THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case no: 85/04

In the matter between:

THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM	**1st APPELLANT**
THE DEPUTY DIRECTOR-GENERAL: DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM	**2nd APPELLANT**
and	
SCENEMATIC FOURTEEN (PTY) LTD	**RESPONDENT**

Coram	**:**	**SCOTT, FARLAM, CAMERON, LEWIS JJA *et* COMRIE AJA**
Date of hearing	**:**	**15 FEBRUARY 2005**
Date of delivery	**:**	**22 MARCH 2005**

Summary: Allocation of fishing rights in terms of s 18(1) of Act 18 of 1998 in hake longline sector – Procedure adopted by Minister's delegate procedurally fair, did not preclude him from exercising his discretion and did not involve an abdication of his power. Proceedings on appeal in terms of s 80 lawful and procedurally fair – no justification for referral for oral evidence.

JUDGMENT

SCOTT JA/…..

SCOTT JA:

[1] In terms of s 18(1) of the Marine Living Resources Act 18 of 1998 ('the Act') no person may undertake commercial fishing or subsistence fishing unless a right to do so has been granted to such person by the first appellant ('the Minister').The object, of course, is to manage the exploitation of the fishing stocks and to prevent their destruction. This involves, in the first place, research being carried out by scientists in the Department of Environmental Affairs and Tourism ('the Department') and other research organisations. The resource forming the subject matter of each of the 22 commercial fishing sectors in the industry is monitored on a regular basis. At the opening of each fishing season an estimate is made of the stock size, or 'biomass', together with a recommendation to the Minister as to the 'Total Allowable Catch' ('TAC') which the resource can sustain over the ensuing period. Based on the quantum so determined fishing rights in respect of each sector are then awarded to successful applicants. Given the large number of applicants in respect of each sector, the limit imposed by the predetermined TAC and the need to allocate fishing rights in quantities that are commercially viable, it is inevitable that many applicants are disappointed. The unfortunate consequence has been a flood of review applications in the past,

which the Department complains has had the effect of disrupting commercial fishing in some sectors. To add to the difficulties associated with the allocation of fishing rights, there has also been the need, imposed by the Act, to take steps to transform the industry which until recent times was dominated by companies that historically were established, owned and managed by white people. Section 18(5) of the Act provides –

'In granting any right referred to in subsection (1), the Minister shall, in order to achieve the objectives contemplated in section 2, have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society.'

The objectives identified in s 2 include –

'(j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.'

[2] The present appeal concerns the allocation of commercial fishing rights in the hake longline sector for the 2002 - 2005 fishing season. Four of the 22 fishing sectors relate to hake, one of which is the longline sector. Because of the large number of applications that were anticipated in the 22 sectors – in the event there were over 5000 – the Minister, acting in terms of s 79 of the Act, delegated his power to grant fishing rights in some of the sectors to Dr Mayekiso, the Chief Director, and in others, including the

hake longline sector, to Mr Horst Kleinschmidt, the Deputy Director General ('the DDG') who is the second appellant. The TAC in the hake longline sector was determined at 10 840 tons. A little more than 9 per cent, ie 1015 tons, was set aside for appeals leaving 9825 tons for immediate allocation to successful applicants. There were 333 applicants; 115 were successful. Of the latter, 40 were so-called '2001 rights holders'. The other 75 were so-called 'potential new entrants'. (The distinction is the subject matter of one of the principal issues in the appeal.) Some 204 of the disappointed applicants lodged an appeal to the Minister in terms of s 80 of the Act. Three were 2001 rights holders. The remainder were new entrants. Ultimately some 26 were successful. These included the three 2001 rights holders. The respondent was not one of the successful applicants. Its application in terms of s 18(1) failed, as did its appeal to the Minister.

[3] The respondent in due course instituted motion proceedings in the High Court, Cape Town, in which it sought orders reviewing and setting aside all of the allocations of the DDG and the Minister's decisions on appeal in the hake longline sector. It also sought an order directing the appellants to re-allocate the commercial fishing rights in the sector for the 2002 - 2005 season

before a date to be determined. The appellants were cited as the first and second respondents and the 141 successful applicants were cited as the remaining respondents. In the course of the hearing in the court *a quo* the respondent withdrew its application in so far as it concerned the allocations made to the successful applicants but persisted in its application against the Minister and the DDG, contending that their decisions were fatally flawed and reviewable. In the result, the court *a quo* set aside the decision of the DDG not to grant commercial fishing rights in the hake longline sector to the respondent. It made no order regarding the Minister's decision on appeal, holding that it was unnecessary to do so. It also found it unnecessary in the circumstances to consider the respondent's application to have certain matters referred for oral evidence in terms of Uniform Rule 6(5)(*g*). In this court we were informed by counsel that a certain quantity of the TAC had been held back for contingencies and that for this reason it was unnecessary for the court *a quo* to make an order regarding the re-allocation of hake longline fishing rights. It simply referred the respondent's application back to the DDG for reconsideration.

