CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 27/03

BATO STAR FISHING (PTY) LTD Applicant

versus

THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM First Respondent

THE CHIEF DIRECTOR: MARINE AND COASTAL MANAGEMENT, DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM Second Respondent

CERTAIN RIGHTS HOLDERS Third to Eighteenth Respondents

Heard on : 11 September 2003

Decided on : 12 March 2004

JUDGMENT

O'REGAN J:

[1] This application for special leave to appeal to this Court against a judgment of the Supreme Court of Appeal (the SCA)[1] concerns the allocation of fishing quotas. The applicant, Bato Star Fishing (Pty) Ltd, is dissatisfied with the allocation it received in the 2001 allocation

[1] The SCA judgment is reported as *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA).

process for the 2002 – 2005 fishing seasons and it seeks to review that allocation decision. The review succeeded in the Cape High Court (the High Court), but, on appeal, that judgment was overturned by the SCA. The case raises the question of the extent to which such a decision is susceptible to review under our new constitutional order.

[2] The first respondent is the Minister of Environmental Affairs and Tourism (the Minister) who is the member of Cabinet responsible for the administration of the relevant legislation. The second respondent is the Chief Director in the Department of Environmental Affairs and Tourism (the Chief Director), responsible for marine and coastal management who took the allocation decision under challenge in this case.[2] The third to eighteenth respondents are other rights holders in the deep-sea hake fishing industry (the other respondents) who oppose the relief sought by the applicant.

[3] The applicant has held fishing rights in the deep-sea trawl sector of the hake fishing industry since 1999. The industry is more than a hundred years old and is one of the most lucrative sectors of the South African fishing industry. It generates sales of more than R1,45 billion per annum, is the largest exporter of perishable frozen products in the country and has an international reputation for being a well-managed fishery producing a quality product. The deep-sea trawl sector is both capital- and labour-intensive, with a

[2] The decision was taken in terms of section 18 of the Marine Living Resources Act, 18 of 1998, a power conferred upon the Minister, subject to his right to delegate that authority in terms of section 79 of the Act. That authority was duly delegated to the Chief Director by the Minister on 5 November 2001.

current fixed capital investment of some R5,4 billion and a labour force, directly involved in the industry, of about 8 000 workers.

[4] Hake is caught in four ways – by deep-sea trawling, by in-shore trawling, by long-lines and by hand-lines. For the purpose of the allocation of quotas, the industry is divided into four sectors based on these four methods. Of these sectors, the deep-sea trawl industry is the largest, the most technologically sophisticated and the most capital- and labour-intensive. Of a total allowable catch of 165 000 tonnes of hake in 2002, the deep-sea trawl sector was allocated 138 495 tonnes, while the in-shore trawl sector was allocated 10 165 tonnes, the long-line sector 10 840 tonnes and the hand-line sector 5 500 tonnes. These last two sectors have been introduced only in recent years and, because of their relatively simple technology that eschews the need for high levels of investment, have been earmarked by the Department of Environmental Affairs and Tourism (the Department) as key areas for transformation in the hake fishing industry.[3]

[5] According to industry estimates, each 1 000 tonnes of hake caught in the deep-sea trawl sector represents a turnover of approximately R13 million and a profit of approximately R5 million. Deep-sea trawling for hake was pioneered in South Africa by a handful of companies who remain dominant in the sector. Like most of the South African

[3] See *Policy Guidelines with regard to applications for the granting of rights in terms of the Marine Living Resources Act 18 of 1998*, published as Annexure B to GN 1771, Government Gazette 22517, 27 July 2001, at page 38.

economy, the sector is dominated by companies that historically were established, owned and managed by white people. Accordingly one of the ten objectives identified in section 2 of the Marine Living Resources Act, 18 of 1998 (the Act) is:

> "(j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry."

[6] This objective as well as all the other objectives set out in section 2 of the Act are, by their nature, incapable of immediate or short-term fulfilment. The objectives require action by the executive to facilitate their fulfilment in the medium- and long-term. Measures aimed at the achievement of the goal identified in section 2(j) of the Act need to be taken side by side with the steps designed to fulfil the other objectives identified in the Act. In particular, the Act recognises that the industry exploits a scarce marine resource that may be destroyed if not carefully managed and monitored. Most of the other objectives flow from this realisation. The other objectives identified in section 2 are the following:

> "(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 . . . ."

The sensitivity of the resource is real. In the 1960s and 1970s, a large number of foreign fishing vessels took to fishing in the hake fisheries off the South African coast and threatened the long-term sustainability of fish stocks. In 1977, South Africa accordingly introduced a 200-mile economic zone and excluded foreign fishing vessels from its waters. In order to protect the fishery, a total allowable catch was introduced for the first time in 1978, followed by a quota system for individual companies. The maintenance of the hake fish population as a sustainable living resource is thus appropriately a central tenet of the legislative scheme. This consideration clearly renders the achievement of a more equitable distribution of fishing rights more challenging for the Department, as the total allowable catch cannot simply be increased to accommodate more participants.

Applicant's history in the fishing industry

[7] The applicant was formed in 1996 when it acquired the controlling share in three small fishing companies operating in the abalone sector of the industry. Seventy percent of the applicant is owned by a holding company, SA Amalgamated Union Fishing (Pty) Ltd (SAAUF), and the other thirty percent is owned by the applicant's management. In

turn, SAAUF has two major shareholders both of which are trade union investment companies. According to the applicant, the main purpose behind its formation was the establishment of a medium-sized black empowerment fishing company. In its first few years of operation, the applicant was only engaged in the abalone sector of the fishing industry. It built a processing factory and marketed abalone under its own brand names. Since 1996, however, the applicant has had its quotas of abalone reduced significantly. From the date of its establishment, the applicant sought to enter the hake deep-sea trawl sector. It applied for, but was refused, quotas in 1996, 1997 and 1998. In 1999, for the first time, it was allocated a quota of 750 tonnes. It received the same allocation in 2000, and in 2001 the allocation was increased to 803 tonnes.

The application process for rights for 2002 – 2005

[8] A development identified by the Department as desirable for the stabilisation of the industry was a move to longer term quota allocations, instead of quota allocations for one year only.[4] One of the advantages of a longer term quota allocation is that it permits industry players to make capital and human resource investments in the industry. The Department accordingly decided that it would be appropriate to issue rights for the deep-sea hake sector for a four year period, the initial period to cover the 2002 – 2005 fishing seasons. On 27 July 2001, the Department published in the Government Gazette an invitation to submit applications for a broad range of fishing rights,

[4] *A Marine Fisheries Policy for South Africa* White Paper 5 May 1997 para 4.6.2.2; see also section 18(6) of the Act; see also *Policy Guidelines with regard to applications for the granting of rights in terms of the Marine Living Resources Act 18 of 1998* above n 3, at page 36.

including the deep-sea hake sector.[5] At the same time, the Department issued the policy guidelines in terms of which the allocations would be made.[6] The allocations were to be made in terms of section 18 of the Act.

[9] The policy guidelines stipulated that applications would be evaluated in terms of the objectives and principles set out in section 2 of the Act. The guidelines also identified a range of more specific policy considerations, in no order of preference. These included the importance of historical involvement in the industry, proof of investment and past performance in the industry, and demonstrated ability to create employment. While acknowledging the fact that transformation of the industry could not take place overnight, the guidelines nevertheless affirmed the objective of building a fishing industry whose "ownership and management, broadly reflects the demographics of South Africa".

[10] In order to assess the degree of transformation of any particular applicant, the guidelines adopted a nuanced approach, recognising that transformation involves more than simply a change in ownership. So three relevant factors were listed. The first factor made it plain that equity within an applicant could be an acceptable alternative to the requirement of ownership. The other two factors were the distribution of wealth created through access to marine living resources and the extent to which an applicant

[5] Government Gazette 22517, GN 1771, 27 July 2001.

[6] Id at Annexure B.

employs people from historically disadvantaged sectors of the community. In respect of these three factors, the guidelines noted that "[i]n 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." Moreover, in addressing the injustices of the past, the guidelines stipulated that "it is the intention to allocate a notable proportion" of the total allowable catch to deserving applicants in order to encourage transformation either through internal restructuring or through new entrants. In the hake sector, the guidelines emphasised that the long-line and hand-line sectors had been identified as suitable sectors for promoting small and medium enterprises owned and managed by people from historically disadvantaged communities. The guidelines also emphasised the importance of the sustainable utilisation of marine resources and the dangers of over-fishing.

[11] In its application, the applicant sought a substantial increase of its fishing rights. It sought an allocation of 12 000 tonnes (more than twelve times its allocation for 2001). The applicant stated that it could catch this quantity of fish by purchasing a new vessel and by making agreements with existing rights holders to purchase the balance. The applicant was not the only company to seek a considerable increase in the number of tonnes allocated to it. Overall, applications were made for 1,1 million tonnes of hake per annum – more than nine times the total allowable catch.

