



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
CASE NO: 259/03

In the matter between :

**THE MINISTER OF ENVIRONMENTAL AFFAIRS
AND TOURISM** First Appellant
MONDE LATEGAN DU TOIT MAYEKISO NO Second Appellant
**THE DEPUTY DIRECTOR-GENERAL, DEPARTMENT
OF ENVIRONMENTAL AFFAIRS AND TOURISM** Third Appellant
(First to third respondents in the Court *a quo*)

and

ATLANTIC FISHING ENTERPRISES (PTY) LTD First Respondent
EASTERN MARINE ENTERPRISES (PTY) LTD Second Respondent
SEAFARER DISTRIBUTORS (PTY) LTD Third Respondent
SOUTH AFRICAN SEA PRODUCTS (PTY) LTD Fourth Respondent
RISAR FISHING CC Fifth Respondent
SOUTH COAST SEA PRODUCTS (PTY) LTD Sixth Respondent
AFD FISHING CC Seventh Respondent
C & S UNDERWATER PRODUCTS (PTY) LTD Eight Respondent
BARATZ FISHING (PTY) LTD Ninth Respondent
(First to ninth applicants in the Court *a quo*)

Before: HOWIE P, STREICHER, CONRADIE, LEWIS JJA & MLAMBO AJA
Heard: 14 NOVEMBER 2003
Delivered: 28 NOVEMBER 2003
Summary: Section 80(3) of the Marine Living Resources Act 18 of 1998 – 'person with an interest' – whether a successful applicant in terms of s 18(1) is such a person.

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] In an appeal in terms of s 80 of the Marine Living Resources Act 18 of 1998 ('the Act') by Ensemble Trading 2001 (Pty) Ltd ('Ensemble') the first appellant granted to Ensemble a commercial fishing right for the 2001/2 to 2004/5 season in respect of south coast rock lobster. However, on review the Cape High Court (the 'court *a quo*') set the first appellant's decision aside. With the necessary leave the appellants now appeal against the court *a quo*'s judgment.

[2] According to the long title the object of the Act is to 'provide for the conservation of the marine ecosystem, the long-term sustainable utilisation of marine living resources and the orderly access to exploitation, utilisation and protection of certain marine living resources; and for these purposes to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa'.

[3] It is, no doubt, with that object in mind that:

3.1 Section 14(1)¹ provides that the first respondent shall determine the total allowable catch² of individual species or groups of species, the total applied effort,³ or a combination thereof;

3.2 Section 14(2)⁴ provides that the first appellant shall determine the portions of the total allowable catch, the total applied effort, or a combination thereof, to be allocated in any year to subsistence, recreational, local commercial and foreign fishing respectively; and

3.3 Section 18(1)⁵ provides that no person shall undertake commercial fishing

¹ 'The Minister shall determine the total allowable catch, the total applied effort, or a combination thereof.'

² The 'total allowable catch' 'means the maximum quantity of fish of individual species or groups of species made available annually, or during such other period of time as may be prescribed, for combined recreational, subsistence, commercial and foreign fishing in terms of section 14' (s 1).

³ The 'total applied effort' 'means the maximum number of fishing vessels, the type, size and engine power thereof or the fishing method applied thereby for which fishing vessel licences or permits to fish may be issued for individual species or groups of species, or the maximum number of persons on board a fishing vessel for which fishing licences or permits may be issued to fish individual species or groups of species' (s 1).

⁴ 'The Minister shall determine the portions of the total allowable catch, the total applied effort, or a combination thereof, to be allocated in any year to subsistence, recreational, local commercial and foreign fishing, respectively.'

⁵ 'No person shall undertake commercial fishing or subsistence fishing, engage in mariculture or operate a fish

unless a right to do so has been granted by the first appellant.

[4] On 27 July 2001 applications were invited in respect of all sectors of the fishing industry including the South Coast Rock Lobster Sector for the 2001/2002 to 2004/2005 seasons. The total allowable catch in respect of south coast rock lobster for the 2001/2002 season had been reduced by the first appellant to 340 tons and had not yet been determined for the next seasons.