[4] Before turning to the allocations in respect of the 2002 - 2005 season, it is necessary by way of background to refer briefly to certain earlier events. Until 2002 commercial fishing rights were

granted annually. With effect from that year a policy was adopted of allocating what were styled ‘medium-term fishing rights’ which were for a period not exceeding four years. The rationale was to enhance the opportunity for investment and to promote stability. The previous allocations in the hake longline sector were for the 2000 fishing season. This was the first occasion on which the respondent had applied for fishing rights in the sector. There were initially 43 successful applicants. The respondent and 130 others whose applications had failed thereupon successfully appealed in terms of s 80 to the DDG, acting on delegated authority. Their success, which was published on 19 September 2000, was short-lived. On 3 November and 6 November 2000 separate review applications were launched in the Cape Town High Court resulting in the allocations on appeal being set aside on 20 November 2000. On the same day an applicant in one of the review applications sought an order directing the State respondents to effect a re-allocation in terms of the appeal process within three weeks. The application was opposed by the Department. The DDG explained in an answering affidavit that it was impossible to complete the task within three weeks or to say when it could be completed. However, he gave the undertaking that the respondents would endeavour ‘to deal with the appeals as expeditiously as possible’.

What followed was anything but expeditious. The DDG himself could not reconsider the appeals. This was because various allegations of impropriety had been made against him in the review proceedings. It was decided to appoint a regional magistrate from Pretoria to deal with the appeals. Presumably this was to place the independence of the decision-maker beyond doubt. But the magistrate first had to be seconded to the Department so that the requisite powers could be delegated to him. Apparently this all took time. Eventually he was appropriately briefed. After several weeks he produced a report containing recommendations to the Minister. The report was evidently flawed. On 29 May 2001 it was rejected by the Minister on grounds that were not impugned. By this time the 2000 season had long since expired, as had much of the 2001 season. The allocation process for the 2002 - 2005 season was also imminent and given the time it would take to go through the whole appeal process yet again, it seems that the matter of the appeal was simply abandoned.

[5] In the meantime, no applications for commercial fishing rights in the sector had been called for in respect of the 2001 fishing season. Instead the Minister, acting in terms of s 18(6A)(*a*), extended the rights of the 43 successful applicants to include the

2001 season. These are the applicants who were referred to by the parties as ‘the 2001 rights holders’.

[6] Finally, it is necessary to mention that the respondent is the successor to Elandia Visserye BK which was formed in 1989 to operate a business founded by two brothers by the name of Van der Westhuizen in 1951. The business involved the catching and processing of West Coast rock lobster. More recently and pursuant to what was called a ‘transformation scheme’, the respondent and a sister company were established with a somewhat complicated share structure. It is enough to say that the overall effect of the scheme was to confer on an employees’ trust a 60 per cent interest in the existing or future fishing rights of the enterprise, but a limited interest of something in the region of six per cent in the hard assets of the enterprise, these being owned by the sister company. There were also provisions in the trust deed which in practice made it difficult for employees to receive the benefits from the trust on leaving from their employment.

[7] Against this background I come to the process by which commercial fishing rights were allocated for the 2002 - 2005 fishing season. In terms of s 18(1) of the Act an application for any right referred to in s 18(1) is to be submitted to the Minister in a manner determined by him or her. This the Minister did by way of a

General Notice (1771 of 2001) published in the Government Gazette of 27 July 2001. It contained, first, an invitation to the public to apply for fishing rights in all 22 sectors for the 2002 - 2005 season; second, a specimen application form including instructions for the completion of the form; and third, policy guidelines aimed at assisting prospective applicants in the preparation of their application ('the guidelines'). The latter document is important. A brief summary is necessary. In the introduction the reader is informed *inter alia* that a verification unit had been appointed to verify information contained in the applications and that a panel of specialists would be appointed to assist in the assessment and allocation process. Under the heading 'Evaluation of Applications' it is said that applications will be evaluated in accordance with the objectives and principles set out in s 2 of the Act 'and with regard to the policy guidelines set out below'. The next sentence reads –

'No precedence, ranking or weighting is implied by the order or content of the policy guidelines.'