[12] All applications were initially screened by an Advisory Committee appointed by the Department. The screening process applied criteria drawn up by the Department based on the policy guidelines referred to above. The document listing the criteria commenced as follows:

> "These criteria are based on the key aspects of the policies published by the Department in Government Gazette 22517 of 27 July 2001. It is the Department's policy to endeavour to create stability in the industry in order to retain existing levels of investment and to attract further investment in the industry while at the same time seeking to transform the industry in line with the purposes of the Act. The policy on transformation is broadly to reward those ex-rights holders who have performed and taken steps to transform and to admit suitable new HDP [historically disadvantaged person] entrants that demonstrate both a capacity to catch, process and harvest the right applied for and a willingness to invest in the industry."

Six factors were identified: involvement and investment in the industry; past performance; strategies for by-catch and offal utilisation; compliance; transformation and the extent to which the applicant has used or will use its allocation merely as a "paper quota" – i.e. will sell or transfer the quota to another company or individual. In relation to transformation the following criteria were identified: ownership (a specific points chart was provided in order to determine the percentage of the company owned by people from a historically disadvantaged sector of the community); management structure (a similar points chart was provided); workforce (percentage of the workforce from historically disadvantaged communities); transformation plan; and compliance with the Employment Equity Act, 55 of 1998. Criteria were set out in relation to each factor with an indication of how the factor concerned was to be scored.

[13] There were one hundred and ten applications for the hake deep-sea trawl sector of which fifty four (including the applicant) were existing rights holders. Points were awarded to each applicant in terms of the pre-determined scoring system, described above. The scores then formed the basis of the Chief Director's evaluation of the applications. The applicant was a below average applicant, scoring 4.9 overall out of a possible total of 10. Seventy two of the one hundred and ten applicants scored better than this. On the transformation aspect, the applicant scored only 1.7 points out of a possible total of 4. It had a high score in respect of ownership, but its score was low in relation to the other aspects of transformation. Seventy seven of the other applicants outscored the applicant on transformation, including four of the five pioneer companies.

[14] Although the Advisory Committee did the initial scoring, it was not responsible for the allocation of quantum to each applicant. This was done by the Chief Director. The starting point for the allocation was that made in 2001. Five percent of the quota granted to each applicant in 2001 was deducted from their new quota and put into a redistribution pool. The redistribution pool was then distributed amongst rights holders in direct proportion to their scores. At the end of the process, rights were awarded to fifty one applicants, all of whom were existing rights holders. No new applicants were granted fishing rights.

[15] As a result of the allocation process, the applicant received a quota of 856 tonnes. On 24 December 2001 the Department announced the decision and released general reasons for the allocations made. The general reasons briefly described the decision-making process and its outcome, and annexed a list of the allocations and the manner in which their quantum had been calculated. The Department reserved an amount of 1 487 tonnes for appeals.

Institution of legal proceedings by the applicant

[16] The applicant, dissatisfied with this allocation, sought two different remedies. On the one hand, it appealed as it was entitled to do, in terms of section 80 of the Act to the Minister against the Chief Director's decision. In this appeal, the applicant sought an allocation of 2 500 tonnes. The Department announced in early January 2003 that as a result of the appeal process, the applicant would receive an additional allocation which resulted in a total allocation of 873 tonnes. Secondly, it initiated review proceedings in the High Court to set aside the allocation decision. These proceedings were initiated on 27 February 2002. The Minister and Chief Director were cited as were all the remaining successful applicants in the allocation process. Sixteen of these fifty respondents opposed the relief sought by the applicant.

[17] At about the same time, another disgruntled applicant, Phambili Fisheries (Pty) Ltd (Phambili),

also launched an application to review the decision of the Chief Director. Because of the identity of the issues and parties in both cases, the applications were heard together by the High Court. One of the first issues raised in the High Court was that the applicant had failed to exhaust its internal remedies under the Act as required by section 7(2) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).[7] After considering the matter, however, the High Court held that it was an appropriate case to permit the applicant to seek a review of the decision before exhausting its internal remedies.[8] This decision of the High Court was challenged by the respondents in the SCA on appeal. In the light of its other findings, the SCA did not find it necessary to deal with the issue and the decision of the High Court in this regard has not been directly challenged on appeal in this Court. It is thus not necessary for this Court to consider whether the decision of the High Court in this regard was correct. Suffice it to say that a court minded to grant permission to a litigant to pursue the review of a decision before exhausting internal remedies should consider whether the litigant should be permitted simultaneously to pursue those internal remedies. In considering this question, a court needs to ensure that the possibility of duplicate or contradictory relief is avoided.

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[7] Section 7(2) provides as follows:

> "(*a*) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
> (*b*) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of the Act.
> (*c*) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

[8] *Phambili Fisheries (Pty) Ltd and Another v Minister of Environmental Affairs and Tourism and Others*, Case 1171/2002, 27 November 2002, as yet unreported.

[18] One judgment in respect of both matters was handed down by the High Court holding in favour of both the applicant and Phambili. The High Court granted the applications on a number of grounds including a finding that there was no direct evidence as to how the Chief Director arrived at the allocation decision under challenge; a conclusion that the Chief Director acted arbitrarily, capriciously, irrationally and without reason; and a holding that the Chief Director ignored relevant considerations and took account of extraneous ones such as the need for stability in the relevant sector of the fishing industry.

[19] The respondents in both matters successfully sought leave to appeal to the SCA, where once again both matters were heard simultaneously and only one judgment was handed down. Both appeals were upheld. It should be noted that the SCA expressly, and correctly, rejected the High Court's conclusion that there was no evidence as to how the allocation decision was reached. The applicant thereafter sought special leave to appeal to this Court, but Phambili did not. Because of the inter-relatedness of the two matters, and in particular because the respondents in this matter relied on their affidavits filed in the Phambili matter, large parts of the record in the Phambili matter were, by agreement between the parties, also filed with the record in this Court.

The grounds of appeal raised in this Court

[20] The applicant relies on three grounds in its application for special leave to appeal to this Court: (a) that the SCA misconstrued the nature of the objectives in section 2 of the Act; (b) that the SCA incorrectly concluded that the Chief Director's decision should not be set aside on the ground that he failed to apply his mind to the quantum of hake applied for by the applicant and its ability to catch such quantum; and (c) that the SCA erred in finding that the alleged "undisclosed policy change" by the Department did not infringe the applicant's right to procedural fairness.

[21] The applicant did not mention PAJA either in its notice of motion and founding affidavit in the High Court, or in its application for special leave to appeal to this Court. At the hearing, applicant's counsel were asked why their application was not founded on the provisions of PAJA and after the hearing, the Chief Justice issued directions calling upon the parties to lodge further written argument on the following questions: (a) whether the applicant's cause of action is founded on the common law, PAJA and/or section 33 of the Constitution; (b) if the proper cause of action is PAJA, what effect if any that had on the grounds of appeal as argued by the applicant; and (c) what effect, if any, the partially successful appeal to the Minister in terms of section 80 of the Act had on the applicant's grounds of review in this Court. Supplementary written argument was lodged by all the parties as requested.

[22] In *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*,[9] the question of the relationship between the common law grounds of review and the Constitution was considered by this Court. A unanimous Court held that under our new constitutional order the control of public power is always a constitutional matter. There are not two systems of law regulating administrative action — the common law and the Constitution — but only one system of law grounded in the Constitution.[10] The courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires,[11] nor in the doctrine of parliamentary sovereignty, nor in the common law itself,[12] but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter.[13] The extent to which the common law remains

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[9] 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[10] Id at paras 33-45.

[11] Cf The discussion of the constitutional basis of judicial review of administrative action in *Staatspresident en Andere v United Democratic Front en 'n Ander* 1988 (4) SA 830 (A). For a discussion by academic writers, see A Breitenbach "The Justifications for Judicial Review" (1992) 8 *SA Journal on Human Rights* 512; M Wiechers *Administratiefreg* 2 ed (Butterworth, Durban/Pretoria 1984) and E Mureinik "Pursuing Principle: the Appellate Division and Review under the State of Emergency" (1989) 5 *SA Journal on Human Rights* 60 at 70. And also the discussion by the SA Law Commission in *Report on the Investigation into the Courts' Powers of Review of Administrative Acts* Project 24, November 1992 at paras 4.1.2.

[12] The question of the constitutional basis of judicial review has been the subject of vigorous debate in the United Kingdom. Most of the key articles have been collected in Forsyth (ed) *Judicial Review & the Constitution* (Hart Publishing, Oxford and Portland, Oregon 2000). See also TRS Allan "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?" (2002) 61(1) *Cambridge Law Journal* 87; P Craig "Constitutional Foundations, the Rule of Law and Supremacy" 2003 *Public Law* 92.