[5] Thirty-eight applications for the right to undertake commercial fishing in respect of south coast rock lobster were received. One of the applications was by Ensemble which applied for an allocation of 40 533 kg. The applications were considered by the second appellant to whom the first appellant had delegated the powers vested in him by s 18. Sixteen applicants were successful. The application by Ensemble was not successful and a final decision in respect of applications by Hout Bay Fishing Industries (Pty) Ltd, Amandla Abasebenzi (Pty) Ltd and Amandla Abasebenzi Fishing (Pty) Ltd was held over pending an enquiry into alleged contraventions of the Act by Hout Bay Fishing Industries (Pty) Ltd and confirmation of the requisite authorisation to make the application in the case of Amandla Abasebenzi (Pty) Ltd and Amandla Abasebenzi Fishing (Pty) Ltd. Approximately 240 000 kg of the total allowable catch for the 2001/2002 season were allocated to the successful applicants. Of the remaining approximately 100 tons 49 028 kg were set aside to accommodate possible allocations to Hout Bay Fishing Industries (Pty) Ltd, Amandla Abasebenzi (Pty) Ltd and Amandla Abasebenzi Fishing (Pty) Ltd. The balance of the 100 tons was set aside to provide for additional allocations on appeal in terms of s 80. The second appellant decided in this regard that 'any amount of the 100 tons not allocated will be proportionately allocated to the rights holders'.

[6] In terms of s 80(1)⁶ any affected person could appeal to the first appellant against the decisions by the second appellant. Twenty-three of the 38 applicants who initially applied appealed against the allocations by the second respondent. Although the first, fourth, fifth, eighth and ninth respondents in this appeal as well as the fifth, sixth, seventh, eighth, ninth and tenth respondents in the application in the court *a quo* had been successful applicants they appealed with a view to having their respective allocations increased. The appeals of the first and fourth respondents in this appeal were subject to the portion of the total allowable catch set aside for appeals in terms of s 80 not being distributed proportionately amongst the successful applicants. The remaining 12 applicants who appealed had not received any allocation.

processing establishment unless a right to undertake or engage in such an activity or to operate such an establishment has been granted to such a person by the Minister.'

⁶ 'Any affected person may appeal to the Minister against a decision taken by any person acting under a power delegated in terms of this Act or s 238 of the Constitution.'

[7] The only applicant whose appeal succeeded was Ensemble which received an allocation of 6 000 kg. The balance of the quantity set aside to provide for additional allocations on appeal was in accordance with the decision of the second respondent distributed proportionately to those applicants who had received an allocation.

[8] The respondents thereupon applied to the court *a quo* for an order reviewing and setting aside the first appellant's decision to allow Ensemble's appeal and for certain ancillary relief. They contended that the decision should be reviewed on the ground that it was substantively unfair and unreasonable and also on the ground that it was procedurally unfair.

[9] The respondents contended that the first appellant's decision on appeal was procedurally unfair in that in terms of s 80(3) each of them should have been given an opportunity to state its case as to why Ensemble's appeal should not be granted. Section 80(3) provides as follows:

'The Minister shall consider any matter submitted to him or her on appeal, after giving every person with an interest in the matter an opportunity to state his or her case.'

[10] The first appellant denied in his papers that the allocation of a right to Ensemble on appeal was procedurally unfair and stated that the respondents exercised their rights to appeal and for that purpose submitted comprehensive appeal documents. He stated, furthermore, that in view of the number of appeals which must be considered as well as the fact that the resource is exploited on the basis of an annual total allowable catch or total applied effort it was not reasonably possible to afford each appellant a right to be heard as to whether its appeal and/or another appellant's appeal should or should not succeed. The first appellant did not contend that the respondents had been given an opportunity to state their case in respect of the Ensemble appeal.

[11] The court *a quo* held that the first appellant 'ought to have given at least **each** of the successful applicants for a fishing right in this sector the opportunity to state his or her case as contemplated in s 80(3) of MLRA⁷ when he dealt with the appeals. Moreover, he ought to have had regard to the provisions of s 3 of PAJA⁸'. The court, therefore, set aside the first appellant's decision and granted

⁷ The Act.

⁸ Promotion of Administrative Justice Act 3 of 2000.

ancillary relief to the respondents. In the light of this conclusion the court *a quo* did not consider it necessary to deal with the question whether the decision by the first appellant was substantively unfair and unreasonable.

[12] Before us counsel for the appellants did not argue that the respondents had been given an opportunity to state their case as to why Ensemble's appeal should not have been granted. They also did not submit, correctly so, that the administrative difficulties which would be encountered if such an opportunity were given would entitle a court to disregard the provisions of s 80(3). The only issue argued by them was whether the respondents had an interest in the granting, on appeal in terms of s 80, of a commercial fishing right in respect of south coast rock lobster to Ensemble. If they had, the first appellant was obliged in terms of s 80(3) to give each one of them an opportunity to state its case. It was common cause between the parties that if the respondents did not have such an interest they would not have *locus standi* to attack the decision by the first appellant.