There was some debate in this court as to its meaning. In my view what was intended was that nothing was to be made of the order in which the paragraphs following (including their contents) were

listed. Four numbered paragraphs follow, each with a heading. The headings read –

‘1. Business plan, fishing plan or operational and investment strategy

2. Equity, transformation, restructuring and empowerment

3. Impact on the resources, environment and the fishing industry

4. New Entrants’.

In view of some of the grounds of attack directed at the DDG’s decision, it is necessary to quote certain relevant passages. In paragraph 1 the following is said:

‘Cognisance has been taken of the fact that substantial investments have been made by many of the current rights holders. This factor, together with the need to create an environment that will promote further long-term investment in human and material resources are important considerations. Historical involvements, proof of investment and past performance are therefore important factors.’

Paragraph 2 commences:

‘The transformation of South Africa from an unequal society rooted in discrimination and disparity to a constitutional democracy founded upon freedom, dignity and equality poses particularly profound challenges for the fishing industry. It is here that there are acute imbalances in personal wealth, infrastructure and access to financial and other resources. While it is acknowledged that transformation or restructuring of the fishing industry cannot be achieved overnight, it nevertheless is a primary objective to build a

fishing industry that in its ownership and management, broadly reflects the demographics of South Africa today.'

In paragraph 3 the hake longline and handline sectors are identified as being particularly suitable for the promotion of historically disadvantaged individuals, presumably because these sectors are less capital intensive than the others. In paragraph 4 the following is said:

'Regard will be given to accommodating new entrants, particularly those from historically disadvantaged communities, in order to meet the requirement of restructuring the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.'

I shall have more to say about the guidelines later. It is enough at this stage to observe that it would have been clear to prospective applicants that in allocating fishing rights regard would be had *inter alia* to two conflicting considerations; the one being the need to accommodate new entrants, particularly those from historically disadvantaged communities, the other being the need to recognise and take cognisance of the investments and past performances of current rights holders.

[8] Both a verification unit and an advisory committee were established to assist the decision-maker, in this case the DDG, in processing the applications (which had to be submitted by 13 September 2001). The function of the verification unit was

essentially to scrutinize each application to determine whether it was properly lodged and complied with the formal requirements. The advisory committee comprised persons with legal, accounting and financial expertise. Its function was to assist the decision-maker in evaluating the applications. In the interests of independence the members of both the verification unit and the advisory committee were appointed by what was described as 'a public tender process'.

[9] The applications were divided into two groups: 2001 rights holders and potential new entrants. Each group was evaluated in the first instance by the advisory committee in accordance with a detailed set of written instructions and guidelines devised or approved by the DDG. This involved the allocation of points determined by a closely circumscribed method for each of a number of criteria. The total number of points that could be awarded for each criterion was determined by the DDG. In the case of the 2001 rights holders (in the hake longline sector) the criteria were:

'1. Involvement and investment in the industry, including business plan, fishing plan or operational and investment strategy

2. Past performance

3. Strategies in respect of by-catch and offal utilisation

4. Compliance
5. Transformation
6. Paper quotas'.

(The reference to paper quotas is a reference to applications by persons intending to acquire rights in order to sell or transfer them. This criterion involved the award of a negative mark.) The criteria in the case of the new entrants were:

'(1) Degree of knowledge, involvement and commitment to invest in the industry, including business plan, fishing plan or operational and investment strategy
(2) HDP [historically disadvantaged person] status
(3) Strategies for bycatch and offal utilisation
(4) Business acumen, financial capacity and capacity to catch, process and market the resource
(5) Compliance if applicable
(6) Paper quotas'.

Mr Papier, the chairman of the advisory committee, explained the procedure adopted. Each application was independently examined by two members of the committee to achieve consistency. In many cases the applications would be flagged with annotated notes in order to draw some specific aspect to the attention of the DDG. Significantly, the written instructions emphasised that the criteria and the weighting (the scoring) were ultimately no more than

guides in the assessment of the applications ‘and if [the criteria and weighting] do not apply appropriately, the committee member must record the difficulty on the template so that it can be brought to the attention of the decision-maker’. The DDG, moreover, spent many hours every day at the offices where the advisory committee worked in order to satisfy himself that the evaluations were being carried out in accordance with his instructions.

[10] On these occasions and during the initial briefings the matters that were required to be brought to his attention were identified and discussed at length. In his answering affidavit the DDG stressed that the advisory committee was well aware of the limits within which it was required to operate, particularly as those issues had been raised and discussed many times by December 2001 when the hake longline sector applications came to be considered. The Committee was unaware of what the threshold mark for acceptance would be.

[11] Once an application had been assessed, the information recorded on what in effect was a score-sheet was transferred to one of two sets of spreadsheets, there being one set for each group. The spreadsheets had horizontal columns – one for each application – which were divided into blocks in which the scores for each particular criterion were entered together with, in some

instances, a brief comment. At the end of each horizontal column there were two blocks to be filled in by the decision-maker (the DDG in the case of the hake longline sector) under the headings –

'Does the delegated authority grant the applicants rights in terms of s 18 of the Act?

