



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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

Media Statement

Today the Supreme Court of Appeal (SCA) delivered judgment dismissing the appeal, with costs, against an order of the Western Cape High Court 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 the 'Policy for the Transfer of Commercial Fishing Rights' (TP) presently administered by the fourth respondent, the Minister of Agriculture, Fisheries and Forestry, was dismissed with costs.

The facts and history of this matter can be summarised as follows:

Oceana, a public company, 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. BCP is a wholly-owned subsidiary of Oceana and is the holder of commercial fishing rights. 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 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.

Following the granting of long-term fishing rights, various parties made application to transfer commercial fishing rights, including BCP. Oceana and BCP complained that applications for the transfer of commercial fishing rights had not been processed or finalised by the Department. According to Oceana and BCP this failure on the part of the Department had had a damaging impact on its ability optimally to conduct its business. Oceana and BCP took the view that the TP was unlawful and should be reviewed and set aside.

The TP sets out the principal by the appellants when applications are made for the transfer of fishing rights. 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 by the Broad-Based Black Economic Empowerment Act 53 of 2003 (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.

It was further argued 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 in that 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. It was argued that sections 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.

The SCA, in reaching its decision, had regard to the fact that 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). 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 and recognises that transformation is a constitutional imperative. It has as an objective an improvement on the levels of transformation already achieved with emphasis on the fact that only quality transformation will be recognised, ie 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 the BBBEE Act. However, the SCA concluded that there were no codes in existence that applied to the fishing industry. It held that 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 the legislature could have said so in the terms embodied in s 10(a) of the BBBEE Act.

The SCA held that it was understandable that government would be intent on ensuring by way of the application of the BBBEE codes 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. The GP ensured 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. The SCA noted that the Minister and her Department could hardly be criticised for attempting to do more than is legally required. Thus, the first point was decided against Oceana and BCP.

The SCA viewed the GP as being consonant with the provisions of the MLRA and considered those parts of the TP challenged as being harmonious with both the MLRA and the GP. The paragraphs of the TP criticised by Oceana and BCP are in line with the twin objectives of the MLRA namely, the need to preserve marine resources and the need to transform the fishing industry. The TP cannot be delinked from the GP. Far from the narrow focus contended for by

Oceana and BCP the SCA held that the MLRA, the GP and the TP collectively allow for a flexible approach and that the paragraphs in the TP are not ultra vires the provisions of the MLRA. The SCA did so on the basis that the Minister has an obligation to ensure that the objectives and principles set out in the MLRA are met and complied with.

Lastly, the SCA noted that in their founding affidavit Oceana and BCP rightly lauded the Minister and her Department for facilitating significant transformation of the fishing industry and that South Africa's fishing industry was recognised as one of the most transformed sectors of the South African economy. It held that the granting of the relief sought by Oceana and BCP would have been a regressive step.

The appeal was subsequently dismissed with costs.

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