THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 507/11
Reportable

OCEANA GROUP LIMITED	1st Appellant
BLUE CONTINENT PRODUCTS (PTY) LTD	2nd Appellant
and	
THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	1st Respondent
THE DEPUTY DIRECTOR-GENERAL: MARINE AND COASTAL MANAGEMENT, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	2nd Respondent
THE MINISTER OF TRADE AND INDUSTRY	3rd Respondent
THE MINISTER OF AGRICULTURE, FISHERIES AND FORESTRY	4th Respondent

Neutral citation: *Oceana Group Ltd v Minister of Water & Environmental Affairs* (507/11) [2012] ZASCA 35 (29 March 2012)

Bench NAVSA, VAN HEERDEN, MHLANTLA, LEACH and WALLIS JJA

Heard: 1 MARCH 2012

Delivered: 29 MARCH 2012

Corrected:

Summary: Challenge to policy to be applied in the assessment of applications for the transfer of commercial fishing rights in terms of s 21 of the Marine Living Resources Act 18 of 1998 (MLRA) – contention that the policy was unlawful because it failed strictly to apply the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE) rejected – held that there was no relevant code of good practice issued in terms of the BBBEE Act to be applied – held further that policy not in conflict with objectives of the MLRA – held that impugned parts of policy not ultra vires the MLRA.

ORDER

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

The appeal is dismissed with costs including the costs attendant on the employment of two counsel.

JUDGMENT

NAVSA JA (VAN HEERDEN, MHLANTLA, LEACH and WALLIS JJA concurring):

[1] This is an appeal against a judgment of the Western Cape High Court (Cleaver J), in terms of which an application by the first and second appellants, Oceana Group Limited (Oceana) and Blue Continent Products (Pty) Ltd (BCP), challenging the legality of a policy presently administered by the fourth respondent, the Minister of Agriculture, Fisheries and Forestry, was dismissed with costs, including the costs of two counsel. The appeal is before us with the leave of that court and was heard on the same day as a case in which the legality of the same policy was challenged on similar grounds.[1] The one difference is that in the present appeal, an additional ground, based on the provisions of the Broad-Based Black Economic Empowerment Act 53 of 2003 (the BBBEE Act), was added to the attack on the policy. Where necessary, I will refer to the judgment in that case as *Foodcorp*.

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

[2] The policy in question is entitled 'Policy for the Transfer of Commercial Fishing Rights' (the TP) and was published on 31 July 2009[2] by the Minister previously responsible for the fishing industry, namely the first respondent, the Minister of Water and Environmental Affairs. Because of governmental re-organisation the TP is now administered by the fourth respondent. The Minister of Trade and Industry was cited in the court below because he is the responsible minister in terms of the BBBEE Act, but he took no active part in the litigation.

[3] The fourth respondent (the Minister) and the second respondent, the Deputy Director-General of Water and Environmental Affairs: Marine and Coastal Management, defended the TP, both in the court below and before us. Thus, they and the appellants are the contesting parties.

The background

[4] Oceana is a public company listed on the Johannesburg Securities Exchange and the Namibian Stock Exchange and is a leading role player in the South African fishing industry. Oceana catches, processes and markets a variety of fish species through a number of its operating subsidiaries.

[5] BCP is a wholly-owned subsidiary of Oceana and is the holder of commercial fishing rights, authorizing it to catch fish in the hake and deep sea trawl, horse mackerel, squid and hake longline fisheries. Other subsidiaries of Oceana were also granted commercial fishing rights in various fisheries. All of these rights were 'long-term' rights allocated in terms of s 18 of the Marine Living Resources Act 18 of 1998 (MLRA). The long-term fishing rights allocation process followed on earlier annual and thereafter medium-term rights allocation processes.

[6] Following the granting of long-term fishing rights, various parties made application to transfer commercial fishing rights, including BCP. In the application in the court below

[2] In Government Notice 789 in *Government Gazette* 32449.

Oceana and BCP complained that, from January 2006, applications for the transfer of commercial fishing rights have not been processed or finalised by the Department under the control of the Minister. According to Oceana and BCP this failure on the part of the Department has had a damaging impact on its ability optimally to conduct its business. Oceana and BCP surmised that the failure to process applications for the transfer of commercial rights was due mainly to the fact that the TP had not yet been finalised.