Yes/No'

and

'Comments of the delegated authority'.

[12] Once the applications had been evaluated by the advisory committee they were delivered per sector to the DDG. They were accompanied by the score-sheets and the consolidated spreadsheets reflecting the information on the former as well as checklists. As previously indicated, many of the applications were marked and flagged to draw his attention to specific aspects. The DDG explained that in each case he began by studying the consolidated spreadsheet. Where an aspect had been identified for his attention he considered the issue regardless of the score. He also randomly checked the applications. In many instances the applications were manifestly good or manifestly poor. He tended to spend less time on these and by the very nature of the exercise devoted most of his time and attention to the applications that fell

in the middle group, ie those that were within a point or two on either side of success or failure. He said that in some cases he agreed with the assessments of the advisory committee and in others not. He denied that there was a rigid and inflexible adherence to the scoring system. Where appropriate he made adjustments to accommodate particular cases. He insisted that in the final analysis the decision whether or not to grant fishing rights in the case of each and every applicant was his. Once having taken the decision he recorded it on the consolidated spreadsheet. Where he considered it appropriate he made comments in the space provided.

[13] The points system for potential new entrants differed in various respects from that for 2001 rights holders. Of significance is that in the case of the former, 50 per cent of the points that could be scored were allocated to transformation and employment equity criteria, whereas in the case of the latter only 36 per cent of the points that could be scored were allocated to those criteria. The effect of this weighting was that an applicant who did not score particularly well in the transformation and employment equity criteria had a far better prospect of being granted fishing rights if placed in the 2001 rights holders category than if placed in the new entrants category.

[14] It was this differentiation in scoring that ultimately formed the basis of the respondent's primary attack on the DDG's decision not to grant it fishing rights in the hake longline sector. It contended that by reason of the Minister's failure to dispose of the appeals in the allocation of fishing rights in that sector for the 2000 season and the extension of the rights of those who were successful to the 2001 season, the streaming of applicants into 2001 rights holders and new entrants for the 2002 - 2005 season was both unreasonable within the meaning of s 6(2)(*h*) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and procedurally unfair within the meaning of s 6(2)(*c*) of that Act. I quote s 6(2) in its entirety:

'6(2) A court or tribunal has the power to judicially review an administrative action if –

(*a*) the administrator who took it –

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(*b*) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(*c*) the action was procedurally unfair;

(*d*) the action was materially influenced by an error of law;

(*e*) the action was taken –

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(*f*) the action itself –

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(*bb*) the purpose of the empowering provision;

(*cc*) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(*g*) the action concerned consists of a failure to take a decision;

(*h*) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(*i*) the action is otherwise unconstitutional or unlawful.'

[15] The object of streaming the applications into two groups and affording greater weight to transformation in the case of new entrants was to give effect to the statutory requirements referred to in paragraph [1] above. Possibly the objectives of the Act could have been achieved by adopting some other and notionally better method than streaming. But that is not the test. The inquiry is whether the process of streaming fell foul of one or more of the grounds of review set out in s 6(2) of PAJA. The grounds upon which reliance appears to have been placed were twofold; unreasonableness within the meaning of s 6(2)(*h*) in view of the circumstances relating to the 2000 appeals (*cf Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 45), and procedural unfairness within the meaning of s 6(2)(*c*). In my view, neither was established. The rationale underlying the streaming and the weighting in favour of

transformation in the case of new entrants was obviously to accommodate the two conflicting considerations referred to in the guidelines, namely the need to take cognisance of past investment and performance in the industry on the one hand and the need to admit new entrants, particularly those from previously disadvantaged communities, on the other. The decision to stream with a bias in favour of transformation criteria in the case of new entrants would seem in the circumstances to be both a logical and fair way of going about an undeniably difficult task. However, the gravamen of the respondent's complaint was that had the appeal process in respect of the 2000 fishing season not been abandoned in all probability the respondent would have been a 2001 rights holder and in that event its application in the 2002 - 2005 season would have succeeded. It was accordingly argued that given what had gone before, provision should have been made for a third group comprising the 'formerly successful appellants' in the 2000 allocations. But the simple answer is that there would be no rational basis for making the distinction contended for. In other words, there would be no proper basis for affording some preference or advantage to applicants who had not previously participated in the sector but who happened to have been the victims of some prior administrative blunder. (*Cf Logbro Properties*

CC v Bedderson NO 2003 (2) SA 460 (SCA) paras 16 -22.) The position would, of course, have been different if as a result of the respondent's success on appeal in 2000, although shortlived, it had engaged in hake longline fishing and had made investments in relation to that sector. In that event there would have been good reason for distinguishing it from other new entrants. But that was not the case. Whatever the reason, the respondent was a new entrant like the other new entrants and it was not unreasonably treated as such.