[13] *Pharmaceutical Manufacturers*, above n 9 at para 45.

relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of PAJA and the Constitution.

[23] Section 33 of the Constitution provides that:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
> (3) National legislation must be enacted to give effect to these rights, and must –
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
> (c) promote an efficient administration."

The transitional provisions of the Constitution in schedule 6 required that the legislation referred to in section 33(3) be passed within three years of the Constitution coming into force.[14] PAJA was assented to on 3 February 2000. The long title to PAJA states that it is –

> "[t]o give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996 . . .".

[24] Section 6 of PAJA identifies the circumstances in which the review of administrative action may

[14] Item 23 to schedule 6 of the Constitution.

take place. PAJA itself provides a definition of "administrative action" in section 1, but the scope of that definition does not concern us in this case as it is, quite rightly, common cause that the decision of the Chief Director at issue constitutes administrative action as contemplated by PAJA. Section 6 provides that:

> "(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
>
> (2) A court or tribunal has the power to judicially review an administrative action if –
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> (a) the administrator who took it –
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> (i) was not authorised to do so by the empowering provision;
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> (ii) acted under a delegation of power which was not authorised by the empowering provision; or
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> (iii) was biased or reasonably suspected of bias;
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> (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
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> (c) the action was procedurally unfair;
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> (*d*) the action was materially influenced by an error of law;
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> (*e*) the action was taken –
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> (i) for a reason not authorised by the empowering provision;
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> (ii) for an ulterior purpose or motive;
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> (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
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> (iv) because of the unauthorised or unwarranted dictates of another person or body;
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> (v) in bad faith; or
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> (vi) arbitrarily or capriciously;
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> (*f*) the action itself –
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> (i) contravenes a law or is not authorised by the empowering provision; or
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> (ii) is not rationally connected to –
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> (*aa*) the purpose for which it was taken;
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> (*bb*) the purpose of the empowering provision;
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> (*cc*) the information before the administrator; or
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> (*dd*) the reasons given for it by the administrator;
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> (*g*) the action concerned consists of a failure to take a decision;

(*h*) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(*i*) the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred in subsection 2 (*g*), he or she may in respect of a failure to take a decision, where –

(*a*) (i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

(*b*) (i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision before the expiration of that period,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period."

[25] The provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As

PAJA gives effect to section 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.[15]

[26] In these circumstances, it is clear that PAJA is of application to this case and the case cannot be decided without reference to it. To the extent, therefore, that neither the High Court nor the SCA considered the claims made by the applicant in the context of PAJA, they erred. Although the applicant did not directly rely on the provisions of PAJA in its notice of motion or founding affidavit, it has in its further written argument identified the provisions of PAJA upon which it now relies.

[27] The Minister and the Chief Director argue that the applicant did not disclose its causes of action sufficiently clearly or precisely for the respondents to be able to respond to them. Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative.[16] I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relied is not fatal to its cause of action. However, it must be emphasised that

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[15] *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 14 - 15; *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) at para 15; *Alexkor Limited and Another v The Richtersveld Community and Others*, CCT 19/03, 14 October 2003, as yet unreported, at para 23.

[16] *Ketteringham v City of Cape Town* 1934 AD 80 at 90; *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623F - H; *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A); [1997] 1 All SA 644 (A) at 725H - 726A; *Ben-Tovim v Ben-Tovim and Others* 2001 (3) SA 1074 (C) at 1090A - B.

it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action. I turn now to deal separately with the three grounds upon which the applicant sought leave to appeal.

SCA's application of section 2 of the Act

[28] The first ground of appeal raised by the applicant is that the "SCA misconstrued the nature of the objectives and principles in section 2 of the Act with the result that it failed to consider one of the applicant's principal grounds of review." As described above, section 2 of the Act identifies ten objectives and principles[17] to which "[t]he Minister and any organ of state shall in exercising any power under this Act, have regard . . . ." The applicant's argument is that the Chief Director failed to give due consideration to section 2(j) which requires that regard be had to "the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry." In making this argument, the applicant also relies upon section 18(5) of the Act which provides that:

> "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."

[17] See paras 5 and 6 above.

[29] The High Court concluded that the peremptory provisions of section 2 had been ignored by the Chief Director, and that as a result, the decision was fatally flawed. The SCA did not agree with this conclusion. It held that, properly construed, the purpose of the two provisions was "to guide and not to fetter"[18] the decision-maker and on the facts held that it was clear that the Chief Director had taken the provisions of section 2 into account.

[30] In its supplementary written argument in this Court, the applicant identifies subsections 6(2)(b), (d), (e)(iii), (f)(i) and (ii), (h) and (i) as the provisions of PAJA upon which it relies. Its argument is thus that the Chief Director failed to comply with "a mandatory and material procedure or condition prescribed by" the empowering provision (section 6(2)(b)); that the decision was influenced by an error of law (section 6(2)(d)); that irrelevant considerations were taken into account and relevant ones not (section 6(2)(e)(iii)); that the decision was not empowered or authorised by the empowering provision (section 6(2)(f)(i)); that the decision was not rationally connected to the purpose of the empowering provisions (section 6(2)(f)(ii)(bb)); and that the exercise of the power was not reasonable as contemplated by section 6(2)(h). Although the applicant relies on section 6(2)(i) (that the decision was otherwise "unconstitutional or unlawful"), it points to no specific ground of review not otherwise covered by section 6(2). This argument need not be considered further.

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[18] Above n 1 at para 30.

[31] Of the grounds relied upon by the applicant, subsections 6 (2)(b), (d), (e)(iii) (at least in part), (f)(i) and (f)(ii)(bb) relate to the question of whether in making the decision, the Chief Director misdirected himself as to the legal obligations imposed upon him by the empowering legislation. The other grounds relied upon by the applicant, that is section 6(2)(e)(iii) (in part) and section 6(2)(h), relate to the question of whether the decision itself was "reasonable". I shall address these two arguments separately.

Misconstruction of the empowering provisions

[32] The gravamen of the applicant's complaint under this head is that the Chief Director paid insufficient attention to the requirements of section 2(j), as repeated in section 18(5) of the Act. The question to be considered is the proper interpretation of section 2(j) taking into account section 18(5) and, in particular, the nature of the obligations imposed upon the Chief Director by these provisions. In this regard, it should be noted that section 2 contains a wide number of objectives and principles,[19] for example, the conservation of the marine ecosystem, the sustainable use of marine living resources, and the need to utilise marine living resources to achieve economic growth, to build capacity in the industry and to create employment. Not all the objectives and principles will be relevant to every decision taken under the Act. In determining the amount of the total allowable catch, for example, the provision relating to the sustainable use of marine

[19] Section 2 is cited at paras 5 and 6 above.

resources and the need to conserve the marine ecosystem will clearly be relevant, although once that decision has been taken and the process of allocation of fishing rights commences, those factors will be of less relevance. In relation to some decisions, the objectives and principles listed in section 2 may to some extent be in conflict with one another as they cannot all be fully achieved simultaneously. Moreover, there may be many different ways of achieving each of the objectives individually. The section does not give clear guidance on which method should be selected or how an equilibrium is to be reached.

[33] The applicant argues that the accommodation reached by the Chief Director is improper because it misinterprets section 2(j). The applicant argues in effect that the Chief Director "must give effect to" section 2(j) and that the effect of section 18(5) is to render section 2(j) of pre-eminent importance in relation to the other principles of section 2.

[34] The provisions of section 2 and section 18 make it plain that the obligation imposed upon the decision-maker is an obligation to "have regard to" the factors mentioned in section 2, and to "have particular regard to" the factor mentioned in the case of section 18(5).[20] The repetition of the requirement of the factor of transformation indicates its importance and the need for special attention to be given to the questions of restructuring and redress in the fishing industry. The historical imbalances which continue to disfigure

[20] Section 18(5) speaks of the need to permit "new entrants". It is not necessary for the purposes of this case to determine precisely the ambit of that class. We assume in favour of the applicant that it falls within it.

the South African economy are felt acutely in the fishing industry. By underlining the importance of restructuring so as to redress imbalances, the Act emphasises that the unjust status quo cannot be maintained simply in the interest of stability. The thrust of the Act in this respect is in keeping with the Constitution, which opens its Preamble by recognising the injustices of the past, and then declares in section 1 that equality is a foundational value. When making his determination on quotas the Chief Director was accordingly obliged to give special attention to the importance of redressing imbalances in the industry with the goal of achieving transformation in the industry.

[35] However, what is also clear, as indicated above, is that the broad goals of transformation can be achieved in a myriad of ways. There is not one simple formula for transformation. To the extent that the Act emphasises the need for decisions to facilitate the process of transformation, it suggests no particular preference for the manner in which this should be achieved. The manner in which transformation is to be achieved is, to a significant extent, left to the discretion of the decision-maker.