[7] As stated above, the TP was published on 31 July 2009. Oceana and BCP took the view that the TP was unlawful and should be reviewed and set aside. Hence the application in the court below for an order in those terms, notwithstanding that decisions in several applications by BCP for the transfer of commercial fishing rights were still pending. An application for the transfer of commercial fishing rights is required to be submitted to the Minister in terms of s 21 of the MLRA, the provisions of which will be dealt with in due course. The TP sets out the Minister's and her Department's policy to be applied when applications are made for the transfer of fishing rights.

[8] The principal line of attack on the TP was that it fails to properly apply the strategy and codes provided for by the BBBEE Act. In short, the complaint was that the TP defines transformation on a narrow basis, taking into account only ownership and management control of entities under consideration. It was contended that the elements of employment equity, skills development, preferential procurement, enterprise development and socio-economic development initiatives, catered for in the BBBEE Act and codes, were wrongly excluded from the Department's assessment of transformation in applying the TP. It was submitted that the application of the BBBEE codes was obligatory and that the TP was consequently unlawful for failure to apply the codes.

[9] Furthermore, Oceana and BCP took the view that the TP was unlawful in that it failed to take proper account of the broad principles and objectives of the MLRA. It was contended that the TP misconstrued transformation. It was submitted that in terms of para 4.1 of the TP, the focus, was, once again, wrongly on the degree of black ownership and management. Those criteria were too narrow and neither consonant with the

developmental objectives of the MLRA, nor in line with its other purpose, namely, to create employment opportunities. Other paragraphs of the TP were similarly criticised.

[10] Additionally, it was submitted, as in *Foodcorp*, that paras 6.2 and 6.3 of the TP, requiring approval for the sale of shares resulting in a change of control of entities, or resulting in entities not being as transformed as at the date of allocation of long-term fishing rights, were ultra vires the provisions of the MLRA. It was contended that ministerial approval was required only in the circumscribed situation referred to in s 21(2) which provides:

'(2) An application to transfer a commercial fishing right or a part thereof shall be submitted to the Minister in the manner that the Minister may determine, and subject to the provisions of this Act and any applicable regulation, the Minister may, in writing, approve the transfer of the right or a part thereof.'

[11] Oceana and BCP took the view that there was no basis upon which a change in the transformation status of a holder of long-term fishing rights could properly be regarded as a transfer of a fishing right within the meaning of s 21(2). It was submitted that, in effect, the Minister and her Department were seeking to impose new conditions on rights holders.

The judgment of the High Court

[12] The court below had regard to the specific provisions of the BBBEE Act. It considered s 9 of that Act, the relevant parts of which provide:

'**9 Codes of good practice**

(1) In order to promote the purposes of the Act, the Minister may by notice in the *Gazette* issue codes of good practice on black economic empowerment that may include–

(a) the further interpretation and definition of broad-based black economic empowerment and the interpretation and definition of different categories of black empowerment entities;

(b) qualification criteria for preferential purposes for procurement and other economic activities;

(c) indicators to measure broad-based black economic empowerment;

(d) the weighting to be attached to broad-based black economic empowerment indicators referred to in paragraph *(c)*;

(e) guidelines for stakeholders in the relevant sectors of the economy to draw up transformation charters for their sector; and

(f) any other matter necessary to achieve the objectives of this Act.

(2) A strategy issued by the Minister in terms of section 11 must be taken into account in preparing any code of good practice.

(3) A code of good practice issued in terms of subsection (1) may specify –

(a) targets consistent with the objectives of this Act; and

(b) the period within which those targets must be achieved.

(4) In order to promote the achievement of equality of women, as provided for in section 9(2) of the Constitution, a code of good practice issued in terms of subsection (1) and any targets specified in a code of good practice in terms of subsection (3), may distinguish between black men and black women.'