[16] A further argument advanced on behalf of the respondent was that the effect of streaming was, as counsel put it, to 'straitjacket' the DDG's discretion. In other words, it presupposed, said counsel, that every application would fall within one or other of the two groups and that this would not necessarily have been appropriate. But, as I have sought to show, the system was sufficiently flexible to accommodate such a situation. Whenever the criteria and weighting in any particular case was inappropriate it was brought to the attention of the decision-maker who regarded himself as not bound by the scoring in terms of the prescribed method. So, for example, had the respondent actually engaged in hake longline fishing prior to the allocation in its favour being set

aside on review, due weight would have been afforded to this fact in the determination of its application. But as I have said, nothing like this was shown to have occurred and no facts were advanced to justify the respondent being treated as anything other than a new entrant.

[17] A related contention, and one that found favour with the court *a quo*, was that the adoption of a set of criteria for each group and a system of scoring for the assessment of the criteria had the effect of precluding the decision-maker from properly exercising his discretion. Counsel for the respondent relied in this regard on s 6(2)(*c*), (*d*) and (*f*) of PAJA and a number of decisions in support of the proposition that while a functionary may have regard for guidance to a predetermined rule of which it approves, it would not be exercising its discretion if it treated the rule as a hard and fast one to be applied as a matter of course in every case. (See *Johannesburg Town Council v Norman Anstey & Co* 1928 AD 335 at 340; *Computer Investors Group Inc v Minister of Finance* 1979 (1) SA 879 (T) at 898D-E; *Hofmeyr v Minister of Justice* 1992 (3) 108 (C) at 117F-H.) The position must necessarily be somewhat different where the decision-maker is faced with a large volume of competing applications and the need for consistency becomes an

imperative requirement for fairness. The *Bato Star Fishing* case, *supra*, was concerned with the same allocation process as the present, but in relation to the quantum of the quotas granted in the hake deep sea trawling sector. After quoting a passage in the judgment of Human J in *Computer Investors Group v Minister of Finance, supra,* at 898C-E in which the learned judge reformulated the proposition referred to above in relation to the adherence to hard and fast rules, O' Regan J said the following (at para 57):

'In circumstances such as these, moreover, where the decision-maker is seeking to evaluate a large number of applications against similar criteria, the *dictum* in the *Computer Investors Group* case [at 898C-E] is not relevant. In cases such as the present, it will be permissible, and indeed will often be desirable, for administrative decision-makers to adopt and apply general criteria evenly to each application in order to ensure that the decision subsequently made is fair and consistent.'

As previously indicated, a feature of the method adopted was in any event the provision for adjustment in circumstances where the criteria and weighting were for any reason inappropriate. It follows that in my view the adoption of a set of criteria and a system of scoring for their assessment cannot be faulted. On the contrary, the method strikes me as one which was objective, rational and practical in the circumstances.

[18] A further point made by the respondent was that the applicants for fishing rights ought to have been told in advance of the procedure to be adopted involving as it did the streaming of the applications into two groups and the use of a scoring system applied to predetermined criteria. It was argued that the failure on the part of the DDG properly to advise applicants rendered the allocation process procedurally unfair. Section 3(2)(*a*) of PAJA expressly provides that what is procedurally fair depends on the circumstances of each case. In the present case the applicants for fishing rights were required to complete a detailed application form which indicated precisely what information was required. It was accompanied by instructions on how to complete the form and guidelines setting out in broad terms the considerations which the decision-maker regarded as material for the purpose of making the allocations. An applicant would therefore have been fully aware of the information that was required and on which the allocations were to be made. In these circumstances, the decision-maker, in my view, was not required to explain in advance exactly how the applications would be processed. As Baxter *Administrative Law* at 548 puts it: 'The administration cannot be expected to share with the individual every phase of its final decision-making process.' This point, too, must fail.

[19] Finally, as far as the decision in terms of s 18(1) of the Act is concerned, counsel for the respondent argued that the procedure adopted involved an impermissible sub-delegation of the DDG's discretion to the advisory committee. This was the second of the two grounds relied upon by the court *a* quo to set aside the DDG's decision. The DDG was himself a delegate of the Minister in terms of s 79(1)(*a*) of the Act. Section 79(2) reads:

'The Director-General may delegate any power conferred upon him or her in terms of this Act to an officer in the Department upon the conditions that he or she deems fit.'

