IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

REPORTABLE

Case No.: 3920/2008

In the matter between:

WEST COAST ROCK LOBSTER ASSOCIATION	First Applicant
STEPHAN FRANCOIS SMUTS	Second Applicant
SAHRA LUYT	Third Applicant
SPARKOR (PTY) LTD	Fourth Applicant
SOUTH AFRICAN SEA PRODUCTS LIMITED	Fifth Applicant
and	
THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM	First Respondent
THE DEPUTY DIRECTOR-GENERAL: MARINE AND COASTAL MANAGEMENT. DEPARTMENT OF ENVIRONMENTAL AFFAIRS ANDTOURISM	Second Respondent
THE CHIEF DIRECTOR: RESOURCE MANAGEMENT (MARINE): MARINE AND COASTAL MANAGEMENT, DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM	Third Respondent
RESPONDENTS AS PER ATTACHED SCHEDULE TO THE NOTICE OF MOTION	Fourth to 1245th Respondents

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JUDGMENT: **07 October 2008**

DAVIS J:

Introduction

[1] Applicants seek declaratory relief against first respondent to the effect that he is precluded from using section 81 of the Marine Living Resources Act 18 of 1998 ('MLRA') in order to grant artisanal fishers generally and the fourth to 1 245 respondents in particular, a right to catch and sell West Coast rock lobster for commercial purposes. Applicants also seek to have reviewed and set aside certain decisions of first respondent, second respondent and third respondent relating to the granting of such rights to artisanal fishers. According to applicant, the relevant decisions taken by first respondent were made on 16 April 2007, 2 May 2007 and 14 December 2007.

Factual Background

[2] Commercial fishing for the West Coast rock lobster ('WCRL') dates back more than a century. Until the mid 1960's commercial fishing enterprises consistently exploited the WCRL beyond the maximum sustainable yield for the resource. In order to manage the risks associated with declining catch rates, a reduction was introduced for tail mass production quotes. It appears that after a period of relative stability WCRL fishery was faced with another significant reduction catch rates during the 1990/1991 season. Steps were taken after that season to reduce the commercial total allowable catch ('TAC'), the relevant level reaching as low as 15 000 tons during the 1995/1996 season compared, for example, to a catch in excess of 10 000 tons per annum during the 1950's.

[3] It appears that, in recent seasons, the resource has again been placed under significant pressure. The global TAC in the 2007/2008 season has been decreased to 2571 tons. It is common cause between the parties that the resource continues to be under significant pressure.

[4] The resource and its allocation are now governed by the MLRA. When the legislation was enacted in 1998, it created a legal framework which recognized the existence of a variety of different interests in any given fishery. It made provision for the possibility of local commercial, subsistence, recreational and foreign fishing. Fishing within any of these categories requires the granting of a right and/or permit granted by the Department of Environmental Affairs and Tourism. One of the principle mechanisms by which first respondent can ensure that fish stocks are not exploited is through the annual determination of the TAC in terms of section 14(1) of the MLRA. The TAC (sometimes referred to in the papers as the global TAC) is the maximum quantity of fish that is available during each fishing season for combined recreational, subsistence, commercial and foreign fishing. The TAC is determined after a scientific assessment of the strength of the resource and is based on the level of exploitation considered to be sustainable. Once the TAC is determined for a given season, first respondent must decide what portions of the TAC to allocate to local, commercial, recreational, subsistence and foreign fishing. See section 14(2) of the MLRA.

[5] In 2005 first respondent invited applications for the granting of new long term commercial fishing rights for a ten year duration. He decided to continue with the regime in which two different classes of commercial fishing rights had been constituted: (i) A WCRL off shore fishery which accommodates corporate entities with a rights allocation in excess of 1, 5 tons. These fishers operate a large vessels in off shore areas using the trap system; (ii) A WCRL near shore fishery which, according to Mr Grant who deposed to the founding affidavit, accommodates approximately 820 individuals who are historically dependant on the resource and run relatively small scale commercial operations with smaller allocations in geographically restricted zones in inshore areas using small boats and hoopnets.