[13] Section 11 of the BBBEE Act obliges the responsible Minister to issue a strategy for broad-based black economic empowerment. Section 11(2) states that the strategy must provide an integrated, coordinated and uniform approach to broad-based black economic empowerment by all organs of state, public entities, the private sector, non-governmental organisations, local communities and other stakeholders. Such strategy was published by the Minister in March 2003. In terms of the strategy, government is committed to using a 'balanced scorecard' to measure progress made in achieving black economic empowerment. The core components are listed as being, first, direct empowerment through ownership and control of enterprises and assets; second, human resource development and employment equity, indirect empowerment through preferential procurement and enterprise development. Oceana and BCP complain that the strategy is being thwarted by the application of the TP because of the narrow focus on ownership and management control. It is common cause that codes of good practice have been promulgated in terms of s 9 of the BBBEE Act. The primary questions facing the court below were whether the codes apply in the present circumstances and whether Oceana and BCP's reliance on the BBBEE Act is justified.

[14] Cleaver J considered s 10*(a)* of BBBEE Act, which was the focal point of Oceana and BCP's case, and which reads as follows:

'**10 Status of codes of good practice**

Every organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act in –

(a) determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law'. (Emphasis added.)

[15] The court below then turned its attention to para 3 of the Codes of Good Practice (the Codes):

'**3 Application of the Codes**

3.1 The following entities are measurable under the Codes:

3.1.1 all public entities listed in schedule 2 or schedule 3 (Parts A and C) of the Public Finance Management Act;

3.1.2 any public entity listed in schedule 3 (Parts B and D) which are trading entities which undertake any business with any organ of state, public entity or any other Enterprise, and

3.1.3 any enterprise that undertakes any business with any organ of state or public entity;

3.1.4 any other enterprise that undertakes any business, whether direct or indirect, with any entity that is subject to measurement under paragraph 3.1.1 to 3.1.3 and which is seeking to establish its own B-BBEE compliance.' (Emphasis added.)

[16] Cleaver J concluded that Oceana and BCP were measurable entities in terms of para 3.1 and fell within the category set out in 3.1.3 of the Codes. His reason for doing so is set out in para 19 of the judgment:

'In my view it would be wrong to adopt a narrow interpretation of the phrase in question and that the word "business" should be given a wide and general import. The applicants undertake commercial fishing which is controlled and regulated by the Minister by means of the MLRA. They do so in terms of permits issued to them which contain conditions determined by the Minister and for which fees are extracted. In a broader sense they are, I consider, conducting business with an organ of the state in that the particular organ controls their commercial activities by means of granting them a right to do so. Clearly the Minister and the Department held the same view when the Transfer Policy was published.'

[17] The court below dealt with the criticism by Oceana and BCP, that the TP does not make provision for the proper application of the Codes. Cleaver J went on to note that clause 2.10 of the Transfer Policy expressly provides that the Department will also employ

the Codes and that s 10 of the BBBEE Act provides that the Codes are to be applied 'where reasonably possible'. Notwithstanding the conclusion referred to in the preceding paragraph, the court below accepted the reasons provided by the Minister and the Department as to why the strict application of the Codes to the exclusion of any other criteria in assessing the transfer of rights would lead to serious practical problems. He went on to list the reasons supplied by the Minister for not strictly applying the Codes in the fishing industry. These appear in para 30 of the judgment of the court below. For present purposes it is not necessary to repeat them. On this point Cleaver J concluded as follows:

'Since the Transfer Policy gave effect to the need to transform the fishing industry as emphasised in *Bato Star* and since the policy is being applied for the limited life of the licences granted, I am of the view that the reasons advanced by the respondent for not applying the codes to the exclusion of ownership and management control establish that it would not be reasonably possible for the codes to be applied. To hold otherwise would in all probability undermine the [long-term rights allocation and management] process and the progress made to date with transformation and create new and difficult practical problems. It may be that when new licences come to be issued again in due course, the fishing industry will have been sufficiently transformed to allow the codes to take pride of place, but time will tell.'

[18] Turning to the contention on behalf of Oceana and BCP that the TP is inconsistent with the MLRA because it has a much narrower focus, the court below concluded that the TP did not preclude the decision–maker from taking into consideration factors such as employment and sustainable development. Cleaver J held that Oceana and BCP failed to establish that the TP is inconsistent with the MLRA. The court below rejected the submission on behalf of Oceana and BCP that the TP constituted administrative action. It held that the TP was national policy formulated by the Minister acting on behalf of the government and that it was thus excluded from the ambit of Promotion of Administrative Justice Act 3 of 2000 (PAJA). The court below dealt very briefly with the contention that particularly paras 6.2 and 6.3 were ultra vires the MLRA. Cleaver J took the view that the applications by BCP for the transfer of commercial fishing rights had not been decided, but in any event that the TP had to be applied flexibly and that the application had been

brought prematurely and on abstract basis. As stated above the application was refused with costs including the costs of two counsel.