[36] Section 18(5) is of great importance at the stage when fishing rights are allocated. This section requires the Minister to make allocations that will achieve the objective contemplated in section 2, and in doing so, he is enjoined to "have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society".

[37] Various objectives are set out in section 2. Sections 2(d) and 2 (j) are directed to transformation and capacity building. They provide that regard must be had to:

> "(d) the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture brances, employment creation and a sound ecological balance consistent with the development objectives of the national government;
> …
> (j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry."

[38] Other constitutional values come into the equation as well. Section 24(b) of the Constitution states that everyone has the right −

> "to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that —
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable social and economic development."

[39] When allocations are made the obligation imposed by section 18(5) must be observed. This does not mean, however, that regardless of other considerations all new entrants must be catered for at every allocation, nor that new entrants must be admitted at every allocation in every sector of the fishing industry. The objectives in section 2 must be

taken into account as well as they are of considerable importance to the consistent and sound development of the fishing industry as a whole.

[40] There can be no doubt that the development objectives of the national government include transformation of the economy. On an overall reading of the provisions of the Act, decision-makers, in allocating fishing rights, must seek to give effect to the objectives of the Act and, in particular, must ensure that a process of transformation takes place. To meet the obligations imposed in this regard by subsections 2(d), (j) and 18(5), there must, in the first place, be a recognition of the fact that Parliament required these needs to be fulfilled and that steps must be taken to ensure their fulfilment in time. At the very least, some practical steps must be taken in the process of the fulfilment of these needs each time allocations are made if possible. If no step is taken during a particular round of allocation, the decision-maker cannot be said to have paid due regard to these needs unless there is a reasonable explanation for the absence of such practical steps. A court will require such explanation and will evaluate it to determine whether or not it meets the obligations imposed on the Minister. But so long as the importance of the practical fulfilment of these needs is recognised and a court is satisfied that the importance of the practical fulfilment of sections 2(j) and 18(5) has been heeded, the decision will not be reviewable.

[41] The papers before us show that the importance of the practical fulfilment of sections 2(j) and

18(5) was recognised by the Department. The policy guidelines published at the same time as the invitation for applications on 27 July 2001 indicate that the transformation of the industry was a consideration central to the allocation process. So does the evaluation process of applicants for quotas. The actual allocation as well as the general reasons issued after the allocation process indicate that some steps were taken in relation to the section 2(j) objective but that no new entrants were admitted into the hake deep-sea trawl sector. The evidence shows however that new entrants, including the applicant, had been admitted in previous years. It is also clear that in relation to the deep-sea hake sector of the fishery and its own particular context, particularly its capital- and labour-intensive character, transformation was to be sought, not so much in admitting new entrants to the industry, as in concentrating on the transformation of those companies already in the industry.[21] There is therefore no question of a misapplication or misdirection by the Chief Director.

The 'reasonableness' of the Chief Director's decision

[42] The second aspect of this argument raises the question, not of whether the Chief Director erred in law in failing to take the consideration identified in section 2(j) and 18(5) sufficiently into account, but whether the Chief Director's decision was a decision within the terms of section 6(2)(h) of PAJA which provides that a decision must not be "so unreasonable that no reasonable person" could have reached it.

[21] See para 10 above.

[43] In its original heads, the applicant based its argument on the judgment of Corbett JA in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another*[22] where it was held that:

> "Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice.' [citations omitted] Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated."

It is well known that the pre-constitutional jurisprudence failed to establish reasonableness or rationality as a free-standing ground of review.[23] Simply put, unreasonableness was only considered to be a ground of review to the extent that it could be shown that a decision was so unreasonable as to lead to a conclusion that the official failed to apply his or her mind to the decision.

[44] There was some debate in the supplementary heads filed by the parties as to the precise meaning of

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[22] 1988 (3) SA 132 (A) at 152A - D.

[23] *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220 at 236; *National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) at 735; *The Administrator, Transvaal and The Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) at 79 - 80; *Johannesburg City Council v The Administrator, Transvaal and Mayofis* 1971 (1) SA 87 (A) at 96A - D. See, however, the minority judgment of Jansen JA in *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at 14–21.

section 6(2)(h) of PAJA which provides that if a decision "is so unreasonable that no reasonable person could have so exercised the power", it will be reviewable. This test draws directly on the language of the well-known decision of the English Court of Appeal in *Associated Provincial Picture Houses, Limited v Wednesbury Corporation*.[24] The repetitiousness of the test there established has been found to be unfortunate and confusing. As Lord Cooke commented in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*:[25]

> "It seems to me unfortunate that Wednesbury and some Wednesbury phrases have become established incantations in the courts of the United Kingdom and beyond. Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, an apparently briefly-considered case, might well not be decided the same way today; and the judgment of Lord Greene MR ([1947] 2 All ER 680 at 683 and 685, [1948] 1 KB 223 at 230 and 234) twice uses the tautologous formula 'so unreasonable that no reasonable authority could ever have come to it'. Yet judges are entirely accustomed to respecting the proper scope of administrative discretions. In my respectful opinion they do not need to be warned off the course by admonitory circumlocutions. When, in Secretary of State for Education and Science v Tameside Metropolitan Borough [1976] 3 All ER 665, [1977] AC 1014 the precise meaning of 'unreasonably' in an administrative context was crucial to the decision, the five speeches in the House of Lords, the three judgments in the Court of Appeal and the two judgments in the Divisional Court, all succeeded in avoiding needless complexity. The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock ([1976] 3 All ER 665 at 697, [1977] AC 1014 at 1064) as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. . . . Whatever the rubric under which the case is placed, the question here reduces, as I

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[24] [1948] 1 KB 223 (CA) at 233-4.

[25] [1999] 1 All ER 129 (HL) at 157.

> see it, to whether the chief constable has struck a balance fairly and reasonably open to him."

In determining the proper meaning of section 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act "reasonably", the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of section 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable,[26] that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution[27] and in particular section 33 which requires administrative action to be "reasonable". Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.

[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case.[28] Factors relevant to determining whether a decision is reasonable or not will

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[26] See, for example, the discussion in P Cane *An Introduction to Administrative Law* 3 ed (Clarendon Press, Oxford 1996) at 209; and also C Hoexter *The New Constitutional & Administrative Law, Volume II Administrative Law* (Juta, Cape Town 2002) at 187.

[27] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 21-26.

[28] See *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) at 758H - I; *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 39; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at paras 100-1.

include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.

[46] In the SCA, Schutz JA held that this was a case which calls for judicial deference.[29] In explaining deference, he cited with approval Professor Hoexter's account as follows:

> "[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 interpretations 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 administration 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

[29] Above n 1 at para 47.

> functions of administrative agencies; not to cross over from review to appeal."[30] (footnote omitted)

Schutz JA continues to say that "[j]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function".[31] I agree. The use of the word "deference" may give rise to misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for courts to treat decision-makers with appropriate deference or respect[32] flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.

[47] This was also recognised in a recent House of Lords judgment, *R (on the application of ProLife Alliance) v British Broadcasting Corporation*.[33] In his speech, Lord Hoffmann commented:

> "My Lords, although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any

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[30] C Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SA Law Journal* 484 at 501-2. Also cited by Cameron JA in *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at para 21.

[31] Above n 1 at para 50.

[32] Professor Dyzenhaus has suggested that deference is best understood not as submission but as respect, see Dyzenhaus "The Politics of Deference: Judicial Review and Democracy" in M Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford 1997) 279 at 303. See also *Baker v Canada (Minister of Citizenship and Immigration)* 174 DLR (4th) 193 at para 65.

[33] [2003] 2 All ER 977 (HL).

> particular instance the decision-making power and what the limits of that power are. That is a question of law and must therefore be decided by the courts.
>
> [76] This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. . . . [W]hen a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law."[34]

[48] In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should

[34] Id at paras 75-76.

pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

[49] Section 2 of the Act requires the decision-maker to *have regard to* a range of factors which are to some extent in tension. It is clear from this that Parliament intended to confer a discretion upon the relevant decision-maker to make a decision in the light of all the relevant factors. That decision must strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium. Which equilibrium is the best in the circumstances is left to the decision-maker. The court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances.

[50] If we are satisfied that the Chief Director did take into account all the factors, struck a reasonable equilibrium between them and selected reasonable means to pursue the identified legislative goal in the light of the facts before him, the applicant cannot succeed. The task of allocation of fishing quotas is a difficult one, intimately connected with

complex policy decisions and requires ongoing supervision and management of that process by the departmental decision-makers who are experts in the field.

[51] The main basis for the applicant's claim is the fact that the 2002 allocation took as its starting point the 2001 allocation and then only took a five percent "equity pool" from existing rights holders for re-allocation. This process, they argue, illustrates that insufficient weight was given to the section 2(j) criterion.

