THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case No 87/04

In the matter between:

FOODCORP (PTY) LTD **Appellant**

and

DEPUTY DIRECTOR GENERAL DEPARTMENT
OF ENVIRONMENTAL AFFAIRS AND TOURISM:
BRANCH MARINE AND COASTAL
MANAGEMENT **First Respondent**

THE MINISTER OF ENVIRONMENTAL AFFAIRS
AND TOURISM **Second Respondent**

THE HOLDERS OF RIGHTS IN THE PELAGIC
FISHING INDUSTRY **Third Respondent**

Coram: HARMS, SCOTT, BRAND JJA AND ERASMUS & JAFTA AJJA
Heard: 1 NOVEMBER 2004
Delivered: 19 NOVEMBER 2004

Subject: Administrative law – review – fishing quotas – formula produces irrational results – setting aside of allocations

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J U D G M E N T

HARMS JA/

HARMS JA

[1] This appeal relates to the review of the allocation of commercial fishing rights to pelagic fish for the 2002-2005 fishing seasons. ‘Pelagic fish’ is a generic term that includes principally two species, namely pilchard and Cape anchovy. Such rights are granted in terms of s 18(1) of the Marine Living Resources Act 18 of 1998 (hereinafter referred to as ‘the Act’) by the Minister responsible for the Department of Environmental Affairs and Tourism (the second respondent) or his delegatee, a deputy director in the department (the first respondent). Before granting any fishing rights the minister must determine the total allowable catch (‘TAC’) which, in turn, has to be allocated between different interest groups such as commercial fishers (s 14(1), (2)). The allowable commercial catch then has to be divided between the different commercial fishers who qualify for a quota. To qualify, an applicant must score a minimum number of points on a table which was devised to ensure that the objectives and principles of the Act are attained. The issue in this case concerns the formula used by the department for allocating the allowable commercial catch between the successful applicants. The appellant’s case is that the application of the formula infringed its rights to administrative justice as contained in s 33 of the Bill of Rights and the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’).

[2] The matter was heard in the first instance by Van Zyl J and his judgment is reported (2004 (5) SA 91 (C)). Since the judgment dealt fully with the etymology of the word ‘pelagic’, the history of fishing in South Africa, the nature of the pelagic fishing industry, the habits of pelagic fish, the history of the formula, and related matters, the reader interested in detail is referred to it. In the event, Van Zyl J dismissed the application but subsequently granted leave to appeal to this court. In essence he found that the review application was an appeal in disguise (para 65) and that this was one of those cases in which due judicial deference should be accorded to policy-laden and polycentric administrative acts that entail a degree of specialist knowledge and expertise that very few, if any, judges may be expected to have (para 68).

[3] The long title of the Act indicates that the Act is intended 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 thereof. Accordingly, the Act provides for the exercise of control over these resources in a fair and equitable manner to the benefit of all citizens.

[4] The objectives and principles of the Act are spelt out in more detail in s 2 and those relevant to a greater or lesser extent to the present litigation are

the need to achieve optimum utilisation and ecologically sustainable development of marine living resources; the need to conserve marine living resources; the need to apply precautionary approaches in respect of the management and development of marine living resources; 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; and the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.

[5] The department from time to time prepares an operational management plan (OMP) in order to enable the minister to determine the TAC and allocate commercial fishing rights. In 1999, OMP-99 was prepared, which followed the method adopted in earlier years and in terms of which rights to anchovies and pilchards were allocated separately. These rights, it is said, were based on a global trade-off between those who preferred to fish anchovies and those who wished to fish pilchards. The reason for preferring the one to the other is based principally on the manufacturing facilities or the market of a particular applicant: some have canning factories, some have fish meal processing plants, and some have both. Pilchards are preferably canned and anchovies are used to make fish meal. The allocation of rights for 2001 took place in terms of this OMP.

[6] The department then decided to develop a new OMP valid for the period 2002 to 2005, known as OMP-02. It took into account that pelagic fishing is a high volume low profit enterprise; pelagic fish is usually processed; there are large fluctuations in the annual TAC, which have a significant impact on businesses of rights holders; and that the different sectors are interlinked: any targeting of anchovies is accompanied by a by-catch of mostly juvenile pilchards, which affects future populations of the pilchard resource (pilchards take longer to reach maturity and have a longer life cycle than anchovies).

[7] Instead of allocating rights separately for anchovy and pilchard as in the past, the decision was made to allocate rights on a single percentage of the combined anchovy-pilchard catch with 'the personal trade-off decision being left to the individual right-holders.' The preferred ratio between pilchards and anchovies was to be calculated from the information contained in the application forms. To do a conversion from separate to combined allocations, the 2001 rights allocation per right-holder was converted into an equivalent single percentage right ('ESPR').