[19] It is against the aforesaid conclusions and order that Oceana and BCP presently appeal.

Conclusions

[20] Section 2 of the MLRA reads as follows:

'**2 Objectives and principles**

The Minister and any organ of state shall in exercising any power under this Act, have regard to the following objectives and principles:

(a) The need to achieve optimum utilisation and ecologically sustainable development of marine living resources;

(b) the need to conserve marine living resources for both present and future generations;

(c) the need to apply precautionary approaches in respect of the management and development of marine living resources;

(d) the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government;

(e) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;

(f) the need to preserve marine biodiversity;

(g) the need to minimise marine pollution;

(h) the need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act;

(i) any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law; and

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

[21] In their founding affidavit in the court below, Oceana and BCP rightly point out that the commencement of the MLRA was a watershed moment in the South African fishing

industry. As stated by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 (4) SA 490 (CC),[3] the MLRA was founded on the need both to preserve marine resources and to transform the fishing industry so as to ensure equal access to economic opportunities. On the first aspect, the MLRA enables the Minister, in order to guard against over-exploitation of fish stocks, to determine annually the total allowable catch (TAC) – the maximum quantity of fish available during each fishing season to be allocated to recreational, subsistence, commercial and foreign fishing. The TAC is determined following a scientific assessment of the strength of marine resources and is based on sustainable levels of exploitation. On the second aspect, s 2*(j)* of the MLRA, set out in the preceding paragraph, is significant.

[22] One of the main uses of marine living resources covered by the MLRA, which was the focus of the application in the court below and the present appeal, is commercial fishing. Section 18(1) of the MLRA provides that no person shall undertake commercial fishing unless a right to do so has been granted. Section 18(2) of the MLRA dictates that applications for the grant of commercial fishing rights are to be submitted to the Minister or a delegated authority in the prescribed form. Section 18(5) is important and reinforces what is set out in s 2*(j)* of the MLRA. It reads as follows:

> '(5) 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.'

Section 18(6) provides that fishing rights shall be valid for a period determined by the Minister which shall not exceed 15 years.

[23] Section 13(1) of the MLRA provides that no person shall exercise a right granted in terms of s 18 of the MLRA unless an annual permit has been issued to that person by the Minister.

[24] Section 21(1) and (2) provide:

'(1) Subject to the provisions of this Act, a commercial fishing right may be leased, divided or otherwise transferred.

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[3] Paras 32 and 35.

(2) An application to transfer a commercial fishing right or a part thereof shall be submitted to the Minister in the manner that the Minister may determine, and subject to the provisions of this Act and any applicable regulation, the Minister may, in writing, approve the transfer of the right or a part thereof.'

[25] Section 21(3)*(b)* reads as follows:

'(3) The Minister may, after consultation with the Forum, make regulations regarding –

(a) …

(b) guidelines or criteria concerning the transfer of any right of access, including determining limits on the transfer of rights between holders of such rights on a temporary basis'.

It is common cause that no such regulations have been made. Instead, the TP has been employed to deal with the transfer of fishing rights and related matters.

[26] The following are the relevant paragraphs of the TP:

Paragraph 1.4:

'The transfer of fishing rights is dealt with in terms of section 21(2) of the MLRA, which provides that fishing rights may be transferred, if an application therefor has been made to the Minister, and is subject to the approval and conditions that the Minister (or his/her delegate) may determine. This policy sets out the principles that will govern the transfer of fishing rights.'

Paragraph 2.9:

'For the purposes of a transfer of a commercial fishing right the level of transformation will be assessed on the basis of ownership and management control.'

Paragraph 4.1:

'There are two broad principles that will be considered in the assessment of applications for the transfer of fishing rights. First, whether the transfer will lead to a consolidation of Right Holders and effort in the sector. Second, the degree to which the transformation of the transferee and the black ownership of the total allowable catch (TAC) and total allowable effort (TAE) will change should the transfer be approved. Consideration should also be given to policy regarding multi-sector involvement and monopolies.'