[6] It appears that the near shore fishery category replaced the earlier category of subsistence fishing. The MLRA makes provisions for first respondent to declare communities or persons to be subsistence fishers and empowers him, in terms of section 19(1) of the MLRA, to establish areas or zones where subsistence fishers may fish. A subsistence fisher is defined as 'a natural person who regularly catches fish for personal consumption or for the consumption of his or her dependants, including one who engages from time to time in the local sale or barter of excess catch but does not include a person who engages on a substantial scale in sale of fish on a commercial basis'.

[7] Mr Grant avers that under the new system of offshore and near shore fishing, the commercial fishing rights so allocated represent rights in excess of 100% of the commercial TAC in any given year. Mr Andre Share, who deposed to an answering affidavit on behalf of second and third respondents, contests this averment:

> "I deny that it is conceptually sound to regard the commercial rights as fixed or set percentages of the commercial TAC. In practice, all other things being equal, offshore rightsholders normally do have the same percentage of TAC from year to year, but that is not the content of their right."

I shall return to this dispute later in the judgment.

[8] In December 2004 a group of artisanal fishers initiated litigation in the Equality Court against the first respondent in the matter of Kenneth George and others v Minister of Environmental Affairs and Tourism. They challenged first respondent's failure to make adequate provision for artisinal fishers in the fishing rights policy in terms of the MLRA. They contended that neither the commercial rights nor the subsistence rights which have now been incorporated under the new policy accommodated their needs. In short, they contended that the policy deprived them and hence their communities of access to the sea and their livelihood and traditional way of life.

[9] The litigation initiated by the artisinal fishers was pursued in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. For the background to this case see Minister of Environmental Affairs v George 2007 (3) SA 62 (SCA). In April 2007 the matter was settled and an order was granted by Erasmus J, sitting as a judge of the Equality Court, on 2 May 2007.

[10] To the extent that it is relevant to the present dispute the important component of this order reads thus:

> '2. The respondent shall consider the persons identified by the applicants in terns of the criteria and determine jointly with the applicants the qualifying persons ("the identified fishers");
>
> 3. The identified fishers must apply for and be in possession of a valid recreational fishing permit;
>
> 4. The respondent shall by way of exemption, until 31 December 2007, or any earlier date identified herein, permit the identified fishers to engage in fishing and to sell the lawfully caught catch under the authority of the recreational permit, the following:
>
> 4.1 four west coast rock lobster per day, every day of the week until 31 May 2007;
>
> 4.2 a cumulative total of not more than 30 per day of any combination of the following linefish species, until 30 September 2007:
>
> 4.2.1 Snoek

4.2.2 Yellowtail

4.2.3 Cape bream (Hottentot)

4.2.4 Silver fish (Carpenter)

4.3 Not more than thirty white mussels per day, provided that this is for bait purposes.

5. This exemption may be renewed for a further stipulated period if necessary, pending the satisfactory implementation of the agreement provided for in paragraph 8 below.'

[11] In his answering affidavit, first respondent sets out the response developed by his department pursuant to this order. He states that he received a recommendation from the Director General concerning interim relief for certain fishers which was dated 13 April 2007. He goes on:

> "I considered this recommendation. It was evident to me that the very real social-economic needs of those fishers had to be addressed. It would have been unjust to compel them to await the outcome of the policy development process, which could potentially be delayed or hung up by many factors, including the opposition of existing rights-holders to them being accommodated. In my opinion, the criteria and conditions applicable to the proposed measures were appropriate to an interim regime. I did not anticipate that they would impact on the rights of industry and I approved the proposals on 16 April 2007. The conclusion, however, did not explicitly deal with the fishers' right to sell their catch

which was an important element of the overall arrangement, although it was referred to earlier in the recommendation. The approach was that all such fishers would legally obtain recreational permits, and I added the following rider in my own handwriting:

'4.2 the fishers will be allowed to sell their recreational catch as per e-mail from A Shear.'

[12] First respondent then states that the Director General refined his earlier recommendation and limited the dispensation in respect of WCRL to 500 fishers who are permitted to harvest four lobsters per person per day until 31 May 2007. It was this recommendation which was approved by first respondent on 2 May 2007. He claimed in his affidavit: 'This process resulted in the settlement of the Equality Court proceedings referred to above and its order…'.