[8] Eventually a mathematical formula or algorithm was developed with the expert assistance of a professor of mathematics at the University of Cape Town (Prof Butterworth) and which led to a doctoral thesis on applied

mathematics, parts of which are before us, by Mr D'Oliviera. This was the 'policy-laden and polycentric act that entails a degree of specialist knowledge and expertise' which the court below felt required judicial deference and which cannot be assessed by judges (para 68).

[9] The Act provides that the minister may, after consultation with a forum created by the Act, make regulations regarding the formula by which a commercial fishing right as a portion of the allowable commercial catch must be determined (s 21(3)(a)). The OMP-02 clearly contained such a formula and the minister, so it would appear, agreed to it. The fact of the matter is, however, that the minister did not promulgate a regulation accordingly (cf Interpretation Act 33 of 1957 s 15). Although the power to make a regulation is permissive that does not mean that the minister is entitled to adopt a binding formula without promulgating a regulation. However, if it is assumed that he adopted a formula merely for administrative purposes, he could not thereby lay down an immutable rule, ignoring his residual discretion. Otherwise it would have amounted to the unwarranted adherence to a fixed principle, something the repository of a discretion may not do (*Britten v Pope* 1916 AD 150; *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 152C).

[10] By virtue of s 79, the minister is entitled to delegate his powers under the Act (except for making regulations). In this case he delegated the power to award commercial fishing rights to the first respondent. The respondents submitted that in doing so the minister delegated the purely mechanical function to apply the formula. There is no evidence to support the submission but if it had been done, the minister clearly denied the existence of his discretion or fettered it because it is clear that after the application of the formula no further consideration was given to the allocation by the minister or, for that matter, the first respondent. As was said in *Computer Investors Group Inc v Minister of Finance* 1970 (1) SA 879 (T) 898C-E:

'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.'

It is no different under PAJA, especially s 6(2)(f)(ii)(aa).

[11] In the application for review the appellant launched a wide-ranging attack on OMP-02, including an attack on the decision to move from

separate quotas to a single quota and in the court below it relied on a number of the provisions of PAJA to justify its attack. On appeal, however, the attack became more focussed and reliance was placed mainly on the provisions of s 6(2)(h) of PAJA, which permit a court to review an administrative action if –

'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.'

[12] In assessing whether the allocation of the commercial fishing rights under OMP-02 was 'so unreasonable that no reasonable person could have so exercised the power' to grant rights, a number of matters must be kept in mind: The right to just administrative action is derived from the Constitution and the different review grounds have been codified in PAJA, much of which is derived from the common law. Pre-constitutional case law must now be read in the light of the Constitution and PAJA. The distinction between appeals and reviews must be maintained since in a review a court is not entitled to reconsider the matter and impose its view on the administrative functionary. In exercising its review jurisdiction a court must treat administrative decisions with 'deference' by taking into account and respecting the division of powers inherent in the Constitution. This does not 'imply judicial timidity or an unreadiness to perform the judicial function'.

The quoted provision, s 6(2)(h) of PAJA, requires a simple test namely whether the decision was one that a reasonable decision-maker could not have reached or, put slightly differently, a decision-maker could not reasonably have reached. (See the authorities quoted by the court below in para 60-64 to which must be added *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) paras 42-50, *Associated Institutions Pension Fund v Van Zyl* [2004] 4 All SA 133 (SCA) para 36 and the unreported *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* (CC) (case CCT 73/03 delivered on 15 October 2004) paras 99-103.)

[13] In the light of those principles the appellant, wisely, did not pursue the attack on OMP-02 or the decision to use a single allocation. (It should be noted that the minister's determination of the TAC has never been in contention.) The use of a formula to determine the allocation of fishing rights is also not in issue.

[14] The appellant's problem is with the blind application of the formula and this can best be explained by reference to the facts raised pertinently in the founding affidavit. During 2001, the applicant's pilchard allocation was 5,6% of the TAC. This translated into 10 125 tons of pilchards. One reason the appellant had such an allocation is because it has a large canning facility

that can process 32 000 tons in a season (it does purchase pilchards to use its capacity fully). Additionally, the appellant received 0,1% as a bait quota (which amounted to 310 tons). Two other companies, Lamberts Bay and SASP, that have no canning facilities, received for bait 0,0057% (10 tons) and 1% (1 713 tons) respectively of the pilchard TAC.

[15] On 7 February 2002, under the OMP-02 formula, the appellant received 4% of the TAC (a reduction of 1,7% of the TAC) while Lamberts Bay and SASP received massive increases to 3,4% and 3,2% of the TAC respectively. Taking into account the fact that the provisional TAC for pilchards was substantially lower, this translated into 5 524 tons for the appellant and 4 674 an 4 414 tons for the other two companies respectively. In real terms, the appellant's allocation was reduced from 10 435 tons to 5 524 tons while Lamberts Bay's was increased from 10 tons to 4 674 tons and SASP's from 1 713 to 4 414 tons. In other words, while during the 2001 season Lamberts Bay had an allocation equal to one-thousandth of the appellant's allocation, it was now increased to 84% thereof, an increase of 84 000%. The relative increase of SASP's quota was from 16,9% to 79,9%, an increase of 472%.