Paragraph 5.1:

'An application for a transfer of a commercial fishing right to a current Right Holder in the same sector of the fishing industry as the transferor, will be favourably considered if:

- the transferee is at least as transformed as the transferor;

- has access to a suitable fishing vessel that is already in the fishing sector;
- has invested in the fishing industry;
- the transferee, its controlling shareholders or members have not been convicted of an offence under the MLRA, the Prevention of Corruption Act, 1992 (Act No 94 of 1992), the Prevention and Combating of Corrupt Activities Act, 2004 (Act No 12 of 2004), the Prevention of Organised Crime Act, 1998 (Act No 121 of 1998) or any offence involving dishonesty;
- has a valid tax clearance certificate;
- is not in arrears with any levies, licence fees or other payments, catch returns or other documentation required by the Department in terms of the applicable permit conditions.'

Paragraphs 6.1, 6.2 and 6.3:

'6.1 The alienation of shares/member's interest in right holding entities for purposes of the MLRA may require a transfer of a right.

6.2 Approval for transfer of a right is not required if the sale of shares/member's interest does not result in change in control of the company or close corporation and the company/close corporation remains at least as transformed as at allocation of the long-term right. The Right Holder (except in the case of a public company) will still be required to complete a form informing the Department so that the change in shareholding/member's interest can be recorded.

6.3 If the sale of shares/member's interest results in change of control of the company/close corporation or results in the company/close corporation not being as transformed as at date of allocation of the long-term right an application for transfer of the right is required and the following will be considered:

- The change in shareholding/member's interest relating to race and gender in the right holding entity;
- The number (percentage) of share/member's interest to be sold;
- Whether the entity or person acquiring the shares/member's interest is an existing Right Holder in the fishing industry and if so, in which sector;
- The investment of the transferee entity or person acquiring the shares/member's interest in the fishing industry;
- The fishing performance of the entity or person acquiring the shares/member's interest;
- Whether the proposed transfer of shares/member's interest will lead to a consolidation of either Right Holders, or of effort;

- There is evidence that the transferee will be a "paper quota" and not become directly involved in the catching or processing of the fish caught.'

[27] As was noted in *Foodcorp*, the fishing rights allocation process was guided by a document entitled 'General Policy for the Allocation and Management of Long-Term Commercial Fishing Rights: 2005' (the GP), issued by the then Department of Environmental Affairs and Tourism. The GP records that the MLRA requires restructuring of the fishing industry in order to address historical imbalances and to achieve equity within all the branches of the fishing industry. It recognises that transformation is a constitutional imperative. It goes on to state that the GP has as an objective an improvement on the levels of transformation already achieved The GP emphasises that 'only quality transformation will be recognised, that is, transformation which results in real benefits to historically disadvantaged persons'. According to the GP, beneficial ownership by black people, in the form of unrestricted voting rights and economic interest associated with equity ownership, will be assessed and taken into consideration. The management structure of an applying entity will be taken into account and, in particular, senior executive management positions will be scrutinised. Gender, employment equity, skills development, affirmative procurement and corporate social investment are all factors to be taken into account when commercial fishing rights are allocated in terms of the GP. These factors are largely similar to those provided for in s 1,[4] s 2 and s 9 of the BBBEE Act.

[28] That then is the background against which the present appeal has to be adjudicated. I turn to deal with the first point raised on behalf of Oceana and BCP, namely, whether the TP is inconsistent with the Codes published in terms of the BBBEE Act.

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[4] '**"broad-based black economic empowerment"** means the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include, but are not limited to –

(a) increasing the number of black people that manage, own and control enterprises and productive assets;
(b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
(c) human resource and skills development;
(d) achieving equitable representation in all occupational categories and levels in the workforce;
(e) preferential procurement; and
(f) investment in enterprises that are owned or managed by black people.'

[29] At the outset I agree with the conclusion of the court below that the TP formulated by the Minister is national policy and is thus excluded from the ambit of PAJA. However, because the challenge to the TP is essentially based on legality and rationality, that conclusion does not preclude it from being subjected to judicial scrutiny. In any event the application of the TP and decisions on matters related thereto might very well be within the ambit of PAJA. However, as is clear from what is set out above, nothing turns on this point.

