THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 532/09

WEST COAST ROCK LOBSTER ASSOCIATION	First Appellant
STEPHAN FRANCOIS SMUTS	Second Appellant
SPARKOR (PTY) LIMITED	Third Appellant
SOUTH AFRICAN SEA PRODUCTS LIMITED	Fourth Appellant
and	
THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM	First Respondent
THE DEPUTY DIRECTOR-GENERAL: MARINE AND COASTAL MANAGEMENT, DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM	Second Respondent
THE CHIEF DIRECTOR: RESOURCE MANAGEMENT (MARINE): MARINE AND COASTAL MANAGEMENT DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM	Third Respondent
FURTHER RESPONDENTS	Fourth to 1245th Respondents

Neutral citation: *West Coast Rock Lobster Association v The Minister of Environmental Affairs and Tourism* (532/09) [2010] ZASCA 114 (22 September 2010)

CORAM: Navsa, Lewis, Ponnan and Mhlantla JJA and K Pillay AJA

HEARD: 31 August 2010

DELIVERED: 22 September 2010

SUMMARY: **Fishing rights in terms of the Marine Living Resources Act 18 of 1998 – dispute involving access to West Coast Rock Lobster – unnecessary to answer questions concerning Minister's power of exemption in terms of s 81 of the Act – appeal fails at two related preliminary levels – first, no practical effect – measures by Minister were regarded as interim – time and circumstances have overtaken the relief sought in the high court – no indication that similar facts would come before court in the future – second, nature and extent of declaratory order – order sought too wide – purports to bind category of persons not all of whom were before court – formulation not such as to deal with nub of complaint.**

ORDER

On appeal from: Western Cape High Court (Cape Town) (Davis J sitting as court of first instance).

1 The appeal is dismissed.

2 The appellants are ordered to pay the respondents' costs, including the costs attendant upon the employment of two counsel

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JUDGMENT

NAVSA JA (LEWIS, PONNAN and MHLANTLA JJA and K PILLAY AJA concurring)

[1] For a fortunate few, rock lobsters conjure up images of exotic cuisine. For others, like communities who engage in subsistence fishing, they are a means of survival and a modest source of income. In South Africa, West Coast rock lobster (WCRL) is a scarce resource, with commercial entities, subsistence and recreational fishers all competing for access to this rare crustacean. Coastal fishing communities, including many previously disadvantaged individuals, assert an entitlement to this scarce resource. Established commercial fishing entities, on the other hand, are equally insistent about maintaining their existing long-term fishing rights and preventing any incursion from new competitors. The State, in its regulatory role, has to achieve a balance between these competing interests. The litigation leading up to this appeal was about whether the State legitimately went about that task.

[2] The appellants had applied in the Cape High Court for an order reviewing and setting aside decisions by the first three respondents granting subsistence fishers generally, and the fourth to 1 245th respondents in particular, rights to catch and sell WCRL. In addition, the appellants had

sought a declaratory order in the following terms:

'[T]hat the First Respondent is precluded from using section 81 of the Marine Living Resources Act 18 of 1998 in order to grant [subsistence] fishers generally, and the Fourth to 1 245th Respondents in particular, a right to catch and sell West Coast rock lobster for commercial purposes.'

[3] The application was dismissed with costs, including the costs of two counsel. This appeal is before us with the leave of this court.

[4] The first appellant, the West Coast Rock Lobster Association, describes itself as a non-profit organisation whose members presently all hold long-term fishing rights in terms of s 18(1) of the Marine Living Resources Act 18 of 1998 (the MLRA), to undertake commercial fishing for WCRL. The second appellant, Stephan Francois Smuts, is the holder of long-term commercial fishing rights in the WCRL Nearshore fishery. The third appellant is Sahra Luyt, who also holds long-term commercial fishing rights in the WCRL Nearshore fishery. The fourth appellant, Sparkor (Pty) Ltd, is a company that holds long-term commercial fishing rights in the WCRL Offshore fishery. The meaning of nearshore and offshore fishing rights will become clear in due course.

[5] The first three respondents are the Minister of Environmental Affairs and Tourism (the Minister), his Deputy Director-General Marine and Coastal Developments, and his Chief Director. The fourth to 1 245th respondents are individuals to whom the Minister, purportedly in terms of s 81 of the MLRA, either granted rights, or who have been identified as possible recipients of rights to catch WCRL. The 134th respondent is Kenneth Blaauw, a subsistence fisher, who was represented during the appeal and who, in turn, came to be representative of the remaining respondents.

