



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 28 March 2012

STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

***New Foodcorp Holdings (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries
82/11) [2012] ZASCA 30 (28 March 2012)***

Today the Supreme Court of Appeal (SCA) dismissed an appeal against a judgment of the Western Cape High Court, Cape Town, in terms of which an application by the first and second appellants New Foodcorp Holdings (Pty) Ltd and Foodcorp (Pty) Ltd, to have two paragraphs of a policy for the transfer of commercial fishing rights (the TP), administered by the first respondent, the Minister of Agriculture, Forestry and fisheries declared unconstitutional, unlawful and invalid is dismissed with costs. The two appellants had also unsuccessfully applied for an order that Foodcorp (Pty) Ltd was not required to obtain authorisation for a composite commercial transaction in terms of which its shareholding and corporate structure was re-arranged.

In applying for fishing rights in terms of s 18 of the Marine Living Resources Act 18 of 1998 (MLRA), the second appellant, Foodcorp (Pty) Ltd (referred to

as F), relied on the fact that its majority shareholders were previously disadvantaged persons. The permit was subsequently granted. Essentially, F's transformation credentials were affected as a result of the corporate restructuring. Its black shareholding was reduced from approximately 59% to approximately 20%.

The two paragraphs of the policy that are in dispute deal with those instances where a sale of shares/member's interest results in change [in] control of the company or close corporation or results in the company/close corporation not being as transformed as at date of allocation of the long-term right. In these instances there is a duty on the appellants to apply for and obtain ministerial approval for the transfer of the rights.

The SCA held that the permits issued to F were subject to the provisions of the 'General Policy for the Allocation and Management of Long-Term Commercial Fishing Rights: 2005' (the GP) and the MLRA. The Court held that the GP emphasised the need to restructure the fishing industry in order to address historical imbalances and to achieve equity within all branches of the fishing industry. In addition Ministers had an obligation to ensure that the transformation and developmental objectives and principles set out in s 2 of the MLRA are met and complied with. The SCA found the paragraphs in dispute to be in line with the provisions of the MLRA.

The SCA stated the following:

'It follows that, purely on the basis that the permit condition appears to have been contravened by the composite restructuring exercise referred to at the beginning of this judgment, because of the resultant dramatic reduction in black share-holding, the Minister is entitled to require scrutiny of that exercise in terms of paras 6.2 and 6.3 of the TP. Moreover, the Minister has an obligation to ensure that the objectives and principles set out in s 2 of the MLRA, referred to in para 24 above, are met and complied with. Additionally, fishing rights were granted in terms of s 18 which obliges the Minister to have regard to transformational imperatives. Far from being ultra vires, paras 6.2 and 6.3 appear to me to be admirably consonant and in line with the provisions of the MLRA. There is no substance to the submission on behalf of Holdings and F that, since the adjudication of applications for permits involves a process different from the process relating to changes in control of entities and the

transfer of permits, the court below erred in concluding that paras 6.2 and 6.3 were not ultra vires. Throughout the various processes transformation of the fishing industry to address historical imbalances and to achieve equity is a constant imperative.

The somewhat emotionally-laden submission that, if the impugned paragraphs of the TP were to remain extant, they would have the effect of prohibiting bona fide share transactions which could never have been the intention of the Legislature, with concomitant negative results for the free market system, is in my view unfounded. Particularly in the modern world, with environmental and human rights concerns, most, if not all, industries are regulated. Holdings and F took advantage of the regulation of the fishing industry in relation to transformation when they ensured that they had adequate transformation credentials when they applied for fishing rights. The corollary to obtaining benefits because of one's transformation profile may well be an obligation to ensure that the cause of transformation is not harmed by the pursuit of private advantage.'

The SCA found that the respondents were unjustifiably criticised for stating in advance the criteria and principles to be applied when dealing both with the transfer of fishing rights or share sale transactions which impinge on important provisions of the MLRA. The Court found the relevant criteria and principles to be in line with constitutional imperatives and consonant with the MLRA.

The Court did not agree that the impugned paragraphs were impermissibly vague. The SCA could also not find the disputed paragraphs irrational as they are in line with constitutional and statutory objectives.

Finally, the SCA went on to say:

'In our constitutional order courts have fulfilled their constitutional duty when the legislature or members of the executive have transgressed the bounds of the power vested in them and have made the necessary orders. In instances such as the present, when members of the executive fulfil their constitutional duties and meet the constitutional transformation imperative in impressive fashion courts should say so. Finally, it needs to be stated that the professed litigation objective of F and Holdings, namely, that they were intent on ensuring responsible and progressive transformation is belied by their actions in completing the composite transactions in question.'

For the reasons above the SCA dismissed the appeal with costs.

-ends-