[52] The respondents' answer is that the 2002 allocation, albeit for a four-year period, is near the start of a process of transformation in a complex, capital- and labour-intensive sector of the fishing industry in which instability would be detrimental to the overall management of the fishery. The government respondents argue that the four-year period will permit a reshuffling in the industry which will facilitate transformation in the medium-term. It is true that five percent of the overall allocation is a small amount. However, it cannot be said that in opting for this amount the Chief Director acted unreasonably. The question is not whether a different proportion of twenty five percent or fifty percent would have produced a different or better result, but whether in adopting five percent the Chief Director acted unreasonably. It is plain that the process of transformation of the fishing industry, and in particular, the highly complex, capital- and labour-intensive deep-sea hake fishery is no easy task. Parliament has identified

the relevant policy considerations and has left the implementation of this task to the executive.

[53] In considering the Chief Director's decision on the record before us, it is clear that he took into account the need for restructuring the fishing industry throughout the process – the policy guidelines identified transformation as a key consideration, as did the screening evaluation process and the final reasons given for the decision. The policy guidelines also recognised that the capital intensity and labour intensity of this sector make transformation more difficult and that given the need to continue to encourage investment the number of new entrants into this fishing sector needs to be limited. The focus, therefore, was always on the internal transformation of existing participants rather than new entrants. This focus cannot be said to be unreasonable in the light of the overall framework of the empowering legislation. It is clear from the record that the short-term strategy is to maintain stability in the sector, while the medium-term strategy of the Department is to seek a rationalisation of new entrants which will see the emergence of one or two major new players coupled with a continued emphasis on the importance of the internal transformation of pioneer companies as the route to the required restructuring.

[54] The evidence establishes that the Chief Director did take all the identified considerations into account. In particular, the Chief Director recognised that transformation as required

by sections 2(j) and 18(5) of the Act can be achieved in a variety of ways and selected the way he thought appropriate in the circumstances. The Chief Director's decision may or may not have been the best decision in the circumstances, but that is not for this Court to consider. The Court must merely decide whether the decision struck a reasonable equilibrium between the principles and objectives set out in section 2 and section 18(5) in the context of the specific facts of the deep-sea hake trawl sector. In my view, and for the reasons given above, the equilibrium achieved cannot be said to be unreasonable. In the circumstances, this ground of appeal will not succeed.

Failure to consider applicant's application on its merits

[55] The second ground of appeal is that "the SCA incorrectly concluded that the Chief Director's decision should not be set aside on the grounds that he did not apply his mind to the quantum of hake applied for by the applicant and the applicant's ability to catch such quantum." It will be recalled that the applicant made application for 12 000 tonnes of hake (more than twelve times its existing tonnage). In its supplementary argument, the applicant identifies section 6(2)(e)(iii), (h) and (i) as the provisions of PAJA upon which the cause of action is based. This is a similar complaint to the complaints concerning the lack of reasonableness and the failure to take relevant factors properly into account that were dealt with in the previous part of this judgment. Nevertheless, it is appropriate to consider it briefly here. The nub of this complaint is that the Chief Director did not apply his mind to the quantum of tonnage applied for by the applicant and, in particular, did not take into account the change in capacity of the applicant

since 2001. The applicant argues that the Chief Director failed to take relevant considerations into account. In so arguing, it relies on *Computer Investors Group Inc and Another v Minister of Finance*,[35] where the court held:

> "Where a discretion has been conferred upon a public body by a statutory provision, such a body may lay down a general principle for its general guidance, but it may not treat this principle as a hard and fast rule to be applied invariably in every case. At most it can be only a guiding principle, in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits. In considering the matter the public body may have regard to a general principle, but only as a guide, not as a decisive factor. If the principle is regarded as a decisive factor, then the public body will not have considered the matter, but will have prejudged the case without having regard to its merits. The public body will not have applied the provisions of the statutory enactment."

That case was different from this one. It concerned the way in which sales duty payable on certain imported computer equipment was to be calculated. The decision-makers in that case had wrongly concluded that the relevant provisions of the statute were not applicable to the calculation and had instead applied a different formula. They did not consider the merits or appropriateness of that formula to the calculation in issue. That formula was described by the court as "at most a very rough guide or check".[36]

[56] This case is quite different. The Chief Director here has not applied a "rough guide or check" without considering its appropriateness in the place of an applicable statutory formula. Far

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[35] 1979 (1) SA 879 (T) at 898C-E.

[36] Id at 897H.

from it. Each application was carefully considered and rated according to a range of criteria identified as relevant by the Department. Included in those criteria were "essential requirements" which related to ownership of or access to an appropriate vessel and the use of regulation size mesh for the bottom-trawl nets. The other criteria evaluated, as stated above, were the degree of transformation of the applicant, the degree of involvement and investment in the industry, past performance, legislative compliance and the degree of "paper quota" risk. Each application was then evaluated and scored according to these criteria. Those scores were then considered by the Chief Director. The scores achieved were used to calculate the distribution of the "equity pool". This entailed an individualised approach to each application.

[57] In circumstances such as these, moreover, where the decision-maker is seeking to evaluate a large number of applications against similar criteria, the dictum in the *Computer Investors Group* case[37] is not relevant. In cases such as the present, it will be permissible, and indeed will often be desirable, for administrative decision-makers to adopt and apply general criteria evenly to each application in order to ensure that the decision subsequently made is fair and consistent.

[58] Although the starting point for the allocation was the 2001 allocation, the Chief Director did not simply repeat the allocations of 2001. In at least two cases, existing quota holder

[37] Id

applicants were unsuccessful. This was an appropriate and fair procedure to follow, and one which did involve a consideration of the merits of each individual application.

[59] It is true that the amount of tonnage that the applicant sought was not directly taken into consideration in the calculation of its final allocation. It is not clear why it should have been. In total the applications lodged sought allocations of approximately 1,1 million tonnes of hake, nearly ten times the total allowable catch. The Chief Director was entitled to consider all the applications together in the light of their scores on the individualised assessment and previous quota allocations, having considered the "essential requirements" identified above, being the ability to ensure that the allocation was caught.

[60] There is therefore no indication of unreasonableness, nor of relevant factors having been ignored nor of irrelevant factors having been taken into account. For these reasons, this ground of attack must also fail.

Undisclosed policy change

[61] The third ground of appeal raised by the applicant was that the respondents changed the basis upon which the allocation would be made after the applications and policy guidelines were published without notice to the applicant, or indeed any of the applicants for fishing

quotas. This ground is apparently based on section 6(2)(c) of PAJA which requires administrative action to be procedurally fair. In putting this argument forward, the applicant relied not only on the policy guidelines,[38] but also on a range of other instruments, including the White Paper[39] and certain draft policy documents. It is clear that the relevant policy guidelines for the purposes of this argument are those published on 27 July 2001 at the time of the invitation for applications. Unpublished guidelines, draft guidelines and policy documents subsequently overtaken by legislation or regulations cannot be relevant to determining whether there has been a change in policy. The guidelines issued on 27 July 2001, together with the terms of the Act, are the only materials which may be considered to determine this complaint.

[62] The applicant relies on paragraph 2 of those guidelines to make its case. Paragraph 2 provides in part that:

> "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/TAE[40] to deserving applicants in order to encourage transformation, either through the internal restructuring of current rights holders, or through the accommodation of new entrants." (emphasis added)

The applicant argues that the proportion of the total allowable catch allocated is not a "notable" proportion and that therefore the policy was changed without notice to the

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[38] Above n 5 Annexure B.

[39] Above n 4.

[40] The total allowable catch/total applied effort.

applicant and to its detriment. Paragraph 2 however must be read in the context of the guidelines as a whole. Paragraph 1 states that:

> "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."

[63] Moreover, it is clear from the guidelines that transformation requirements are met not only by permitting new entrants but also by transformation of existing rights holders. So another paragraph in paragraph 2 of the guidelines states:

> "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."

In this regard, the guidelines also make plain that for the purposes of transformation the situation in the capital-intensive sectors was to be treated somewhat differently to other sectors of the fishing industry. Another paragraph in the guidelines states that:

> "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."

[64] The corollary was that the less capital-intensive sectors of the industry were more appropriate for the form of transformation that required extensive admission of new entrants. The relevant guideline states:

> "The hake line sector (longline and handline) has been identified as a suitable vehicle for the promotion of HDI's [historically disadvantaged individuals] 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."

Finally it is clear from the guidelines that the Department sees transformation in the industry as a long-term goal:

> "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."