[30] It will be recalled that the court below had held that Oceana and BCP were 'measurable entities' to which the Codes applied. In this regard Cleaver J considered the paragraph of the Codes which sets out its ambit of applicability. The court below concluded that Oceana and BCP fell within the category set out in para 3.1.3.[5]

[31] The Codes were published by the Minister of Trade and Industry in the *Government Gazette* on 9 February 2007,[6] after the long-term rights allocation process, but before the adoption of the TP. In terms of s 10*(a)* of the BBBEE Act, the provisions of which appear in para 14 above, every state and public entity is obliged to take into account as far as is reasonably possible 'any relevant code of good practice' issued in terms of that Act. The immediate question that arises is whether a relevant code of good practice exists which the Minister and her department are obliged to apply.

[32] It is clear from a reading of para 3 of the Codes that what was intended by paras 3.1.2 to 3.1.4 is that specified public entities and enterprises that 'undertake business' with inter alia any organ of state or public entity should be measurable entities to which the Codes apply. It is understandable that government would be intent on ensuring that those with whom it engaged in commercial activity would meet government's transformation objectives. The reward for complying with government's transformation targets would be eligibility for government contracts. Paragraph 3.1.2 applies to public entities that are trading entities. When they 'undertake any business' with any other 'enterprise' in accordance with para 3.1.2, it must be taken to mean commercial interaction between the

[5] Paragraph 3 dealing with the applicability of the Codes appears in its entirety in para 15 above.
[6] *Government Gazette* No. 29617 Government Notice 112.

two entities. Where the same or essentially similar words or phrases or expressions are used in various places throughout a legislative instrument, they are presumed to bear the same meaning throughout.[7] In my view a purposive interpretation leads ineluctably to the conclusion that the entities considered measurable in terms of paras 3.1.3 to 3.1.4 are enterprises that engage in commercial activity with inter alia any organ of state or public entity.

[33] Moreover, if the Codes had been intended to apply to the issuing of licences, concessions or other statutory authorisations, such as the granting of fishing rights and the concomitant annual permits, they could have said so in the terms embodied in s 10*(a)* of the BBBEE Act. There are no specific codes that apply in this regard and it might well be due to the fact that there is a myriad of regulatory statutory criteria that apply to the issuing of licences, concessions or other statutory authorisations in relation to specific areas of endeavour. Settling uniformity across the board as aimed for by the BBBEE Act in relation to different fields of endeavour is likely to prove difficult. It might explain why the court below readily accepted the explanation proffered by the Minister for not slavishly applying the BBBEE Act. The Minister explained why it was impractical in particular areas of the fishing industry to wholly adopt and apply the Codes. In the GP it is expressly stated that given the nature of the fishing industry the Minister has deliberately not encouraged the adoption of charters for the sector and has not adopted the weighting and benchmarks in relation to ownership and management set out in the available draft codes.

[34] Section 10*(a)* of the BBBEE Act obliges state departments to apply any 'relevant' code of good practice. Since there is no code that can be identified in relation to the granting of statutory authorisations to catch fish, the obligation does not arise in the present circumstances. Considering the submissions on behalf of Oceana and BCP, referred to in para 8 above, as to the application of the BBBEE Act in the present circumstances, the apposite words of Wilson CJ in *Richardson v Austin* (1911) 12 CLR 463 at 470 come to mind:

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[7]See *Principal Immigration Officer v Hawabu & another* 1936 AD 26; *Minister of the Interior v Machadodorp Investments (Pty) Ltd & another* 1957 (2) SA 395 (A) at 404D-E*; Ndluli v Wilken NO* 1991 1 SA 297 (A) at 306B; Lourens du Plessis *Re-Interpretation of Statutes* 2002 194.

‘ … As to the argument from the assumed intention of the legislature, there is nothing more dangerous and fallacious in interpreting a statute than first of all to assume that the legislature had a particular intention, and then, having made up one’s mind what that intention was, to conclude that that intention must necessarily be expressed in a statute, and proceed to find it.’