[13] The first respondent informed the court that, on 09 November 2007, the Acting Director General made a further recommendation to him in respect of the TAC for WCRL for the 2007/2008 season. This recommendation was approved on 13 November 2007 and signed on 16 November 2007. According to first respondent:

"By this time the intended finalization of the subsistence and small scale commercial fisheries policies had not been achieved. It had previously been the expectation that the policy would have been finalized by 31

December 2007, but that proved to be impossible. In an endeavor to speed up the process of finalising that policy, a summit was arranged for 1and 2 November 2007 where the various role players and interest groups in relation to the subsistence and small scale fisheries could participate and endeavor to reach some conclusion.

A national task team was constituted pursuant to the aforesaid national summit on subsistence and small scale fisheries, the terms of reference of which included consolidating and finalising the policy.

Pursuant to these developments, a further recommendation relating to interim relief for small scale fishers was forwarded to me by the Director General on 27 November 2007."

[14] First respondent approved this recommendation in principle. Significantly he recorded his decision thus:

"Approval is granted in principle subject to the following:

- *It will be a once-off relief for a limited period.*
- *I first want to see a scientific report by our scientist that they support any allocations we make. I am mot convinced that Masifundise's proposal is sustainable.*
- *It is not clear (see annex C) what species are recommended. Please provide clarity on that.*

- *I therefore need a follow up memo to clarify and address the abovementioned issues.*

Your memo says that the subsistence policy will be finalized by March 2008, but Monde M reported yesterday in the 3 D that it will probably only be mid year."

[15] It appears that a scientific report prepared by Dr C J Augustyn, Chief Director: Resource Antarctica and Islands dated 7 December 2007 was then obtained. The report did not support the contention that the quantity of WCRL required for the proposed interim relief, which was estimated as between 120 to 140 tons for some 868 fishers, could be accommodated within a nominal 257 ton allocation for recreational fishing for the 2007/2008 season 'without further reductions for recreational effort'. Dr Augustyn went on to say: "Such an interim relief measure would not be compatible with the long term sustainable use of the resource."

[16] In justifying his decision to approve the recommendation, Dr Augustyn's report notwithstanding, first respondent said the following:

> "It is obvious that in view of this report, I was faced with a difficult decision. I had to consider the position of the fishers who, by definition, had traditionally relied on, *inter alia,* the west coast rock lobster resource and would suffer personal hardship if they were not accommodated. The resolution of their claims of access to the resource was being held up by

the delays on the development of the policy, for which they were not to blame. The estimated total harvest by this group could be 120 to 140 tons which, given their circumstances, I considered would probably partly be consumed by them on a subsistence basis, with the balance being sold locally. It is public knowledge that the holders of commercial rights engage mostly in export of west coast rock lobster. For instance, my attention has been drawn to the fact that the Oceana Group Limited published a statement on its website that 98% of live lobster is for the export market and only 2% is for distribution on the local market. To the extent that the small scale fishers would compete with the existing commercial rights holders, I considered that their impact would probably be minimal and would in any event not be in a market sector in which the large commercial interests participated meaningfully.

The estimated quantum of fish required for the interim relief measure was about half of the recreational TAC. The estimate was based on 868 persons catching 20 lobsters per person per week for the entire season from 15 November 2007 to 30 April 2008. The scientific recommendation was expressly based on the assumption that there would be no further reductions of recreational effort. Clearly as the season had already commenced by the time the decision was taken, the actual catch would be less than that estimated.

> In my judgment the interim relief group had a much more legitimate claim to the resource than recreational fishers. If there had to be further effort reduction measures for the recreational sector that would have to be endured. In any event, as I understood it, the predicted recreational "take' was based on estimates that were known to contain a wide error margin. It seemed logical to me that allowing fishing for west coast rock lobster would replace or subsume within it some of the recreational effort, without knowing exactly how much. Unpalatable though the notion may be to some, and naturally without condoning poaching, it also seemed realistic and logical to me, that some of the assumed illegitimate catch would be brought into the regulated environment by these measures.
>
> I weighed up these competing considerations and, on 14 December 2007, decided to recommend a second interim relief measure for a limited period. In my judgment the interests of the small scale fishers outweighed the considerations against granting then a further round of interim relief.'