The Oceana Group's tonnage, on the other hand, remained substantially the same at about 26 000 tons.

[16] Soon after awarding these rights the department must have realised that something was wrong with the particulars fed into the formula. Part of the problem may have been due to the fact that the application form was ambiguous (something that was sought to be rectified by a letter which all did not read or heed) and that some applicants did not understand the implication of the choice they had to exercise in choosing a preferred ratio. Consequently, forms were completed on different bases by different applicants and the department then used a mathematical model (which was not necessarily the appropriate one) in an attempt to eliminate the differences.

[17] The department consequently gave those applicants who had qualified the opportunity to amend their preferred pilchard:anchovy ratio. The appellant did so but its new preference was subjected by the department to a cap. In any event, on 10 May 2002, new rights (replacing those of 2 February) were allocated. (The TAC for 2002 had in the meantime risen from 136 500 to 257 978 tons but that has nothing to do with the case.) The appellant's percentage was increased from 4% to 4.2%, Lamberts Bay's from 3.4% to 3.7% and SASP's from 3.2% to 3.34%. Translated into tons, and compared to the 2001 allocations, the appellant's rose from 10 435 to 10 832 tons, Lamberts Bay's from 10 to 9 508 tons, and SASP's from 1 713 to 8622 tons. In other words, instead of one-thousandth of the appellant's

quota, Lamberts Bay now had 87%, an increase in relation to the appellant's quota of 87 000%. The relationship between quotas of the appellant and SASP remained at about the same level of 471%. Since these two companies have no canning facilities, the more valuable pilchards are being used by them to manufacture fish meal.

[18] How do the respondents explain these glaring anomalies? The answer is that they simply do not proffer any explanation. Their counsel could not suggest any, except for saying that the first respondent probably had not noticed them. It is clearly not a case of the appellant having had a low score, that a reallocation was necessary to restructure the industry, that the appellant had been subject to some or other disqualification or the author of its own misfortune, or that Lamberts Bay and SASP were entitled to special treatment for some or other reason. The appellant argued that the anomalies could be explained on the ground that the 2001 season was taken as a benchmark without making any adjustments to take into account the fact that it was an abnormal season with an overabundance of anchovies which skewed the formula input. It also suggested that it may have been because of the fact that the department had to make adjustments to the ratios selected by applicants or that applicants did not understand the implications of their choices or were opportunistic in selecting their preferred ratios. To come to any definitive conclusion in this regard is unnecessary because the results

speak for themselves. One does not need to understand the ‘complex processes, mathematical or otherwise’ (to quote the court below at para 68) to realise that at least some of the results produced by the simple application of the formula were irrational and inexplicable and consequently unreasonable.

[19] A reasonable decision-maker would, in my judgment, have used a formula to make a provisional allocation but would have considered the output as a result of the application of the formula and then have considered whether the output gives reasonably justifiable results bearing in mind the facts. That the results were distorted would have been patent to anyone applying his or her mind to them. Some participants were inexplicably and unreasonably favoured; at least the appellant was prejudiced, but not only the appellant. A reconsideration of the formula or of the input fed into it would have been called for. If the problem had not been solved thereby, the results would have been adjusted to make some sense.

[20] Misallocations in respect of three important commercial fishers must affect the allocations in relation to all the other quota holders. On a recalculation they may get more or less of the TAC. They were all cited as parties to the review but failed to enter an appearance and oppose the setting aside of the allocations. Whether any quota holder has received more or less

than what was its due does not arise at this stage. That is a matter for one or other of the respondents when new quotas are determined. Because of the delay since the review application was launched during 2002, the allocation for 2005 is the only one which is not of academic interest only and the appellant has on appeal limited itself to relief in respect of that year.

[21] ORDER

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court below is set aside and replaced with the following order:
   (a) The decision of the first and/or second respondent pertaining to the distribution of the total allowable catch in the pelagic fishing industry amongst successful applicants for commercial fishing for the 2005 season is reviewed and set aside.
   (b) The matter is referred back for fresh determinations as to the distribution of the pelagic TAC (and thus the individual rights allocations in the commercial pelagic fishing industry) in respect of the 2005 season.
   (c) The respondents are to pay the costs of the application,

including the costs of two counsel.

L T C HARMS
JUDGE OF APPEAL

AGREE:

SCOTT JA
BRAND JA
ERASMUS AJA
JAFTA AJA