



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

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A Penglides (Pty) Ltd and Another v Minister of Agriculture, Forestry and Fisheries and Another (Case no 298/2021) [2022] ZASCA 74 (26 May 2022)

Today the Supreme Court of Appeal (SCA) handed down judgment upholding, with costs, an appeal against a decision of the Western Cape Division of the High Court, Cape Town (the high court).

The issue before the SCA was whether the appeal lodged by the first appellant, A Penglides (Pty) Ltd (Penglides), challenging the decision of the Deputy Director General of the Department Agriculture, Forestry and Fisheries (the Department), was served a day late – under circumstances where the last day for service was a Saturday and the offices of the Department were closed on that day.

On 1 September 1998, the Marine Living Resources Act 18 of 1998 (the Act) came into effect. The Act empowered the first respondent, the Minister of Agriculture, Forestry and Fisheries (the Minister), to grant access to South African fishing resources and to manage such access. In anticipation of the granting of the first large pelagic commercial fishing rights to South African fishing companies, the then Minister published a policy for the Management and Allocation of Commercial Fishing Rights in the Large Pelagics (Tuna and Longline) Fishery on 24 March 2004 (the 2004 policy). It, accordingly, provided that foreign-flagged vessels would be considered as long as they are re-flagged as South African vessels within 12 months of the large pelagic longline fishing right being granted.

The re-flagging of foreign vessels provided for in the 2004 policy proved too onerous. Thus, all of the foreign owners withdrew their vessels upon completion of the first year of the long-term fishing right. As a result, catches of tuna dropped drastically. On 12 June 2015, the Minister published a draft policy on the allocation and management of fishing rights in the large pelagic (Tuna and Swordfish Longline) sector (the draft 2015 policy). The draft 2015 policy altered the 2009 policy in only one respect, by the addition of the following requirement in paragraph 7.3(b)(i) ‘. . . the foreign fishing vessel shall reflag within the first three years when operating as a joint venture’. The draft 2015 policy was replaced by the final policy, published on 16 November 2015 (the final policy). It accorded with the draft 2015 policy, except that it also included the following paragraph: ‘[t]o prevent fronting each vessel and each right holder will only be considered once for the duration of the fishing right to enter into a joint venture’.

On or about 25 January 2017, the second respondent, the Deputy Director General of the Department (the DDG) decided on the allocation of fishing rights in the large pelagic longline sector. Penglides was successful. Successful applicants were required to confirm their two vessels within 90 days of the publication of the final decisions. Penglides confirmed its nomination of the Matsufuku Maru No. 28 and the MFV Elize. Shortly after the allocation of the long-term rights, Penglides was advised that the Matsufuku Maru No 28 would not be available to it.

On 28 April 2017, Penglides applied to the Department to allow a temporary replacement vessel, the Koei Maru No. 1, to be employed on its behalf, in the stead of the Matsufuku No. 28. The application

was rejected on 17 May 2017. On 19 June 2017, the first appellant lodged an appeal with the Minister challenging both the rejection of its vessel-change application and the conditions limiting the use of foreign vessels in the fishery. Almost a year later, on 9 May 2018, the Minister dismissed the appeal on a number of grounds. The Minister also noted that the appeal had been submitted two days late. Regulation 5 of the Marine Living Resources Regulations (regulation 5) provides that an appeal 'shall be submitted in writing to the Minister within 30 days after the appellant has been notified of the decision against which he or she is appealing'. The high court held that the appeal was lodged out of time as the first appellant failed to lodge its appeal by 17 June 2017. As a result, the high court declined to adjudicate the lawfulness of the conditions limiting the use of foreign vessels.

In considering whether the appeal was out of time, the SCA reasoned that: The decision by the Minister was made on 17 May 2017. The next day, 18 May 2017, was 'day 1'. Thursday 15 June 2017 was day 29. The day thereafter, namely Friday 16 June 2017, was a public holiday and not a 'day' for purposes of the Interpretation Act 33 of 1957 (the Interpretation Act). Nor was Sunday 18 June 2017. The appeal was served on the Department on 19 June 2017. It was not in dispute that the Department's offices had been closed on that Saturday, which was the last day for service, as they generally were over weekends. The Interpretation Act does not deal with the situation where the last day, not being a public holiday or a Sunday, is a day on which the accomplishment of the task cannot be achieved because the offices where the task is to be performed are closed.

After considering South African and English authorities, the SCA held that regulation 5(1) could only be interpreted to mean that when the Department's offices are closed on the last day of the 30-day period for the serving of an appeal, the appeal will be served within the designated period if served on the next day on which the offices are open. The SCA therefore upheld the appeal with costs and remitted the matter to the high court.

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