It was accordingly common cause that the Act did not allow the DDG to sub-delegate his discretionary powers to the advisory committee which, it will be recalled, comprised persons from outside the department. Counsel for the respondent referred to the *modus operandi* of the advisory committee and pointed out that the scoring in the case of at least some of the pre-determined criteria involved value judgments based on facts of which the DDG would have been unaware unless he read the application itself. This, he said, amounted to more than giving advice on facts placed before the DDG; it amounted to the exercise of a discretion. Similarly he pointed to the decisions taken by members of the advisory

committee as to when particular aspects of an application were to be brought to the attention of the DDG. These decisions, too, he argued, amounted to the exercise of a discretion based on facts which would have been unknown to the DDG unless he read the application. The grounds of review relied upon were those contained in s 6(2)(*a*)(i) and (ii) and (*f*)(i) of PAJA (quoted in para 14 above).

[20] A functionary in whom a discretionary power is vested must himself exercise that power in the absence of the right to delegate. In *Hofmeyr v Minister of Justice* 1992 (3) SA 108 (C) at 117F-G King J formulated the rule thus:

> 'It is well established that a discretionary power vested in one official must be exercised by that official (or his lawful delegate) and that, although where appropriate he may consult others and obtain their advice, he must exercise his own discretion and not abdicate it in favour of someone else; he must not, in the words of Baxter *Administrative Law* (at 443), "pass the buck" or act under the dictation of another and, if he does, the decision which flows therefrom is unlawful and a nullity.'

As to the reliance on the advice of another, the functionary would at the least have to be aware of the grounds on which that advice was given. (See *Vries v Du Plessis NO* 1967 (4) SA 469 (SWA) 481F-G.) But it does not follow that a functionary such as the DDG

in the present case would have to read every word of every application and may not rely on the assistance of others. Indeed, given the circumstances, Parliament could hardly have intended otherwise. What the functionary may not do, of course, is adopt the role of a rubber stamp and so rely on the advice of others that it cannot be said that it was he who exercised the power. If in making a decision he were simply to rely on the advice of another without knowing the grounds on which that advice was given the decision would clearly not be his. But, by the same token, merely because he was not acquainted with every fact on which the advice was based would not mean that he would have failed properly to exercise his discretion. This would be particularly so if that advice was merely one of the factors on which he relied to arrive at his ultimate decision. As Baxter *Administrative Law* at 436 says: 'Where the delegation is very limited and the delegator retains full control over the final decision the delegation is likely to be *intra vires*'. Whether therefore there has been an abdication of the discretionary power vested in the functionary is ultimately a question that must be decided on the facts of each case. The same must apply to the enquiry whether there was a delegation within the meaning of s 79(2) of the Act and s 6(2)(*a*)(ii) of PAJA.

[21] The procedure adopted to evaluate the applications and ultimately decide which of the applicants were to be granted fishing rights has been described above. As observed by Schutz JA in *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) para 5 that procedure was 'a detailed and complex one'. Significantly, it was devised by the DDG, or at the least with his concurrence. The all important criteria and the number of points allotted to each (the weighting) were determined by the DDG, as was the manner in which those points were to be awarded. This was closely circumscribed by way of guidelines, written instructions and constant consultations with the advisory committee. Each application was scored by two members of the committee acting independently of each other to ensure consistency. In these circumstances, the latitude afforded to the committee in determining the marks for each criterion was minimal. In many cases the DDG himself checked the scoring, either at random regardless of the score, or because some aspect of the application was specifically drawn to his attention, or because the sum of the marks awarded were within a mark or two of the threshold mark for the granting of the application. That mark, as I have said, was unknown to the advisory committee.

[22] In passing it is necessary to mention that there was a dispute as to whether the respondent's application was one of those personally examined by the DDG. The reason for this was that the latter's comment in the appropriate column on the spreadsheet referred to advice which he subsequently and mistakenly identified as relating to the respondent's appeal in respect of rock lobster fishing rights. However, for the purpose of this judgment I shall assume in favour of the respondent that its application was not one of those personally examined by the DDG.

[23] As previously indicated, the DDG when finally deciding whether or not to grant fishing rights to an applicant had particular regard to those applications which were within a mark or two of the threshold mark. The respondent's score was well below that mark. Given the minimal latitude afforded to the advisory committee in following the 'detailed and complex' procedure, both devised and closely supervised by the DDG, the failure on the part of the latter to examine the application itself rather than the spreadsheet summary would not in my view amount to an abdication of the DDG's discretionary power in favour of the advisory committee.

[24] The further complaint was that the decision whether to draw any aspect to the attention of the DDG was left in the hands of the

advisory committee. This complaint, however, ignores the evidence that in the course of initial briefings and while the work was in progress the DDG identified and instructed the committee as to the matters that were to be brought to his attention so that, according to the DDG, it was fully aware of the limits within which it was required to operate. This aspect of the committee's work was similarly, therefore, closely circumscribed and indeed monitored by the DDG who in a large number of instances examined the applications as well as the spreadsheet summary. It follows that in my view this ground of review must similarly fail and that the court *a quo* erred in upholding it. I should add, however, that having regard to the conclusion to which I have come regarding the Minister's decision on appeal, there is a further reason why this ground must fail. I shall refer to it later.