It is against this factual background that the various legal disputes raised in this application must be evaluated.

Mootness

[17] In the answering affidavit of second and third respondent, Mr Share contends that the relief sought in prayer three of the notice of motion no longer has any force

and effect in that the decisions which applicant seek to have reviewed and set aside were taken in respect of the 2006/2007 and 2007/2008 fishing seasons which had already been concluded. By contrast, applicants contend that the first substantial issue raised in the notice of motion concerns the ambit of first respondent's powers exercised in terms of section 81 of the MLRA.

[18] Applicants contended that, on three occasions, first respondent exercised powers in terms of section 81 to grant artisanal fishers exemptions from provisions of the MRLA. It is not in dispute, applicants contend, that first respondent may well grant an exemption to artisanal fishers for a further period or further periods. In reply, applicants further state that they sought an undertaking from first respondent that he will not again exercise such powers, pending the finalization of the present application. No such undertaking has been provided. In applicant's view, there is every likelihood that the first respondent will again use the power in terms of section 81 to grant exemptions in terms of the scheme. As this issue was hardly pressed by respondents in argument before this court and as it may well be that first respondent will seek to exercise powers in terms of section 81 in future as the final policy regarding small scale fishers has not been implemented, I am prepared to assume in favour of applicants that a live controversy still confronts this court.

Standing

[19] Initially an issue was raised about the standing of applicants to bring this application. First applicant is the West Coast Rock Lobster Association, a non profit organization whose members all hold rights to undertake commercial fishing for WCRL in terms of section 18 (1) MLRA. The association is a recognized industrial body in terms of section 8 of the MLRA, whose objectives include the promotion of the interests of its members' and the development and protection of the WCRL fishery. The second and third applicants are the holders of long term commercial fishing rights in the WCRL near shore fishery, while fourth and fifth applicants are holders of long term commercial fishing rights in the WCRL off shore fishery.

[20] No argument was pursued by any of the respondents regarding the issue of standing. Accordingly, the case proceeded on the basis that all of the applicants had the requisite standing to bring this application.

The Exemption

[21] As is clear from the statement made by first respondent on 3 May 2007, the exemption granted read as follows: "The Minister shall by way of exemption until 31 December 2007 or any earlier date identified, permit the identified fishers to engage in fishing and to sell the lawfully caught catch under the authority of the

recreational permit, the following: four west coast rock lobsters per day; every day of the week until such 31 May 2007..."

[22] The letter sent to each of the fishers, who were beneficiaries of the exemption read, in so far as is relevant, as follows: "Exemption in terms of section 81 of the Marine Living Resources Act 1998... to undertake fishing without a right to undertake or to engage in such activity been granted in terms of section 18(1) and to be issued with a valid permit for such activity without the payment of any fees as contemplated in section 13(2) (c) of MLRA.

The Exemption Holder is hereby authorised to undertake fishing without a right to undertake or to engage in such activity being granted and without payment of any fees for the issue of a valid permit as contemplated in section 13 (1) of MLRA subject to the following conditions:

> "The exemption holder must apply to the Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management for a valid permit in terms section 13 of MLRA"

[23] It is useful to refer at this point to the key statutory provision employed by first respondent, the meaning and scope of which are the subject of much of this dispute. Section 81 (1) of the Act reads thus: "If in the opinion of the Minister there are sound reasons for doing so, he or she may, subject to the conditions that he or she may determine, in writing exempt any person or group of persons from a provision of this Act."

[24] This section forms the basis of applicant's argument to which I now turn.

Applicants' contentions

[25] Mr Burger, who appeared together with Ms Norton on behalf of applicants submitted the first respondent had carefully refrained in his answering affidavit from advising the court of which provisions of the Act he had exempted the group of artisanal fishers. Mr Burger further submitted that the reason why respondents had been so reluctant to explicate upon the legislative content of the exemption was that there was no provision of the MLRA from which exemption could sensibly been granted in order to achieve that which, by definition, was unachievable, namely to allow recreational fishing permits to be used for commercial fishing purposes.

