijk* (1881-1884 (2) SAR 246) by KOTZÉ, C.J., where he held that where a contract of lease provided that the payment was to be made on the 1st January, and that date fell on a Sunday, the parties must necessarily have contemplated that the payment need not be made on that particular day.'[15]

[30] The facts in *Leon Levson*[16] were these: The respondent was the lessee of premises under a lease, which provided: 'should the lessee fail to pay the monthly rental within 15 days after same shall have become due . . . the lessor shall thereupon have a right to cancel this lease'. The rental was payable monthly in advance on the first day of the month at the appellant Bank. The respondent failed to pay or tender the rent for the month of December until the 17th of that month. On

[14] *National Bank of South Africa Ltd v Leon Levson Studios Ltd* 1913 AD 213 at 218.
[15] *Davis v Pretorius* 1909 TS 868 at 871-872.
[16] *National Bank of South Africa Ltd v Leon Levson Studios Ltd* fn 14 above.

15 December, which was a Sunday, and 16 December, which was a public holiday, the Bank was closed.

[31] Maasdorp JP, writing separately in the *Leon Levson* matter, put it thus:

'In my opinion it was open to the respondent to pay the rent on Monday the 16th December. What prevented his paying on that day was not his own negligence, but the fact that the applicant Bank was closed. Under ordinary circumstances, where there is nothing to prevent it, I think payment should be made on the day stipulated, although it happens to be a Sunday or a holiday. But it is very different where payment is to be made at a place of business which happens to be closed to business on those days. The view taken at one time by the applicant, which was, however, abandoned by his counsel, was that tender of payment after 3 p.m. was futile, because although bank officers happened to be on the premises it was after business hours; the idea being that out of business hours no business could be done. But now the suggestion is made that although Monday was a holiday and the bank was closed to business, the respondent would have found people on the premises if he had gone there on that date. I agree in thinking that it was not contemplated that payment should be made either on Sunday, the 15th December, or Monday, the 16th December, which days were holidays, on which no business was done at the Bank. I am, therefore, of opinion that the respondent was not in default when he tendered payment on Tuesday, the 17th December'.[17]

[32] The above conclusion reached by Maasdorp JP addresses as well the finding of the high court in this matter that apart from emailing the appeal, it 'could [have been] delivered to the security on the ground floor' of the building housing the Department's offices. Service on the 'security on the ground floor' would, in any event, stand on a similar footing to fax or email service to an unattended number or email address on a non-business day.

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[17] *National Bank of South Africa Ltd v Leon Levson Studios Ltd* fn 14 above at 221.

[33] There is thus long-standing authority in this country, albeit in the field of the law of contract, that accords with the approach adopted in *Pritam Kaur* (and the other English cases that have since followed it) that the high court could have called in aid. Somewhat surprisingly, it did not. It must follow that regulation 5(1) can only be interpreted to mean that when the Department's offices are closed on the last day of the 30-day period for the serving of an appeal, the appeal will be served within the designated period if served on the next day on which the offices are open. This is the effect of the South African and English authorities. The high court's conclusion to the contrary accordingly cannot stand. It follows that the appeal must succeed.

[34] In the result:

(1) The appeal is upheld with costs.

(2) The order of the high court dismissing the application under case no 20760/18 is set aside.

(3) The matter is remitted to the high court.

V M PONNAN

JUDGE OF APPEAL

APPEARANCES

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