[13] The second appellant did not merely reserve 50 972 kg (100 000 - 49 028) of the total allowable catch pending appeals in terms of s 80. He decided how the quantity remaining after allocations had been made on appeal should be allocated. It follows that an allocation on appeal to an applicant whose application in terms of s 18 had been unsuccessful, or an additional allocation to an applicant whose application in terms of s 18 had been successful, would diminish the quantity available for distribution amongst those applicants who received an allocation.

[14] Counsel for the appellants submitted that the respondents nevertheless did not have an 'interest', within the meaning of the word in s 80(3), in the appeals of the other applicants. They submitted that the word 'interest' in s 80(3) should be interpreted to mean a legal interest in the sense that only a person whose legal rights may be affected by the decision on appeal should be given an opportunity to state his or her case. In the light of the conclusion to which I have come as to the nature of the respondents' interest in the Ensemble appeal I shall assume in favour of the appellants that the word 'interest' should be given the narrow meaning contended for by them.

[15] As a result of the second appellants' decision that any amount of the 50 972 kg reserved for allocation on appeal would be proportionately allocated to the applicants who had received allocations, the successful applicants acquired a contingent right to a proportionate share of the amount reserved for allocation on appeal, the contingency being the dismissal of the appeals. The word 'contingent' is used by me in the narrow sense. In this regard Watermeyer JA said in *Durban City Council v Association of Building Societies* 1942 AD 27 at 33:

'In the large and vague sense any right to which anybody may become entitled is contingent so far as that person is concerned, because events may occur which create the right and which may vest it in that person; but the word "contingent" is also used in a narrow sense, "contingent" as opposed to "vested", and then it is used to describe the conditional nature of someone's title to the right. For example, if the word "contingent" be used in the narrow

sense, it cannot be said that I have a contingent interest in my neighbour's house merely because my neighbour may give or bequeath it to me; but my relationship to my neighbour, or the terms of a will or contract, may create a title in me, imperfect at the time, but capable of becoming perfect on the happening of some event, whereby the ownership of the house may pass from him to me. In those circumstances I have a contingent right in the house.'

[16] The difference can also be illustrated by reference to the respondents' position, before they had been granted any commercial fishing rights in terms of s 18, in respect of the total allowable catch and their position in respect of the portion of the total allowable catch reserved for allocation on appeal. In the former case the respondents had a contingent right to the total allowable catch in the wide sense which is in fact not a right. In the latter case they actually had a right, albeit a contingent right, to the portion of the total allowable catch reserved for allocation on appeal.

[17] It follows that the respondents had an interest in the appeal by Ensemble and that each of them should, in terms of s 80(3), have been given an opportunity to state its case.

[18] But, argued counsel for the appellants, even if the respondents had an interest in Ensemble's appeal in so far as it concerned the allocation of a portion of the total allowable catch it had no interest in the decision to grant a commercial fishing right to Ensemble. They submitted that a distinction should be drawn between the granting of the right and the allocation of a portion of the total allowable catch. In support of this contention they referred to the fact that the determination of the first appellant of the total allowable catch and the portion thereof to be allocated to commercial fishing is done in terms of s 14 and the granting of a commercial fishing right is done on application in terms of s 18. In further support of the contention they referred to the fact that in this case commercial fishing rights were granted for the seasons 2001/2002 to 2004/2005 while the first allocations were only made for the 2001/2002 season.

[19] There is, in my view, no merit in the contention. A right to undertake commercial fishing without an allocation is not a right to fish at all. Any application in terms of s 18(1) for a right to undertake commercial fishing would of necessity be an application for the right in respect of a portion of the total allowable catch. A right granted in terms of s 18(1) would similarly be a right to a portion of the total allowable catch. In the case of Ensemble the right it applied for was the right to harvest 40 533 kg of the total allowable catch. On appeal it was granted the right to harvest 6 000 kg of the total allowable catch. It is true that the first appellant could in terms of s 14(5) have determined that the total allowable catch for the 2002/2003 season would be nil but the effect of such a determination would have been that the successful applicants would not have had a right to fish during that season.

[20] During the oral argument before us the question arose whether, by reason of the fact that the respondents had an opportunity to appeal against the decision by the second appellant, it can be said that they were given an opportunity to state their case in respect of the Ensemble appeal. The appellants, in their papers, did not contend that that was the case and counsel for the appellants

were not prepared to argue that it was. The respondents were satisfied with the second appellant's decisions in respect of the unsuccessful applications. In so far as those decisions were concerned they had nothing to appeal against. It can, therefore, not be said that an opportunity to appeal constituted an opportunity on the part of the respondents to state their case in respect of the Ensemble appeal. [21] For these reasons the appeal should be dismissed.

Order

The appeal is dismissed with costs including the costs of two counsel.

STREICHER JA

HOWIE P)
CONRADIE JA)
LEWIS JA)
MLAMBO AJA)