[6] Section 81 of the MLRA, under the heading 'Exemptions', provides:

'(1) 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 or organ of state from a provision of this Act.

(2) An exemption granted in terms of subsection (1) may at any time be cancelled or

amended by the Minister.'

[7] The decisions by the first three respondents sought to be impugned in the court below, referred to in para 2, are no longer in issue because time and circumstance have overtaken them. This appeal is against the refusal by the court below to grant the declaratory order set out above. It was submitted on behalf of the appellants, both in the court below and before us, that whilst the power set out in s 81 may rightly be employed to exempt persons from requirements such as having to lodge applications for fishing rights within a prescribed time, or from having to pay fees for fishing permits it may not, as happened in this case, be employed to grant fishing rights. The appellants sought to persuade us that by resorting to s 81 of the MLRA, in the manner more fully described later in this judgment, to grant rights to the fourth to 1 245th respondents to catch and sell WCRL, the Minister was subverting other applicable provisions of the statute, more particularly those dealing with the manner in which fishing rights are to be allocated.

[8] As will become apparent the appeal falls to be determined within a narrow compass. The question whether a decision on the issues referred to in the preceding paragraph will have any practical effect and the ambit of the declaratory order are crucial in that regard and are aspects which I shall deal with in due course. For the benefit of the reader, however, it is necessary to first set out the background.

[9] The MLRA, which was promulgated on 21 May 1998 and came into effect on 1 September 1998, signalled a new era in marine ecosystem conservation. The preamble to the MLRA reads as follows:

'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; and to provide for matters connected therewith.'

[10] In line with the MLRA's conservation objective s 18 prohibits commercial or subsistence fishing unless 'a right to undertake or engage in

such an activity . . . has been granted . . . by the Minister'. The relevant parts of s 14(2) of the MLRA provide that the Minister 'shall determine the portions of the total allowable catch, . . . or a combination thereof, to be allocated in any year to subsistence, recreational, local, commercial and foreign fishing, respectively'.

[11] As set out in the judgment of the court below the total allowable catch (the TAC) is the maximum quantity of fish that is legally available during each fishing season for combined recreational, subsistence, commercial and foreign fishing. It is one of the principal means by which the Minister ensures that fish stocks are not over-exploited. It is within that TAC that fishing rights granted by the Minister are exercised. Section 18(5) of the MLRA provides that in granting fishing rights the Minister 'shall . . . have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society'.

[12] WCRL is but one of the many species of marine life requiring protection and in respect of which the Minister grants fishing rights. WCRL and abalone are very valuable and are naturally under intense pressure of over-exploitation. The pressure arises not only from legitimate and regulated fishing but also from unregulated illegal fishing operations and conservation measures are self-evidently a national imperative.

[13] WCRL occurs inside the 200-metre depth contour from just north of Walvis Bay in Namibia to East London in the Eastern Cape. Female size at maturity ranges from approximately 57 mm carapace length (CL) to 66 mm CL. Male lobsters attain a larger size and grow faster than females. As a result of the size limit of 75 mm CL that is currently imposed on commercial fishers, male lobsters make up virtually the whole of the catch. Commercial exploitation of WCRL in South Africa occurs from the mouth of the Orange River in the north-west to Danger Point in the Cape South Coast. Recreational fishing covers the same area, but also extends further eastwards towards Mossel Bay.

[14] Commercial fishing for WCRL dates back more than a century. Initially there was very little regulation of the WCRL industry. Notwithstanding a minimum size of 89 mm CL introduced in 1933 and a tail mass quota limitation in 1946, catches in excess of 10 000 tons per annum were maintained from 1950 to 1965 putting enormous strain on the resource and endangering its long-term sustainability. Predictably, by the mid-1960's WCRL hauls had begun to decline appreciably. In response, tail mass production quotas were reduced. In the 1970's tail mass production quotas were replaced by a whole lobster (landed mass) quota, in tandem with a TAC limitation. Various other measures were also introduced, including the introduction of area limitations, the stipulation of size limitations, the establishment of a closed season and the banning of catches of berried or soft-shelled WCRL. These measures combined to restore some balance to the WCRL industry, and TAC stabilised at between 3 500 and 4 000 tons per annum.