[26] When the exemption permit was examined it appeared that the Deputy Director General had purported to grant an exemption from sections 18(1) and 13(2) (c) of MLRA. Mr Burger submitted that the latter provision pertained to the payment of fees for a permit and was therefore neutral in regard to the kind of activity which could be permitted by way of exemption. Thus, what first respondent may do in terms of section 81 is to grant a person immunity from or relieve him or her of a liability to which others are subject – such as the need for a permit under section 13 to perform and activity in terms of the MLRA. He may, to use the examples in Smith v Minister of Environmental Affairs & Tourism, RSA and another [2003] 1 All SA 628 (C) at 633h-I, grant exemption from paying an

application fee in terms of section 25 of the MLRA, or from submitting an application in the manner determined by him in terms of section 18(2). Section 18(1) applied to commercial fishing and subsistence fishing. The exemption on its own terms was accordingly not one which pertained to recreational fishing.

[27] This argument leads to the central submission of applicants: Once WCRL is allowed to be sold, the catch falls outside of the definition of recreational fishing. It becomes part of a commercial catch. In terms of section 14, in particular section 14 (4), first respondent is prohibited from increasing the commercial catch unless there is an increase in the resource. By acting in terms of section 81 (1), he, in effect, increased the commercial catch, notwithstanding clear scientific evidence which revealed a declining resource. In short, the exemption granted by first respondent was in conflict with the carefully conceived structure of the MLRA. The exemption had conflated the various categories of fishing and thus the statutory division as set out in the MLRA. Furthermore, section 81 (1) refers clearly to an exemption from '<u>a provision of this Act</u>' (my emphasis). In this case, first respondent had sought to exempt a whole category of fishers from various sections of the Act.

[28] Expressed differently, applicants' case is that section 18 lies at the heart of the regulatory scheme envisaged by the Act. The section allows commercial and subsistence fishing, only where a right has been granted by the Minister, following a proper application process. Recreational fishing does not require a

right such as that granted under section 18 but only a permit because the Act itself prohibits the sale of recreational catches.

[29] Accordingly, section 81 cannot be invoked to subvert the protective regulatory measures of the Act and thus should be interpreted as narrowly as possible and in accordance with the scheme of the Act so outlined. The narrow scope of section 81 is further revealed by its wording exemption may be granted by 'a provision' of the Act. By contrast, section 15 A of the Usury Act 73 of 1968 and section 79 of Mine Health and Safety Act 29 of 1996 provide that the Minister may grant an exemption from 'any or all the provisions of the Act'. By construing the exemption in section 81 widely and as if the words used in these two Acts were employed in the MLRA, first respondent, in effect authorised the various respondents to catch and sell without a right granted under section 18 and hence placed these respondents outside the scope of the Act.

Evaluation

[30] A Full Bench of this court has examined the nature of section 81 in Laingville Fisheries (Pty) Ltd v the Minister of Environmental Affairs and Tourism (unreported decision of the CPD: 30 May 2008). In their judgment Griesel and Waglay J J noted at para 36:"The intention the legislature was to confer upon the Minister in appropriate cases and for sound reasons, a wide discretion to 'exempt' a person from any provision of the Act – whether prospectively or retrospectively."

[31] As the court held in Laingville, supra, section 81 employs wide and clear language. There is no basis for the contention that the Minister may only exempt a person from certain provisions of the Act but not others. No section remains untouchable or out of reach of the exemption power contained in section 81. That conclusion follows from the wording of the provision and the interpretation of the provision by the Full Bench.

[32] Applying this interpretation to the exemption granted by the first respondent in terms of section 81 of MLRA, it is clear that an exemption was granted from the provision of section 18(1), namely no persons shall undertake commercial fishing or subsistence fishing.... unless a right to undertake or engage in such an activity or to operate such an establishment has been granted by such a person by the Minister.'

[33] Pursuant to section 81, the Minister exempted a category of persons from having to acquire a right before they could undertake commercial or subsistence fishing. Pursuant to that decision, it was logical that the related provision in section 13(2) (c), namely that persons exempted from section 18 would not require a permit (section 13(1) is manifestly a corollary to section 18) and accordingly no fees would be paid by the fishers.