[65] It is true that at the end of the day only a small portion of the total allowable catch was allocated to the "equity pool". The question that arises is whether the small proportion that was allocated was such as could on an overall reading of the guidelines be said to constitute a change in policy of which the applicant should have been notified. In my view, it could not. The guidelines make plain that transformation is not going to happen "overnight" and that in the capital-intensive sectors, emphasis is being placed

on the internal transformation of existing rights holders rather than the introduction of new entrants. It is also clear on the evidence before us that the pioneer companies are in the main making progress in the task of internal transformation. Moreover, in the hake industry, the long-line and hand-line sectors have been identified as suitable sectors for the promotion of small- and medium-sized enterprises owned and managed by historically disadvantaged persons. There has been a shift in the proportion of the total allowable catch allocated per sector in favour of those sectors, although it remains a small proportion of the overall total.

[66] In the circumstances, this ground of appeal, too, must fail.

Effect of internal appeal

[67] In the light of the decision I have reached, it is not necessary to consider the effect of the internal appeal to the Minister. It may be that the effect of that appeal was to replace the Chief Director's decision with another decision by the Minister which would render any challenge to the decision of the Chief Director futile. We also do not need to decide whether, when an exemption is granted in terms of section 7(2)(c) of the Act, internal remedies may not be pursued, as the respondents argued. This question may stand over for another day.

The order

[68] The following order is made:

1. The application for leave to appeal is granted.

2. The appeal is dismissed with costs, such costs to include the costs of the application for leave to appeal, and those attendant upon the employment of two counsel by both the first and second respondents and the third to eighteenth respondents.

Chaskalson CJ, Langa DCJ, Ackermann J, Goldstone J, Madala J, Mokgoro J Moseneke J, Ngcobo J, Sachs J and Yacoob J, concur in the judgment of O'Regan J.

NGCOBO J:

Introduction

[69] I have read the main judgment. I concur with it. However, I write separately to emphasise the importance of transformation in the context of the Marine Living Resources Act[41] (the Act).

[41] Act 18 of 1998.

[70] The factual background is fully set out in the main judgment. I need not repeat it here. Much of the debate in this Court concerned the question whether the Chief Director had proper regard to section 2(j) of the Act. That subsection sets out one of the objectives which the Minister must "have regard to" when exercising any powers under the Act.[42] It requires the Minister to "have regard to" "the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry." The applicant contended that the Supreme Court of Appeal misconstrued section 2(j) when it held that subsection (j) requires no more than that the functionary concerned should "bear in mind" or "not overlook" its

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[42] Section 2 of the Act provides:

> "Objectives and principles
>
> 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."

provisions. It contended that the Act imposes an obligation on the decision-maker to give effect to section 2(j).

[71] In my view, the answer to the question whether the Act imposes an obligation to give effect to section 2(j) depends, in the first place, on the place of transformation in our constitutional democracy, and, in the second place, on how the phrases "have regard to" or "have particular regard to" are to be understood in the context of the Constitution and the Act.[43] The exercise is essentially one of statutory interpretation.

The constitutional context

[72] The Constitution is now the supreme law in our country.[44] It is therefore the starting point in interpreting any legislation. Indeed, every court "must promote the spirit, purport and objects of the Bill of Rights" when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights "is a cornerstone of [our constitutional] democracy."[45]

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[43] I use the term "transformation" to refer broadly to redressing the historical imbalance caused by past unfair discrimination.

[44] Section 2 of the Constitution provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[45] Section 7(1) of the Constitution.

It "affirms the democratic values of human dignity, equality and freedom."[46] In interpreting section 2(j), therefore, we must promote the values of our constitutional democracy. But what are these values?

[73] South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed "to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms."[47] This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution "recognises the injustices of our past" and makes a commitment to establishing "a society based on democratic values, social justice and fundamental rights". This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.[48]

[74] The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one "in which

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[46] Id

[47] Preamble to the interim Constitution.

[48] Section 1(a) of the Constitution.

there is equality between men and women and people of all races".[49] In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities.[50] Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it. This point was made in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[51] where this Court observed:

> "It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."[52]

[75] The commitment to achieving equality and remedying the consequences of past discrimination is immediately apparent in section 9(2) of the Constitution.[53] That

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[49] Preamble of the interim Constitution.

[50] The United States Constitution, which contains an equal protection clause, has limited application where government seeks to enact a programme to remedy societal discrimination based on race. *Fullilove et al v Klutznick Secretary of Commerce, et al* 448 US 448 (1980); *Richmond v JA Croson Co* 488 US 469 (1989).

[51] 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

[52] Id at para 60.

[53] Section 9(2) provides:

> "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

provision makes it clear that under our Constitution "[e]quality includes the full and equal enjoyment of all rights and freedoms." And more importantly for present purposes, it permits "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination." These measures may be taken "[t]o promote the achievement of equality".

[76] But transformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution. As was recognised in *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape, and Another*:[54]

> "The difficulties confronting us as a nation in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others."

[54] 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 7.

[77] It is against this constitutional commitment to achieving equality that the Act must be understood and construed.

The Act

[78] A foundational principle of the Act is the transformation of the fishing industry. This is an industry that has been and continues to be dominated by a few so-called pioneer companies. These companies were and continue to be controlled and owned predominantly by members of the community that were privileged under apartheid and had exclusive access.[55] There was, and still is, therefore a need to ensure that access to this industry is opened to those newly created companies mostly controlled and owned by communities that were previously excluded from this industry. To break away from the past, a new marine fisheries policy was announced. It is a "fisheries policy [that] is founded on the belief that all natural marine living resources of South Africa, as well as the environment in which they exist and in which mariculture activities may occur, are a national asset and the heritage of all its people, and should be managed and developed for the benefit of present and future generations in the country as a whole."[56]

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[55] The ownership scores of these companies are telling in this regard. Scores are given in numbers which represent a percentage. 0 represents 0-4%; 1 represents 5-29%; 2 represents 30-49%; 3 represents 50-65%; and 4 represents 66%-100%. Under the Black Economic Empowerment Column which reflects the percentage of ownership on asset value by previously discriminated groups in the companies they scored as follows: Irvin & Johnson Limited scored 1 point which represents 5-29%; Sea Harvest Corporation Limited scored 2 points which represents 30-49%; Atlantic Trawling (Pty) Limited score 1 point which represents 5-29%; and Foodcorp (Pty) Limited scored 4 which represents 66-100%. This judgment recognizes the fact that the majority of workforce in the companies come from previously disadvantaged groups. But a primary objective must be 'to build a fishing industry that in its ownership and management, broadly reflects the demographics of South Africa today." See Policy Guidelines for the allocation of fishing rights for the period of 2002 – published in Government Notice No. 1771 published in Government Gazette No. 22917 of 27 July 2001.

[56] White Paper 5 May 1997 *A Marine Fisheries Policy for South Africa* at para 1.

[79] This commitment to the transformation of the industry was affirmed and reinforced in the Act. After stating that the purposes of the Act are "the conservation of the marine ecosystem, long-term sustainable utilisation of marine living resources," the preamble to the Act declares as one of its goals: "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". (My emphasis).

[80] There are a number of provisions of the Act which are indicative of this foundational principle:[57] Section 2(j) enjoins those who exercise any power under the Act to have regard to "the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry"; section 18(5) provides that in granting any rights to undertake or engage in commercial or subsistence fishing under section 18(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"; part 5 of the Act provides for the establishment of the Fisheries Transformation Council (the Council), whose main object is "to facilitate the achievement of fair and equitable access to the rights referred to in section 18";[58] and under section 31(1), the fishing rights allocated to the Council shall be leased "to persons from historically disadvantaged sectors of society and to small and medium size enterprises."

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[57] *Langklip See Produkte (Pty) Ltd and Others v Minister of Environmental Affairs and Tourism and Others* 1999 (4) SA 734 (C) at 743H–744B.

[58] Section 30.

[81] In *Langklip See Produkte v Minister of Environmental Affairs*, the Cape High Court found that "[t]he principles of the . . . Act are clearly directed to the promotion of equality."[59] I agree. The transformative objectives of the Act are congruent with the Constitution and with section 9(2) in particular.

[82] It is against this statutory background that section 2(j) must be construed and understood.

The construction of section 2(j)

[83] Section 2 of the Act sets out a number of objectives and principles to which the Minister must have regard in exercising any powers under the Act. One of those objectives is "the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry." In enacting this provision, the legislature was acutely aware that the fishing policy of this country must function within and be guided by our constitutional system which guarantees "equal protection and benefit of the law."[60] It realised too that the effects of the past inequities stemming from racial and other forms of discrimination have not remained in the past but have adversely affected the present fishing industry. It was also aware that there may be business practices in the fishing industry which are racially neutral on their face, but because of past overt social and economic discrimination, they are presently operating, in effect, to perpetuate these past inequities.

[59] *Langklip See Produkte* above n 17 at 744F.

[60] Section 9(1) of the Constitution.