[15] In the 1990/1 season there was another notable decline in the somatic growth rate of WCRL.[1] There were fewer WCRL of legal size. Up until the mid 90s the commercial TAC was gradually reduced reaching as low as 1 500 tons in the 1995/6 season. There was a slow recovery of the resource up to the 2004/5 season when the global TAC was 3 527 tons. Unfortunately, in recent seasons, WCRL has been placed under renewed significant pressure. The global TAC in the 2007/8 season was decreased to 2 571 tons. WCRL is a slow-growing crustacean and due to the slow recruitment of the adult population any recovery plan must be a long-term one.

[16] In his affidavit opposing the relief sought by the appellants in the court below, the Minister explained that the short, medium and long-term fishing rights allocation processes with which his department's Marine and Coastal Development branch (MCM) had been involved over the past decade had focused primarily on the interests of medium and large sized commercial entities. The interests of surrounding coastal communities and subsistence fishers and their access to the use of the marine living resources have hitherto

1 This means the extent of the physical growth of the creature itself.

been neglected, notwithstanding the provisions of s 18(5) set out above.[2] Only in recent years have their interests received the necessary attention. The dispute giving rise to the litigation that culminated in the present appeal arose from that historical imbalance.

[17] The Minister described the problems attendant upon the allocation of fishing rights to subsistence and smaller scale users of our country's marine living resources. Coastal communities have historically depended and relied on fishing along the coast to earn a living. WCRL fishing, as indicated above, is lucrative and the demand from this category of users far exceeds the sustainability of the resources. Although the number of participants in this group is large the quantum of fish involved in their quota is relatively small compared to that exploited by medium and large commercial enterprises. It has been difficult to assess their impact on the resources they access, legally and illegally.

[18] Government set in motion a process to develop a management policy in order to deal with the growing clamour by subsistence users and small commercial entities for access to a share of the TAC. This process has taken longer than anticipated. According to the Minister this was due to a larger group of fishers than initially anticipated having to be accommodated in the consultation process.

[19] One of the issues facing government in its regulatory function is that it has obligations towards coastal communities under international treaties, principally the United Nations Convention on the Law of the Sea and the Voluntary Code of Conduct for Responsible Fisheries adopted by the Food and Agricultural Organisation of the United Nations on 31 October 1995. These instruments oblige the government of the Republic of South Africa to heed the economic and socio-economic needs of coastal fishing

2 Section 2(j) of the MLRA provides that the Minister and any organ of State 'shall in exercising any power under this Act 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'.

communities.[3]

[20] Problems hampering government in its attempts to accommodate subsistence and small-scale fishers who were seeking access to WCRL are largely due to its own making. Around the beginning of the new millennium the Ministry had phased out subsistence permits and restyled them as 'limited commercial rights'. In allocating these limited commercial rights the Minister had failed to accommodate a large number of subsistence fishers from coastal communities seeking access to the limited resource. The 'limited commercial rights' that had been granted were part of a medium-term fishing allocation of four-year duration.

[21] In 2005 the Minister invited applications for long-term fishing rights of ten-year duration. The former full-term commercial rights, which catered for medium and large scale commercial entities, were re-branded as 'rights in the off-shore fishery' and comprised rights allocations greater that 1.5 tons. The previous 'limited commercial rights' were now known as commercial 'rights in the near-shore fishery' and accommodated 820 individuals who were historically dependent on the resource. They ran relatively small-scale commercial operations, in inshore areas using smaller boats and hoop-nets. The changes brought about by renaming categories were changes in form rather than substance. Thus, the Minister had committed himself to these right-holders on a long-term basis and was still facing further calls by a large number of individuals for inclusion in the near-shore fishery.

[22] As the calls by subsistence and small scale fishers for inclusion grew ever louder, so too did the resistance by those already in possession of long-term rights. The battle lines were drawn and tensions mounted. Consultations with and representations to the Ministry followed.

[23] The consultation and policy development processes dragged on and the pressure increased on the Minister to find a means to accommodate those

3 Section 2(i) obliges the Minister and any organ of State, in exercising any power under the MLRA to have regard to 'any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law'.

who had previously been excluded and who desperately sought access to the resource. The Minister's problems were compounded when a non-governmental organisation, Masifundise, assisted subsistence fishers in the Equality Court to seek relief against him, based on their alleged wrongful exclusion from access to WCRL. The present appellants were not party to that litigation.

[24] In May 2007 the Minister, in settlement of that litigation, and in accordance with an agreement which was made an order of the Equality Court, publicly announced 'interim measures to accommodate fishers along the Western and Southern Cape coastline'. In terms of that arrangement Masifundise undertook to identify 1 000 bona fide 'artisanal' (subsistence) fishers who were not holders of existing commercial fishing rights allocated in terms of s 18 of the MLRA and who could 'demonstrate both historical dependence and reliance'. It was agreed that the names of those so identified would be submitted to the Minister's Department. Those who qualified would be required to apply for a recreational fishing permit.[4] The Minister, in turn, after considering whether they met the criteria, would:

'[B]y 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; . . .'.