[34] In effect what happened was the following: The respondent fishers were exempted from the provision that they could not undertake commercial fishing without having been granted a right thereto by first respondent. To the extent that the exemption letter constituted a permit, they were also exempted from paying any fee for this permit.

[35] Once it was accepted that the first respondent can exempt any person or persons from a provision of this Act, it must follow that the power to exempt from section 18 (1) is permissible. Once this is permissible, a decision to dispense with a permit fee by virtue of the fact that the letter exempting the holder of the letter from the provisions of section 18 constitutes a permit is both logical and ancillary to the substantive exemption. There is nothing in the Act to gainsay this conclusion, save for a formalistic emphasis on the word 'a provision'. To over emphasize the words 'a provision' is, however, to run the risk of subverting the wide range of the discretion afforded to first respondent pursuant to section 81; that is where an exemption from one provision necessitates exemption from a consequential provision as occurred in this case. If section 81 permitted an exemption from section 18(1), it was logical to dispense with a need for a permit.

[36] For these reasons, I am satisfied that first respondent acted *intra vires* in his application of section 81. It therefore becomes necessary to proceed to the other basis for review.

Delegation

[37] Applicants submit that, in terms of section 79 (a) of MLRA, first respondent has a general power of delegation to the Director General or on officer in his department nominated by the Director General. However what he cannot do is to delegate part of the decision making process required for the proper exercise of a power in terms of section 81. Therefore, first respondent cannot decide that artisanal fishers, as a category should be exempted, but make no decision regarding which persons within that category would be so exempted.

[38] As Mr Duminy, who appeared together with Ms Bawa on behalf of first second and third respondents, submitted, this argument was not foreshadowed in applicant's papers. However, first respondent was given the power to exempt 'any person or group of persons from any provision of the MLRA. First respondent laid down criteria for the identification of the persons who so qualify in terms of his decision of 14 December 2007. This group of persons was clearly identified as 'not more than a thousand *bona fide* traditional artisanal fishers who had been allocated a long term fishing right and who can demonstrate both historical dependence and reliance on fishing... along the Cape, West and South Coast between Port Nolloth in the north and Arniston in the south'.

[39] This appears to have been indicative of an identifiable ascertainable group persons as contemplated in section 81 of the MRLA. According to Mr Share, the Department commenced issuing permits on 22 January 2008 and proceeded to

issue no more than a thousand permits for the season. The reason for the delay in the commencement of the season was that 'a vigorous verification of interim fishers had been undertaken'. There appears to be clear merit in the argument that, having identified the category of persons to whom the exemption would apply, first respondent was entitled to delegate the decision of the exact persons who would benefit from that category to another person within his department.

A rational basis for first respondent's decision?

[40] Mr Burger referred to the only scientific report which had been prepared, that by Dr Augustyn who had recommended that the interim strategy not be implemented as it was in compatible with the long term sustainable use of the resource. Mr Burger submitted further that first respondent had no countervailing scientific evidence placed before him when he decided to approve the scheme. On the contrary, the information that he had received from the Director General supported the views of Dr Augustyn. In a recommendation of 21 April 2007, the Director General had confirmed 'indications are that the resource are declining further and a reduction of the TAC to 2007/2008 fishing season is inevitable.' Furthermore, 'if the total of a thousand fishers as indicated by Masifundise is accommodated in this interim measure, then approximately 22 tons would be harvested by this group of fishers until the end of May 2007. This would in fact mean that the TAC would have exceeded by this amount.' Further 'due to the known vagaries of fishing, the limited fishing days remaining and the use of a

recreational permit, it is likely that the TAC will be exceeded by far less than the 11 tons indicated in 2.15'.

[41] Mr Burger also submitted that the decision of first respondent was even more surprising in that Dr Augustyn's report had been obtained, pursuant to first respondent's own decision that approval for the scheme would be granted in principle but that he required a scientific report prior to making a final decision. Furthermore, the calculations employed by first respondent as to the tonnage to be granted to the fishing respondents was made on the basis of 868 persons. This was significantly less than applicants estimate of 1242, Mr Share's figure of a 1000 and Mr Blaauw, on behalf of fourth and other respondents, of about 1100.