[25] I turn then to the appeal to the Minister in terms of s 80 of the Act. What was envisaged was clearly an appeal in the wide sense involving as it did a complete rehearing and a fresh determination on the merits of the application. (*Cf Tikly v Johannes NO* 1963 (2) SA (T) 588 at 590F-591A.) Indeed, the respondent used the opportunity to place a large amount of further evidence and information before the Minister.

[26] The initial attack on the Minister's decision not to uphold the appeal related solely to the question of streaming and the bias in favour of historically disadvantaged persons in the new entrants category. It was contended that:

(i) The Minister was insufficiently apprised of the circumstances relating to the 'formerly successful appellants' in the allocations for the 2000 fishing season.

(ii) He perpetuated the streaming process resulting in the respondent being categorised as a new entrant, notwithstanding its success on appeal in 2000.

(iii) He failed to apply his mind to the fact that there was a bias against applicants in the new entrants category who were not from historically disadvantaged communities.

In his answering affidavit the Minister refuted the contention that he had failed to apply his mind in any of the respects alleged and endorsed the streaming and the bias in favour of historically disadvantaged persons. For the reasons previously advanced the grounds of review based on the streaming process and the favouring of historically disadvantaged applicants must similarly

fail. Nothing further need therefore be said of the grounds of review on which the initial attack was based.

[27] During the course of argument in the court *a quo* the respondent sought and was granted leave to introduce additional evidence pertaining to the treatment of the appeals. The evidence was to the effect that the reports of the DDG in respect of each appeal in the sector, as required by Regulation 5(3) promulgated under the Act, had been signed by the DDG on 8 and 9 August 2002 while the respondent's appeal had been dismissed on 12 August 2002. As there were some 204 appeals (of which 173 concerned the merits) it was contended that the Minister would not have had sufficient time to apply his mind to each appeal in the manner described in his answering affidavit. This elicited a response from the Minister and the latter's legal adviser, Mr Mohammed Moolla, who in answering affidavits said that the latter had begun working on the appeals as early as 3 July 2002, analysing and collating them in order to assist the Minister. The Minister explained that between 3 July and 9 August 2002 he had had extensive discussions with the officials in his Department, including Moolla, regarding the procedure adopted by the DDG and such matters as the rationale for distinguishing between 2001

rights holders and new entrants and the issue of the successful appellants in the allocations for the season of 2000. Both deponents described how on 9 and 12 August 2002 they had spent a total of 15 hours together during which each appeal was discussed and disposed of by the Minister. The Minister reiterated that he had applied his mind to each and every appeal and confirmed the contents of his earlier affidavit in which he listed the documents he had before him when taking each decision. He also gave his reasons for rejecting the respondent's appeal, but these need not be considered.

[28] In this court it was argued that the facts set out above raised various questions concerning the appeal process which warranted an order that the matter be referred for oral evidence and in particular the cross-examination of the Minister, the DDG and Moolla. These questions were principally whether the Minister could have disposed of the appeals in the manner he says he did in 15 hours; whether Moolla, who had no authority to take part in the decision of the appeals, would have influenced the Minister; and whether it was possible that Moolla, and not the DDG, had drawn up the Regulation 5(3) reports given that the former had

been working on the appeals since 3 July 2002 and the reports were dated 8 and 9 August 2002.

[29] In *Khumalo v Director-General of Co-operation and Development* 1991 (1) SA 158 (A) at 167G-168A the court cited with approval the conclusions of Kumleben J in *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA (D) at 93E-H regarding the approach to be adopted in applications to hear oral evidence in terms of Rule 6(5)(*g*). The passage is worthy of repetition.

'(*a*) As a matter of interpretation, there is nothing in the language of Rule 6(5)(*g*) which restricts the discretionary power of the Court to order the cross-examination of a deponent to cases in which a dispute of fact is shown to exist.

(*b*) The illustrations of "genuine" disputes of fact given in the *Room Hire* case at 1163 do not – and did not purport to – set out the circumstances in which *cross-examination* under the relevant Transvaal Rule of Court could be authorised. They *a fortiori* do not determine the circumstances in which such relief should be granted in terms of the present Rule 6(5)(*g*).

(*c*) Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion implicit in this Rule, in my view oral evidence in one or other form envisaged by the Rule should be allowed

if there are reasonable grounds for doubting the correctness of the allegations concerned.

(*d*) In reaching a decision in this regard, facts peculiarly within the knowledge of an applicant, which for that reason cannot be directly contradicted or refuted by the opposite party, are to be carefully scrutinised.'