In addition, the persons who qualified and who were holders of recreational permits were granted the right to catch stipulated quantities of other species of marine life until 30 September 2007.

[25] The order of the Equality Court records that 'the exemption may be renewed for a further stipulated period if necessary. . .'. The order of the Equality Court is dated 2 May 2007 and, as can be seen from what is set out in the preceding paragraph, the initial 'interim' right to fish for WCRL was for a very limited duration.

[26] Following on the public announcement the first appellant and its

4 Recreational fishing is defined in s 1 of the MLRA as 'any fishing done for leisure or sport *and not for sale, barter, earnings or gain*'. (My emphasis.)

members, considering this exercise of the power of exemption as an abuse of the provisions of the MLRA, engaged the Minister in correspondence and discussions. That process dragged on for months during the latter half of 2007 and the beginning of 2008. When the Minister appeared bent on proceeding with further interim measures in the same vein as referred to above, but for a longer period the appellants resorted to the litigation in the court below in March 2008.

[27] The Minister's own scientific advice indicated that the further interim measures he intended proceeding with would result in the TAC for WCRL being exceeded and not being absorbed within the recreational catch, which was the Minister's objective. Nonetheless, the Minister took the view that there were compelling reasons to proceed. The following part of the Minister's answering affidavit is significant:

'[F]rom a humanitarian and socio-economic perspective understood in the context . . . of the MLRA and the considerations that led to the settlement of the Equality Court case, it was very important that the affected group of fishers be accommodated, inter alia, with access to WCRL. Time did not permit a process of rights allocations to them under s 18 coupled with a possible re-allocation for commercial TAC under s 14. The development of the policy had been held up longer than expected, not due to the fault of the interim relief fishers. Not addressing their needs could, and probably would, cause very severe hardship for the interim relief fishers. . . . In my opinion, these were sound reasons for addressing this issue by way of exemptions under s 81.'

[28] The following statement by the Minister is of some importance:

'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.'

[29] The court below (Davis J),[5] in considering whether the Minister had properly used the power of exemption provided for in s 81 of the Act, had regard to the full bench decision in *Laingville Fisheries (Pty) Ltd v The Minister of Environmental Affairs and Tourism*.[6] In that case the power of exemption provided for in s 81 of the MLRA was described as a 'wide

5 [2008] ZAWCHC 123 (7 October 2008).
6 [2008] ZAWCHC 28 (30 May 2008).

discretion' to exempt a person from any provision of the Act. The court below concluded that there was no basis for a contention that the Minister may only exempt a person from certain provisions of the Act but not others. Davis J said the following (para 31):

'No section remains untouchable or out of reach of the exemption power contained in section 81. That conclusion does not follow from the wording of the provision and the interpretation of the provision by the Full Bench.'

[30] The learned judge went on to say (para 34):

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

[31] The court below held that the Minister had acted rationally and that the transformative agenda of the MLRA, of restructuring the fishing industry to address the historical imbalances of the past, had rightly been taken into account. Davis J described the Minister's decision-making as follows:

'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.'

He held that the Minister had acted *intra vires* in his application of s 81 and went on to dismiss the application with costs.

[32] Subsequent to the judgment of the court below the respondents approached the Equality Court once again and once more an order was made by that court in accordance with an agreement reached with the Minister. That order is dated 19 November 2008 (approximately six weeks after the judgment of the court below). In terms of the order the Minister undertook to finalise the policy development process by publication in the Government Gazette by 31 July 2009. Furthermore, subsistence fishers who were identified in the same way as before and who held recreational fishing permits would, by way of exemption by the Minister, be granted the right to catch, inter alia, 20 WCRL per person per week from 15 November 2008 to 15 April 2009 (on weekdays only).

[33] In refusing leave to appeal, Davis J thought it important that the decision by the Minister was 'buttressed' by the two orders of the Equality Court, which he reasoned it was not competent for him to overturn. In addition, Davis J was not persuaded that another court would come to a different conclusion on the interpretation and application of s 81 of the MLRA.

[34] The facts in *Laingville*, where applications for fishing rights were lodged beyond a time deadline set by the Minister and where the court held that s 81 could be employed by him to exempt persons from that requirement, are of course far removed from the facts of the present case.