[35] It follows that the court below erred in concluding that para 3.1.3 is applicable. As stated earlier, the GP ensures that in the allocation of fishing rights process a variety of factors similar to those catered for by the BBBEE Act are taken into account. The TP has to be read as building upon the GP to ensure that the objectives of the MLRA are met. The TP itself proclaims that it will ‘employ’ the BBBEE Act but it does refer to the difficulty of a strict application of that Act within the fishing industry.[8] The Minister and her Department can hardly be criticised for attempting to do more than is legally required. Thus, the first point is decided against Oceana and BCP.

[36] I now turn to deal with Oceana and BCP’s challenge to the validity of the TP. It will be recalled that it was contended on their behalf that the provisions of the TP were at odds with the provisions of the MLRA and, as was submitted in *Foodcorp*, that certain of its provisions were ultra vires the MLRA. More particularly, it was contended that the Minister was not empowered to regulate bona fides share sales transactions as she purported to do by resorting to paras 6.2 and 6.3 of the TP.

[37] In *Foodcorp* this Court undertook a thorough analysis of the relevant provisions of the MLRA. It had regard to the long title, s 2, s 13, s 18, s 21 and s 28 and took into consideration a number of paragraphs of *Bato Star* which highlighted the importance of transformation in the fishing industry.[9] In *Bato Star* the Constitutional Court regarded transformation of the fishing industry as being central to the process of granting fishing rights.[10] The Constitutional Court approved of the GP as being consonant with the transformation objectives of the MLRA. Similarly, in *Foodcorp*, this Court viewed the GP as being consonant with the provisions of the MLRA and considered those parts of the TP challenged in that case as being harmonious with both the MLRA and the GP. In my view,

[8] Paragraphs 2.6 to 2.10.
[9] See *Foodcorp* paras 27 and 28.
[10] See *Bato Star* paras 40, 41 and 92.

the paragraphs of the TP criticised by Oceana and BCP, set out in para 26 above, are in line with the twin objectives of the MLRA recognised in *Bato Star*, namely, the need to preserve marine resources and the need to transform the fishing industry. As stated in an earlier paragraph the TP cannot be delinked from the GP. Far from the narrow focus contended for by Oceana and BCP, the MLRA, the GP and the TP collectively allow for a flexible approach. In exercising her discretion in dealing with matters provided for in the TP, the Minister would be astute to have regard to the dictum in *Dawood, Shalabi and Thomas v Minister of Home Affairs & others* 2000 (3) SA 936 (CC):[11]

'Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.'

[38] In respect of the specific challenge to paras 6.2 and 6.3 of the TP, this Court held in *Foodcorp* that these are not ultra vires the provisions of the MLRA. It did so on the basis that the Minister has an obligation to ensure that the objectives and principles set out in s 2 of the MLRA are met and complied with. It took into account that fishing rights were granted in terms of s 18, which obliges the Minister to have regard to transformation imperatives. It rejected the submission 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 processes should each be viewed in isolation. It also held that, throughout the various processes, transformation of the fishing industry to address historical imbalances and to achieve equity is a constant imperative.[12]

[39] Of course, in *Foodcorp*, the permits in question were stated to be subject to the provisions of the MLRA and the GP. In the present case we have no idea of the conditions attaching to the permits issued to Oceana and BCP since the permits do not form part of

[11] Para 53.
[12] Paragraph 33.

the documents constituting the record in the court below. This does not mean that the conclusions arrived at in *Foodcorp* in relation to paras 6.2 and 6.3 have any less force.

[40] I agree with the statement by the court below that Oceana and BCP were misguided in bringing the application on an abstract basis and that it was premature. If a well-founded basis arises for challenging the Minister's decisions on the pending transfer applications, Oceana and BCP can approach the appropriate court for relief. Instead, they launched a pre-emptive strike which, for all the reasons set out above, rightly failed in the court below. Lastly, it should be stated that in their founding affidavit Oceana and BCP rightly laud the Minister and her Department for facilitating significant transformation of the fishing industry. They state that today the fishing industry is recognised as one of the most transformed sectors of the South African economy. Granting Oceana and BCP the relief they sought would have been a regressive step.

[41] The following order is made:

The appeal is dismissed with costs including the costs attendant on the employment of two counsel.

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M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For 1st Appellants:	J A Newdigate SC N Mayosi (Ms) Instructed by: Webber Wentzel Cape Town Matsepes Inc Bloemfontein
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