[42] Furthermore, when first respondent contended that the artisanal fishers had a more legitimate claim to the resource, this contention was directly at war with the earlier decision made by first respondent in terms of section 14 of the MLRA in which the allocation of WCRL to commercial fishing and recreational fishing had been made, presumably after careful consideration, including the obligation imposed on first respondent in terms of section 2 of the Act to take account the socio economic issues. He should have so done and was presumed to have done so when he made the earlier decision and not only later when the exemption scheme was introduced.

Evaluation

[43] In Laingville supra at paras 44-47, the court gave content to the nature of the discretion afforded to first respondent in terms of section 81(1). The learned judges' reasoning reads thus:

> "Given the wording of s81(1) and the subjective nature of the discretion conferred on the Minister in that section, the scope for judicial interference on review is of course extremely limited, as pointed out earlier. The question as to whether or not the Minister was 'right' or 'wrong' does not arise, because this is not an appeal. Realising these constraints, the applicants argued that the reasons given by the Minister for the decision to exempt either do not exist at all or are not sound. On this basis, they argued that the Minister acted 'unreasonably, capriciously or arbitrarily'. The requirement of administrative reasonableness in review proceedings is somewhat circumscribed. As stated by the Constitutional Court, a decision will be reviewable if it is 'one that a reasonable decision-maker could not reach'. O'Regan J, writing for a unanimous court, proceeded as follows:
>
> > '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. Factors relevant to determining whether a decision is reasonable or not will 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.'

> Having regard to these principles, and '(giving) due weight to findings of fact and policy decisions made by those with special expertise and experience in the field', we are not persuaded that a reasonable decision-maker in the position of the Minister could not have decided to exempt applications from the requirement of timeous lodgement, nor can we find that the Minister acted either capriciously or arbitrarily.

> It follows that this ground of review cannot succeed."

[44] While the approach adopted in this case is clearly binding on me and the judgment is meticulous in its reasoning, I consider it somewhat unfortunate that the court sought to emphasize the subjective nature of the discretion conferred in the Minister in terms of section 81 South African administrative law used to draw

an unsatisfactory distinction between a subjective discretion and a discretion based on reasonableness. It is a distinction that, all too often, allowed the courts to retreat from its supervisory jurisdiction. As Hoexter, Administrative Law in South Africa at 46 correctly notes 'to act with discretion means to act wisely and after due reflection; and so while discretion can be very wide, it is never completely "free" "unfettered" "absolute" "arbitrary" notwithstanding the frequency with which these and similar adjectives have been used by the courts.... The idea of uncontrolled or unguided discretion is hopelessly at odds with modern constitutionalism.' See for the relevant history Baxter Administrative Law at 407-410.

[45] I would prefer to engage directly with the purpose of section 81 to divine the scope of the Ministerial power. Within the context of affording deference to the responsible Minister, O'Regan J observed in Bato Star v Minister of Environmental Affairs 2004(4) SA490 (CC) at para 48 that, in treating administrative decisions with respect, a court must recognize 'the proper role of the executive within the constitution'. In short, a court 'should be careful not to attribute to itself superior wisdom and relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decision made by those of special expertise and experience in the field'. (para 48)

[46] Within the Canadian context Prof David Mullin has set out four factors which guide a court in its review of decisions such as that raised in this dispute:

> 'The four factors are (1) any statutory indicators of the scope of review, such as the language in which the discretion is conferred and the presence or absence of a privative (ouster) clause; (2) the expertise of the reviewing court relative to that of the administrator; (3) the purpose of the legislation and the particular provision; and (4) the nature of the question in two different senses: first, the mix of law, fact and discretion involved and secondly, whether the question relates to the very reasons for the conferral of the statutory authority and the core of the administrator's expected area of expertise.' 2006 Acta Juridica 42 at 50.

[47] In this case, first respondent has been given the power to decide whether it is appropriate to exempt persons or categories of persons in provisions of the Act. Of course, he cannot act unreasonably, capriciously or arbitrarily. He must consider the evidence placed before him, engage with the competing interests involved and the impact of his decision on those affected by the decision and come to a carefully considered determination. It is not for a court to choose a better interpretation or application when the decision complies with these requirements. It is for the court to respect the decision which has been entrusted by the legislation in wide terms to first respondent.