[35] It was submitted on behalf of the appellants that the Minister could not re-categorise subsistence fishers and pretend they were recreational fishers in order to get around the seemingly already fully subscribed rights in the subsistence sector. The appellants contended that by employing s 81 in the manner referred to above, the Minister was subverting the very purpose of the Act and that the granting of rights ought to be dealt with in terms of s 18 of the MLRA.

[36] There is some force in the attack by the appellants on the Minister's application of s 81 of the MLRA. There is also the allied concern that permitting such a wide power of exemption could result in the executive being able to undo the structure, purpose and principles of the legislation. That concern would have as a concomitant that the jurisdictional lines between the various arms of government would be blurred. It was argued that the effect of using an exemption provision in the manner resorted to by the Minister is to subvert not only the definition of recreational fishing, referred to above, but also s 20(1) of the MLRA which provides that 'no person shall sell, barter or trade any fish caught through recreational fishing'.

[37] On the other hand, it was submitted on behalf of the respondents that s 81 of the MLRA could rightly be used, as the Minister did in this case, to grant fishing rights. It was contended that s 18 militated against the common-law

entitlement to retain a catch from the sea and that by granting an exemption in terms of s 81 of the MLRA the Minister was restoring the common-law position, thereby, in effect, granting the rights challenged by the appellants. The counter-submission by the appellants in that regard was that the MLRA now regulated the fishing industry and that its core provisions, in the interests of conservation, had to be maintained and enforced.

[38] It is unnecessary to deal with all the submissions in this regard and to decide that issue finally, because the appeal fails at two related fundamental preliminary levels.

[39] Before dealing with them it is necessary to deal briefly with a submission on behalf of the 134th respondent, namely, that the appellants lacked *locus standi*. It was contended that the appellants have no direct and substantial interest in the interim relief afforded to the subsistence fishers: a mere financial or personal interest did not suffice and that the interest had to be related to the relief sought by the appellants. They contend that the appellants' commercial rights were not infringed upon by the rights granted to the subsistence fishers. I am willing to assume in favour of the appellants, without deciding the matter finally, that they have the necessary *locus standi*. I turn to deal with the two fundamental reasons why the appeal should fail.

[40] First, courts will not decide issues of academic interest only. In *Radio Pretoria v Chairman, Independent Communications Authority of South Africa* 2005 (1) SA 47 (SCA) this court had regard to s 21A(1) of the Supreme Court

Act 59 of 1959 which provides:

'(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

[41] In that case this court was concerned about a proliferation of appeals that had no prospect of being heard on the merits as the orders sought would have had no practical effect and referred to *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA), at 63H-I, where the following was said:

'The present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation or dilution of the fundamental principle . . . that Courts will not make determinations that will have no practical effect.'

[42] In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) the Constitutional Court said the following (para 21, fn 18):

'A case is moot and therefore not justifiable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'

[43] As set out above, the time periods during which the Equality Court orders operated have passed. The measures reflected therein were described as 'interim' and it was always understood by all that a policy would some day be finalised that would inform future conservation measures and the granting of fishing rights in the future. The Equality Court orders certainly did not operate at any time so as to prevent the court below from deciding the dispute. The second Equality Court order, obtained pending an application for leave to appeal, contemplated a date for finalisation of the new policy, namely 31 July 2009. That time too has come and gone. A further fishing season has passed since then and we are unaware of how subsistence fishers were accommodated therein, if at all. There is no indication on the record that the interim measures contained in the Equality Court orders are to be repeated in

respect of the new fishing season that begins in November 2010.

[44] In *Radio Pretoria*, at para 40, this court said:

'[T]here is no clear indication that another case on identical facts will surface in the future.'

The same applies here.

[45] It is true that this court said more than four decades ago, in *Ex parte Nell* 1963 (1) SA 754 (A), that the absence of an existing dispute was not an absolute bar to the grant of a declaratory order. What *was* required was that there should be interested parties upon whom the declaratory order would be binding. In considering whether to grant a declaratory order a court exercises a discretion with due regard to the circumstances. The court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation. If the court is so satisfied it must consider whether or not the order should be granted.[7] In exercising its discretion the court may decline to deal with the matter where there is no actual dispute.[8] The court may decline to grant a declaratory order if it regards the question raised before it as hypothetical, abstract or academic. Where a court of first instance has declined to make a declaratory order and it is held on appeal that that decision is wrong the matter will usually be remitted to the lower court.

