



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 22 September 2010

Status: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

On 22 September 2010 the Supreme Court of Appeal handed down judgment in *West Coast Rock Lobster Association & others v The Minister of Environmental Affairs & others* dismissing an appeal against a refusal by the Cape High Court to grant a declaratory order in terms of which the Minister of Environmental Affairs and Tourism Marthinus van Schalkwyk would have been precluded from using s 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 the right to catch and sell West Coast Rock Lobster for commercial purposes. The appellants who are established commercial fishers were ordered to pay the respondents' costs including the costs of two counsel.

The court expressed the view that there was some force in the attack by the appellants on the Minister's application of s 81 of the Act. It had been submitted that the effect of using the power of exemption in terms of s 81 of the Act to grant subsistence fishers the right to fish as 'recreational fishers' was to subvert not only the definition of recreational fishing but also s 20(1) of the Act which provides that no person shall sell, barter or trade any fish caught through recreational fishing.

It had been submitted on behalf of the respondents that the prohibition against commercial fishing in terms of s 18 of the Act, unless one was in possession of a permit by the Minister, militated against the common-law entitlement to retain a catch from the sea and that by granting an exemption the Minister was restoring the common-law position.

This court found it unnecessary to finally decide this issue because the appeal failed at two fundamental preliminary levels. The measures by the Minister were regarded as interim. They had been overtaken by time and circumstances. There was no indication that similar facts would come before court in the future. Courts were disinclined to grant orders that had no practical effect. For that reason alone the appeal was destined to fail. There was a second reason why the appeal could not succeed. The declaratory order sought was couched too widely purporting to bind an entire category of fishers not all of whom were before court. In any event, the declaratory order sought did not deal with the nub of the appellants' complaint. The appeal was accordingly dismissed with costs.

Finally, the court expressed concern about the dissonance in the interplay between the Equality Court and the high court. It noted a number of cases that had come before it in which jurisdictional questions were raised. In the present case the Cape High Court questioned whether it could issue an order that cut across a decision of the Equality Court. Parties some times resorted to parallel and cross-cutting litigation. Legal uncertainty arose and litigation abounded which was the antithesis of what was intended by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. These were issues that should be of concern to the legislature and other interested parties. The Registrar was directed to bring this judgment to the attention of the Chief State Law Advisor and the Minister for Justice and Constitutional Development.