[48] First respondent stated that he had a difficult decision to make, particularly in balancing competing rights. Whatever the decision he may have made initially, he was now faced with an order granted by the Equality Court. It is not strictly necessary for me to decide upon the careful, eloquent and persuasive arguments advanced by Mr Gauntlett, who appeared together with Ms Fourie on behalf of the 134th respondent. However, once the Equality Court had granted an order, first respondent was confronted with the reality thereof, together with any scientific and further evidence which had been placed before him. He was thus required to reconsider his position pursuant to the order of the Equality Court.

[48] Mr Duminy submitted that there was evidence, particularly in the report generated by Mr D van Zyl, that the recreational TAC was not fully exploited in either the 2004/5, 2005/6 and 2006/7 seasons. This information, in his view, provided direct support for the approach adopted by first respondent, namely that the allocation on an interim basis to the fisher respondents could be accommodated within the unused portion of the recreational TAC.

[49] Whereas in his initial report, Dr Augustyn suggested that he did not consider 'that there is scope to accommodate interim relief fishers within the current nominal recreational allocation of 257 tons unless far more drastic effort reduction measures the previously recommended... were imposed on recreational fishers', in a further affidavit, to which he deposed, he stated: ' Short term measures, such as for example the interim relief dispensation or allowing 'a rollover' may result

in a increase in the catch for a particular season but should not affect the long terms trends materially. The effects of variations of this kind are considered in the population model used and factored into the OMP. The effect cannot be determined with any accuracy in isolation nor can they be accurately quantified'.

[50] In summary, there was evidence, particularly in the first report generated by Dr Augustyn that the interim measure may place excessive pressure on the resource. However, the possibility of transferring an excess from the recreational TAC to accommodate the interim measures was based on previous history and a concession by Dr Augustyn that, firstly an interim measure as proposed would not have long term effects and secondly that it was difficult to be precise with regard to predictions of how much excess on the recreational TAC could be so utilised.

[51] It is possible to argue, as applicants have done, that first respondent should have given more weight to the report by Dr Augustyn and the recommendations which he made. By itself, this is insufficient to conclude that the approach adopted by first respondent was not undertaken in a rational and careful fashion based on the need for the balancing of competing interests within the context of a limited resource.

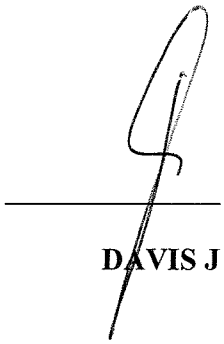
[52] I noted earlier that there was a dispute as to whether rights holders obtain specific tonnages of fish or whether the right is to be expressed as a fixed percentage of the TAC. Whatever the merits of this dispute, I cannot decide, on these papers,

that any of the applicants have suffered prejudice pursuant to the decisions under review. Of course, any future decisions taken may cause prejudice but that is not an issue before this court, once the scope of section 81 has been determined in favour of respondents.

[53] It should not be forgotten that the Act sets out in clear terms as one of its objectives:'The need to restructure the fishing industry to address historically imbalances and to achieve equity within all branches of the fishing industry' (section 2(j)). The 134th respondent is a traditional artisanal fisher, that is a small scale fisher who is historically linked to the sea. He and other members of traditional fishing communities for generations have depended on the resources provided by the sea. They have employed traditional methods to catch fish not on a grand commercial scale but in a modest fashion in order to make a living for themselves and to feed their families. They are members of poor, predominantly black communities on the South and West Coast.

[54] First respondent was obliged to take their interests into account in the crafting of his decision. That he did so in the fashion set out in the evidence is indicative of a decision maker having to make a difficult decision in the allocation of limited resources but doing so in a fashion in which he was cognisant of the competing interests which, in any event, may be intrinsic to section 2 of the MLRA.

[51] In my view, there is no basis by which this court should interfere with this decision. For these reasons, the application is dismissed with costs, including the costs of two counsel.



DAVIS J