[46] All interested parties were not before the court below and there was no indication on the record that a declaratory order, assuming it to be enforceable in its proposed form, would have any practical effect. These factors in themselves presented an insurmountable obstacle for the appellants.

[47] Second, and as fundamentally fatal to the appellants' case as the first, is the nature and extent of the declaratory order sought in the court below. In the light of the reasoning of the court below and its refusal to review and set aside the Minister's decision, it was unnecessary for it to go further and deal specifically with the terms of the proposed declaratory order. The appellants

7 *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at 213E-G.
8 *Ex parte Nell* 1963 (1) SA 754 (A) at 760B.

sought thereby to bar the Minister from using s 81 of the MLRA to grant subsistence fishers a right to catch and sell WCRL for commercial purposes.

[48] It appears that insufficient thought was given to the wording of the order sought. Subsistence fishers are entitled to engage in limited commercial activity. A subsistence fisher is defined in s 1 of the MLRA:

'[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 the sale of fish on a commercial basis.'

[49] The effect of granting the proposed order would be to bar subsistence fishers as a class from activity they can lawfully engage in, albeit in a limited manner, namely, the sale of a part of their catch. The order proposed does not deal with the nub of the appellants' complaint that subsistence fishers are being dressed up by the Minister as recreational fishers, to get around the already fully-subscribed subsistence quota. They point out that by definition recreational fishers are precluded from selling any part of their catch. The appellants contend, as I have said, that it is this unworkable fiction that is subversive of the objectives and principles of the Act. The proposed declaratory order does not address the appellants' complaint.

[50] The problem is compounded for the appellants by the fact that the proposed order is in substance a perpetual interdict purporting to prejudicially affect a whole class of persons (subsistence fishers), including persons who are not joined as parties to the litigation but who might have wanted to say something in opposition to the relief sought. It is a fundamental principle that all interested parties should be joined in an application that may affect their rights. See in this regard Farlam, Van Loggerenberg and Fichardt *Erasmus Superior Court Practice* at A1-33 and the authorities there cited.

[51] There might conceivably be circumstances in which subsistence fishers could rightly be granted an exemption in terms of s 81, entitling them to sell fish that they might otherwise have consumed. There may well be

permutations that do not readily suggest themselves to the parties presently before us but which might occur to subsistence fishers who are not parties to the present litigation. Granting the declaratory order in the terms sought would be closing the door forever and a day to that possibility and would bind persons who are strangers to the present dispute. A declaratory order cannot affect the rights of persons who are not parties to the proceedings.[9]

[52] An attempt was made during the dying seconds of final submissions in reply on behalf of the appellants to amend the terms of the declaratory order to deal with the problems referred to in paras 47 to 49 above. Alas, it likewise did not satisfactorily address the concerns alluded to and for the various reasons set out above, that attempt too must fail.

[53] There is one remaining aspect. This court has recently seen a number of cases in which[10] jurisdictional questions have arisen in relation to Equality Court matters. The dissonance in the interplay between the Equality Court and high courts has been brought into sharp focus. In this case Davis J, sitting as a high court judge, questioned whether he could validly cut across a decision of the Equality Court in a case not involving all the parties before him. Parties have sometimes resorted to parallel and cross-cutting litigation. Legal uncertainty arises and litigation abounds, the antithesis of what was intended by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.[11] These are issues that should be of concern to the legislature and other interested parties. The Registrar is therefore directed to bring this judgment to the attention of the Chief State Law Advisor and the Minister for Justice and Constitutional Development.

[54] In light of the conclusions set out above the following order is made:

1 The appeal is dismissed.

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9 See *SA Mutual Life Assurance Society v Durban City Council* 1948 (1) SA 1 (N) and Farlam *et al op cit* at A1-33 to A1-34.

10 *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA); *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape (No 1)* 2009 (6) SA 574 (SCA); *Manong & Associates (Pty) Ltd v Department of Roads and Transport Eastern Cape (No 2)* 2009 (6) SA 589 (SCA).

11 See the remarks of this court in *Manong (No 2)* op cit para 53.

2 The appellants are ordered to pay the respondents' costs, including the costs attendant upon the employment of two counsel.

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M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant: S Burger SC
E Fagan SC

	Instructed by Webber Wentzel Cape Town Matsepes Inc Bloemfontein
For first to third Respondent:	W R E Duminy SC
	Instructed by The State Attorney Cape Town The State Attorney Bloemfontein
For 134th Respondent:	J J Gauntlett SC F B Pelser
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