[84] Section 2(j) was enacted "to remove barriers to competitive access which had their roots in racial [and other forms of] discrimination, and which continue today, even absent any intentional discrimination or unlawful conduct."[61] It has both a remedial and prophylactic effect. It is remedial in that it eradicates the effects of past discrimination. It is prophylactic in that it prevents the Minister's decisions, which are non-discriminatory on their face, from reinforcing and perpetuating the exclusionary effects of past discrimination. Section 2(j) is a legislative measure "designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination" so as "[t]o promote the achievement of equality."[62]

[85] There can be no question therefore that section 2(j) gives effect to the transformative policy of the Act. I do not understand the judgment of the SCA to suggest otherwise. The SCA held that "no doubt section 2(j) was intended to remedy the "mischief" of past discrimination".[63] It pointed out that "it is apparent that [the Act] introduces a mandatory requirement to have regard to the redress of certain wrongs of the past."[64] It went on to hold that "if the Chief Director were to fail to

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[61] *Croson* above n 10 at 536, Marshall J dissenting.

[62] Section 9(2) of the Constitution.

[63] *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA) at para 26.

[64] Id at para 28.

heed this injunction he would fail in his duty and his decision would be open to attack."[65] I agree with these findings.[66]

[86] It is in this context that the words "have regard to" or "have particular regard to" must be understood and construed, in particular, the question whether the Act imposes an obligation on the decision maker to give effect to section 2(j).

Does the Act impose an obligation to comply with section 2(j)?

[87] The SCA held that subsections (a) to (j) need not "be given operative effect each time" a decision is made under the Act; all that is required is "that the functionary shall 'have regard to' or 'have particular regard to' them."[67] Relying upon the ordinary meaning of the phrase "have regard to", it also held that this simply means that the functionary must "bear in mind" or "not overlook them."[68] It concluded that the subsections are no more than a guide to the exercise of administrative discretion. I respectfully do not agree with this conclusion. It fails to give due weight to the importance attached to transformation in the Act read as a whole.

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[65] Id

[66] However, the SCA went on to hold that this "does not mean that [section 2(j)] overmasters the other subsections merely because they lacked novelty" or that "the subsection swamps the rest of the Act." Id at para 28.

[67] Id at para 29.

[68] Id at para 29. It cited with approval passages from *Joffin and Another v Commissioner of Child Welfare, Springs and Another* 1964 (2) SA 506 (T) at 508F- H; *Illingworth v Walmsey* [1900] 2 QB 142; and *Perry v Wright* [1908] 1 KB 441.

[88] I accept that the ordinary meaning of the phrase "have regard to" has in the past been construed by our courts to mean "bear in mind" or "do not overlook".[69] However, the meaning of that phrase must be determined by the context in which it occurs. In this case that context is the statutory commitment to redressing the imbalances of the past, and more importantly, the constitutional commitment to the achievement of equality. And this means that the phrase as it relates to section 2(j) must be construed purposively to "promote the spirit, purport and objects of the Bill of Rights". That object is "the achievement of equality", a foundational value that is affirmed in section 9(2) of the Constitution.

[89] It is no doubt true that it is a primary rule of statutory construction that words in a statute must be given their ordinary grammatical meaning. But it is also a well-known rule of construction that words in a statute should be construed in the light of their context. These rules were articulated by Schreiner JA in an oft-quoted passage in his dissenting judgment in *Jaga v Dönges, NO and Another; Bhana v Dönges, NO and Another*[70] where he said that:

> "Certainly no less important than the oft repeated statement that the words and, expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work

[69] *Joffin* above n 28; *Illingworth* above n 28; *Perry* above n 28.

[70] 1950 (4) SA 653 (A).

> of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together."[71]

He concluded that:

> ". . . the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene."[72]

[90] The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in *Thoroughbred Breeders' Association v Price Waterhouse*[73], the SCA has reminded us that:

> "The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning. As was said in *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) at 914D-E:
>
> > 'I am of the opinion that the words of s 3(2)(d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature.'

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[71] Id at 662G–663A.

[72] Id at 664H.

[73] 2001 (4) SA 551 (SCA).

> The well-known passage in the dissenting judgment of Schreiner JA in *Jaga v Donges NO and Another; Bhana v Donges NO and Another* 1950 (4) SA 653 (A) at 662G-663A was also quoted with approval. It is of course clear that the context to which reference is made in the latter case must include the long title and chapter headings. (Compare *Swart en 'n Ander v Cape Fabrix* (Pty) Ltd 1979 (1) SA 195 (A) at 202C."[74]

[91] The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, section 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the "spirit, purport and objects of the Bill of Rights." In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others,*[75] this Court explained the meaning and the interpretive role of section 39(2) in our constitutional democracy as follows:

> "This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."

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[74] Id at para 12 of the concurring judgment by Marais JA and Brand AJA.

[75] 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 21.

[92] I am troubled therefore by an interpretative approach that pays too much attention to the ordinary language of the words "have regard to". That approach tends to isolate section 2(j) and determine its meaning in the ordinary meaning of the words "have regard to". It "ignores the colour given to the language by the context."[76] That context is the constitutional commitment to achieving equality, the foundational policy of the Act to transform the industry consistent with the Constitution and the Act read as a whole. The process of interpreting the Act must recognise that its policy is founded on the need both to preserve marine resources and to transform the fishing industry, and the Constitution's goal of creating a society based on equality in which all people have equal access to economic opportunities.

[93] It has never been in issue that prior to 1994 the fishing industry was grossly unrepresentative of race and gender due to past discrimination. Nor is the need to transform the industry disputed. All of this is abundantly clear from the foundational policy of the Act. It declares that "all natural marine living resources in South Africa … are assets and the heritage of all its people"[77] and should be managed and developed for the benefit of all. This language reflects the affirmation of the founding constitutional value of equality. This same commitment to equality was affirmed in the Preamble to the Act. Control over marine living resources must be exercised "in a fair and equitable manner to the benefit of all the citizens of South Africa", declares the Preamble.

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[76] *Thoroughbred* above n 33 at para 12 of the concurring judgment by Marais JA and Brand AJA.

[77] See above n 16.

[94] The Act recognises that it is insufficient merely to eliminate causes of past unfair discrimination but also that there is a need to redress the imbalance caused by such discrimination. As one reads on, therefore, one finds provisions which plainly show a commitment to redressing the historical imbalance and to achieving equality. Thus in granting fishing rights the Minister is required: to have regard to the need to redress historical imbalance;[78] and to have particular regard to admitting new entrants from those communities that were previously discriminated against.[79] In addition, provision is made for the establishment of the Fisheries Transformation Council, whose object is to facilitate transformation.[80]

[95] The acute imbalance in the fishing industry resulting from past discriminatory policies and laws and the need to transform the fishing industry were recently acknowledged in the Policy Guidelines issued by the Department of Environmental Affairs and Tourism. The Policy Guidelines recognise that:[81]

> "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*." (My own emphasis)

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[78] Section 2(j).

[79] Section 18(5).

[80] Section 30.

[81] General Notice No. 1771 published in Government Gazette No. 22517 of 27 July 2001.

And declares its intention to redress this historical imbalance as follows:

> "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/TAE to deserving applicants in order to encourage transformation, either through the internal restructuring of current rights holders, or through the accommodation of new entrants."[82]

[96] In my view it is important to bear in mind the interaction between sections 2 and 18. Section 2 is a provision of general application. It applies to the exercise of "any power under [the] Act". Section 18 of the Act deals specifically with the granting of fishing rights. Subsection (5) defines the obligation of the Minister in granting rights under section 18(1). It says that "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". What is plain from the subsection is that, when it comes to the granting of fishing rights, the Minister is required to pay special attention to transformation of the fishing industry. Although the subsection uses the phrase "in order to achieve the objectives contemplated in section 2", it is clear from the context that at the time of the allocation the only objective that calls for special attention is the objective in section 2(j). In this sense, section 18(5) reinforces section 2(j) and makes it plain that its provisions are the imperatives to be given effect to when granting rights under the Act.

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[82] The TAC is the Total Allowable Catch.

[97] This construction of the Act is not only consistent with the constitutional goal to achieve equality, but is also consistent with the main foundational policy of the Act to transform the industry.

[98] That the Minister gives effect to transformation when allocating fishing rights under the Act, amply appears from the record. Both the Policy Guidelines and the instructions of the Chief Director to the Advisory Committee on the Allocation of Fishing Rights indicate that transformation was one of the requirements to be considered in the allocation of fishing rights for the period 2002. Thus the Chief Director's instructions state that "[i]n order to address these issues effectively the department has set in place a process that seeks to further transform and restructure the South African fishing industry, achieve equity, to create greater stability and to grow certain sectors through improved management regimes."[83] One of the key elements of this process involves "[p]lacing a high value on the degree of transformation and restructuring displayed by applicants, both in their past performance and future objectives."[84] And if one has regard to the manner in which the applications were considered, it is apparent that transformation was one of the key factors in the allocation of the fishing rights. Finally, the Policy Guidelines indicated that the intention of the government was "to allocate a notable proportion of the Total Allowable Catch" to encourage transformation.