See also *Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd* 1992 (2) SA 807 (A) at 816H-I.

[30] In the present case the facts in issue are, of course, peculiarly within the knowledge of the Minister and Moolla, and accordingly require careful scrutiny. But, in the absence of any other reason and none has been advanced, what would have to be established is the existence of reasonable grounds for doubting the correctness of the allegations concerned before a referral for oral evidence would be justified. As emphasised by counsel for the appellant this in effect means the existence of reasonable grounds for disbelieving the Minister and Moolla.

[31] In my view no such grounds have been shown to exist. It is true that on 9 and 12 August the appeals were disposed of in a relatively short period of time. But it is apparent that many of the salient points that arose in the appeals had been the subject of

extensive discussions between the Minister and officials in his department in the preceding weeks. Moreover, as observed by the Minister, by the time the hake longline sector appeals came up he had already dealt with about a thousand appeals and one can reasonably conclude that by then he would have been extremely familiar with the process.

[32] As to the possible 'influence' of Moolla, there can be no objection to Moolla having taken the Minister through the papers and drawn his attention to salient points; nor can there be an objection to the Minister having discussed issues with Moolla, provided only that the decision in each case was that of the Minister. Nothing has been advanced for supposing that Moolla did any more than this and any suggestion to the contrary is pure supposition. The third question relates to the possibility that Moolla, and not the DDG, prepared the Regulation 5(3) reports. This would appear to be founded on no more than the non-use of the first person in the wording of the reports and the fact that they were signed and dated on 8 and 9 August 2002. In my view no inference can be drawn from the rather formalistic style of writing adopted in the reports. As to the dates on which they were signed, there is no reason to suppose that when Moolla worked with the

files, which presumably came to him in batches, they did not contain the DDG's reports which had been prepared and typed but not yet signed. It follows that in my view the attack on the Minister's decision to reject the respondent's appeal must fail, as must the application to have the matter referred for the hearing of oral evidence.

[33] Finally, it is necessary to revert to an issue to which reference has been made previously in passing, ie the consequence of a procedurally fair appeal in the event of it being found that the DDG had failed to exercise his discretionary power himself ('the delegation issue') In *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 658A-G this court accepted as a general rule Megarry J's dictum in *Leary v National Union of Vehicle Builders* [1971] Ch 34 at 49F ([1970] 2 All ER 713 (Ch) at 720h) that –

'a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.'

More recently however, in *Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union* 1995 (1) SA 742 (A) at 756D-757A, this court expressed the view that such a general rule was unjustified. In coming to that conclusion it relied on the

statement of Lord Wilberforce in *Calvin v Carr and others* [1980] AC (PC) 574 at 592C ([1979] 2 All ER 440 (PC) at 447*h*) that no clear and absolute rule could be laid down as the situations in which the issue arises are too diverse and the rules by which they are governed so various. This approach has similarly been accepted by the House of Lords. See *Lloyd and others v McMahon* [1987] AC 625 (HL) at 716C-D ([1987] 1 All ER 1118 (HL) at 1171*g*.)

[34] Quite clearly, if the effect of whatever it was that vitiated the initial decision is perpetuated so as to taint the appeal process there can be no question of the latter serving to cure the former. If in the present case, for example, the process of streaming had been procedurally unfair, the decision on appeal would be equally affected. On the other hand, even if the appeal process were not intrinsically tainted by the earlier proceedings, the circumstances may be such that considerations of fairness demand that both the initial administrative decision and the appeal process, judged separately, be lawful and procedurally fair. No purpose would be served by attempting to formulate some all embracing rule. Each case will depend on its own facts.

[35] To return to the present case, once it is accepted that the Minister properly applied his mind to the respondent's appeal and that the process was both lawful and procedurally fair, I can think of no reason why any shortcoming in relation to the delegation issue (which in my view was not established) should not have been cured by the appeal. There can be no question of the former tainting the latter. The respondent was one of a large number of applicants for a limited resource. Had it been clear that the DDG had personally examined the respondent's application the latter would have had no cause for complaint. In the event, the application, as supplemented by the respondent on appeal, was considered by the Minister who was the actual repository of the power conferred in terms of s 18(1) of the Act. It follows that the decision to reject the respondent's appeal would have rendered irrelevant any complaint the respondent might have had with regard to the delegation issue.

[36] The appeal is upheld with costs, such costs to include those occasioned by the employment of two counsel. The order of the court *a quo* is set aside and the following is substituted in its place –

'The application is dismissed with costs, such costs to include those occasioned by the employment of two counsel.'

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D G SCOTT

JUDGE OF APPEAL

CONCUR:

FARLAM JA

CAMERON JA

LEWIS JA

COMRIE AJA