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[83] See the instructions of the Chief Director to the Advisory Committee on the Allocation of Fishing Rights.

[84] Id

[99] All these considerations point inexorably to the conclusion that the words "have regard to" and "have particular regard to" in the constitutional and statutory context, require a decision-maker to do more than give lip service to section 2(j). The decision must address the need for transformation in a meaningful way when decisions are made, and be able to demonstrate that this has been done. A failure to do so is unlawful, and the ensuing decision is open to attack.

[100] It is true that the Minister has a discretion in the granting of fishing rights under the Act. But how is the Minister to exercise that discretion? In particular, the question is does the Act read as a whole and in the context of our commitment to equality, indicate any policy which the Minister is to follow? If there is such a policy, then the Minister must exercise his discretion in accordance with such policy.[85] The Minister has a duty to give effect to that policy. Here, the main foundational policy of the Act is to redress the imbalance of the past. The Minister is bound to give effect to that policy in the exercise of the discretion.

[101] Having regard to the provisions of section 2, the Minister had to deal with the issues in two stages. Though the two stages cannot be kept strictly apart and there may well be an overlap at both stages of the decision making process, the emphasis in stage one is different to the emphasis in stage two. Stage one is to determine the total allowable catch. At this stage, subsection 2(a) to (i) would be of particular importance. But the Minister must also keep in mind that at the end of the process he

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[85] *British Oxygen v Minister of Technology* [1970] 3 All ER 165 (HL) at 169.

must meet the transformative objectives of the Act. This he can do if in stage one he has been able to set aside sufficient quota to enable him to meet that objective. At stage one, no doubt all the other objectives are relevant and must be taken into consideration. But it is important that due regard also be had to the need to meet the transformative objective of the Act. However, the overriding consideration at this stage is " the need to conserve marine living resources for both the present and future generations"[86] and ensure that fishing is ecologically sustainable.

[102] Having determined the total allowable catch, the second stage is to make the allocation. At this stage, the other objectives have less relevance. Here the objective to transform the industry assumes prominence. It is here where section 18(5) enjoins the Minister to "have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society" in granting rights under the Act. Section 18(5) reinforces section 2(j) and gives it more weight.

[103] It follows that if the Minister were to fail to heed this injunction, he would be acting unlawfully and his decision would be open to attack. It is incumbent upon the Minister to put forward facts from which it will appear that he has indeed paid due regard to the need to promote transformation. A court reviewing the decision of the Minister has an obligation to ensure that the section has been complied with. Where there is a dispute as to whether the Minister has complied with section 2(j), the court considering the matter must examine the facts relied upon by the Minister as

[86] Section 2(b) of the Act.

establishing compliance with section 2(j), and satisfy itself that there has been compliance with this provision.

[104] The duty of the courts in this regard, however, does not extend to telling the functionaries how to implement transformation. That must be left to the functionaries concerned. The transformation can take place in various ways: by allocating quotas to new companies controlled by historically disadvantaged groups, by insisting on internal transformation of existing companies, by insisting upon employment policies that bring historically disadvantaged groups into senior administrative positions, possibly by schemes designed to build capacity in other fishing activities until the new entrants have the financial and operational stability necessary for the deep-sea hake industry, to mention some. Exactly how this is to be done is complex and difficult and ultimately a matter of policy. What is essential as far as fishing rights are concerned is that the policy should meet the requirement of section 2(j), that is, it must in a meaningful way address the need to restructure the fishing industry to address historical imbalances and to achieve equity within "all the branches of the fishing industry".

[105] Much was made of the need to stabilize the industry. Transformation initiatives had caused instability, it was said, which manifested itself in decreased investment. This has resulted in the trawler fleet aging and has led to the risk that the industry will become less internationally competitive. This argument is familiar when

transformation is in issue. Transformation may bury the industry, so it was argued by the so-called pioneer companies. In his main affidavit Mr Kleinschmidt says that:

> ". . . the restructuring and transformation of the hake deep sea trawl industry has to accommodate the need for stability−a prerequisite for investor confidence. The instability of the past few years has had a significant adverse effect on investment, with the result that South Africa's deep sea trawl fishing fleet is ageing. The industry runs the risk of becoming less and less internationally competitive in the long-term."[87]

[106] No one would dispute the need to maintain stability in the industry. Otherwise there would be nothing to transform. But transformation is required by both the Constitution and the Act. And that change sometimes comes at a cost. I have pointed out earlier that there are profound challenges facing our nation in meeting our constitutional commitment to transformation. The transformation process will inevitably have an adverse impact on some individuals, particularly those that have always been advantaged and, at times, on the industry. These are some of the challenges we will have to confront as a nation in transition. But transformation cannot be sacrificed at the altar of stability. It must be carried out responsibly and its adverse impact must be minimized.

[107] It is difficult to see the connection between transformation, investor confidence and the aging of the deep-sea trawl fishing fleet. No facts have been put forward to support this argument. It is highly speculative. It can only mean that investors have no confidence in the new entrants in the industry because of their lack of experience, which is a result of past discriminatory laws and policies. It would be ironical indeed

[87] Kleinschmidt record 19:1614:103.1.

if the effects of past unfair discrimination, a condition over which the previously discriminated group had no control, were now to be used to exclude them from the very industry under the new legal order. Were this to be the case, our constitutional commitment to transformation would remain an empty promise.

The applicant's complaint

[108] The applicant says where the government went wrong is in promising to allocate up to 25% or "a notable proportion of the Total Allowable Catch" for transformation and thereafter only allocating a mere 2%.[88] These promises were made in a confidential document containing instructions to the advisory committee on allocation of hake deep-sea commercial fishing rights for 2001 and in the Policy Guidelines published in the Government Gazette of 27 July 2001 where the government promised to reserve "up to 25%" or "a notable proportion" respectively for transformation. As it turns out "no more than" 2% was allocated to encourage transformation. This is where the government went wrong, maintains the applicant.

[109] But that is the percentage that was shared by all the companies that complied with the transformation criteria determined by the Chief Director. The applicant does not deny that transformation was given effect to in the allocation of fishing rights. They could hardly do so on the record. The essence of their complaint is that more should have been allocated for transformation.

[88] It is correct that 5% of the total allowable catch was set aside for allocation on the basis of the points scored in the individual assessment exercise. However, only 40% of those points related to transformation. In effect, then, only 2% of the equity pool was allocated on the basis of transformation.

[110] It is true the allocation of 2% already made to encourage transformation as compared to "up to 25%" or "a notable proportion" that was promised, may appear to be paying lip service to the scheme of the Act and the imperatives of transformation. However, on the record, I am unable to say, that what was allocated to encourage transformation, was in the context of the available Total Allowable Catch and the other elements of transformation promoted by the existing operators, so insignificant so as to amount to failure to give effect to transformation. That case has not been made out.

[111] It is not immediately clear why if the proposal says up to twenty five percent would be set aside the applicant should complain when two percent was set aside. Obviously, two percent is within the range of "up to". In any event, the amount reserved was to be determined by a number of factors, one of which would be the Total Allowable Catch and the procedure for allocation. In my view, it is not within the province of the courts to tell the government how much should be allocated for transformation. This is a matter to be determined by the Minister. What is important is that a percentage was actually set aside for transformation.

[112] Accordingly, the argument based on failure to reserve more than 2% of the Total Allowable Catch for transformation must fail.

[113] I agree that on the record, the government has put up sufficient facts from which it is apparent that it accorded transformation prominence. I cannot therefore say that the Minister acted unlawfully in that he disregarded the mandatory obligation to give effect to transformation.

[114] The contention by the applicant that its application was not considered on its merits was based on the statement by the Deputy Director-General that the method of allocation used avoided the impossible task of considering the applications on the merits. Had officials separately reviewed each submission, the applicant contended, they would have considered issues of transformation. Properly understood, the statement relied upon says no more than that 2001 allocations were taken as a starting point. Then, based on the transformation criteria, an allocation was made. Not one company got everything they had asked for. This method made it unnecessary for the Chief Director to consider whether an applicant should get what it had asked for because there was simply not enough to allocate on that basis. It is in this context that the statement must be understood. I cannot say that the government acted unlawfully in doing so.

[115] For these additional reasons, I concur in the main judgment.

Chaskalson CJ, Langa DCJ, Ackermann J, Goldstone J, Madala J, Mokgoro J Moseneke J, O’Regan J, Sachs J and Yacoob J, concur in the judgment of Ngcobo J.

For the applicant:	I Jamie SC and PR Hathorn instructed by Marais Muller Inc.
For the first and second respondents:	W Trengove SC, A Schippers and AM Breitenbach instructed by the State Attorney.
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