IIN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 3519/02

In the matter between:

FOODCORP (PTY) LTD Applicant

and

THE DEPUTY DIRECTOR GENERAL - DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM:
BRANCH MARINE AND COASTAL MANAGEMENT First Respondent

THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM Second Respondent

THE HOLDERS OF RIGHTS IN THE PELAGIC FISHING INDUSTRY AS SET OUT IN ANNEXURE "NM1 Third to Ninety Second Respondents

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JUDGMENT: 12 DECEMBER 2003

VAN ZYL J:

INTRODUCTION

[1] This application is directed, in essence, at reviewing and setting aside that portion of the decision of the first respondent in terms of which the separate fishing quota allocated for pilchards and anchovy was replaced by a single percentage quota for both. The gist of the complaint is that the quota had been allocated separately from 1984 to 2001, but in 2002 was allocated as a single pelagic fishing quota, split between pilchards and anchovies, in accordance with a complicated mathematical formula. As a rights holder in the pelagic fishery business the applicant, which trades as "Marine Products", avers that the new allocation was arbitrary and unreasonable, and demonstrated a failure by the first respondent to apply his mind properly to the decision made in this regard. In addition it is averred that the first respondent acted *ultra vires*in making the decision, which was in any event procedurally unfair.

[2] For the aforesaid reasons, and inasmuch as the allocation for 2002 had the effect that the applicant's quota for both pilchards and anchovy was substantially diminished when compared with the 2001 quota, it appealed to the Minister during April 2002. The appeal was dismissed on 19 September 2002. It is common cause that the appeals process in terms of the relevant statute, the *Marine and Living Resources Act* of 1998 ("the Act") has not yet been finally disposed of. This does not, however, constitute a bar to a review application such as the present. This court is hence invited to correct the allocation to bring it in line with the separate allocations of 2001, alternatively to direct the first respondent to effect such correction.

[3] As Deputy Director General in the Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management ("the Department"), the first respondent is cited in his capacity as the delegate of the second respondent, the Minister of Environmental Affairs and Tourism, in terms of section 79(1) of the Act. The first respondent has the power to consider applications for rights of exploitation under the Act and to make allocations of such rights in respect of pelagic fish. The second respondent in turn has the right to consider appeals against decisions of the first respondent in terms of section 80 of the Act. The Act further more contains a policy framework to which I shall advert later on in this judgment (par 15 below).

[4] At all relevant times the third to ninety second respondents have, like the applicant, been the holders of rights to pelagic fish and have conducted their business within the jurisdiction of this court. As such they have engaged in the catching and processing of pelagic fish off the South African coast. They have been joined as respondents in view of their legal interest in the outcome of this application. No costs are sought against them unless they oppose the relief sought by the applicant.

BRIEF HISTORICAL AND EXPLANATORY SURVEY

[5] The concept "pelagic fish", in its original connotation, refers simply to "fish belonging to the sea". In classical Greek the noun *pelágos*means "sea" and the adjectives *pelágios pelágikòs*mean "pertaining to, relating to or belonging to the sea". The Latin equivalents are *pelagus, pelagius pelagicus*, although the pure Latin forms are *mare*("sea") *marinus* ("pertaining to, relating to or belonging to the sea" or, simply, "marine").

[6] In the instructions to the advisory committee regarding the allocation of pelagic fishing rights for the 2002 season, the Department has set out a brief, but useful, history of the pelagic fishing industry in South Africa. Useful summaries appear in the founding affidavit and in the first respondent's answering affidavit. I have attempted to capture their essence in the following paragraphs.

[7] Four main species are included in the South African pelagic fishery. They are Cape anchovy (*Engraulis capensis*), pilchard (sardine) (*Sardinops sagax*), round herring (*Etrumeus whiteheadii*), also known as "red-eye", and Cape horse mackerel (*Trachurus capensis*), known locally as "maasbanker". The latter two species have, for various reasons, produced relatively limited catches. By contrast anchovy and pilchard account for 60% to 90% of landings in the multi-species pelagic fishery. For present purposes the red-eye and horse mackerel do not require further consideration.

[8] The first pelagic fishing operations in South Africa began in 1935, but major commercial operations began only in 1943, in response to the demand for canned goods during World War II. Pilchard dominated the catches until well into the 1960's, peaking at 410 000 tons in 1962 but experiencing a rapid decline to less than 100 000 tons in 1967. Simultaneously there was a rapid increase in catches of anchovy, which replaced pilchard as the dominant species during the 1970s and 1980s. Anchovy catches peaked at 595 000 tons in 1987 but dropped to 150 000 tons in 1990. Acoustic surveys, which began in 1984, demonstrated significant fluctuations in anchovy abundance during the 1990s. At the same time there was a steady increase in pilchard abundance, leading to speculation that it may eventually replace anchovy as the dominant species in the pelagic fishery.

[9] The regulation of commercial catches of anchovy and pilchard was introduced in the 1950s. The measures applied were pragmatic, including constant catches and minimum mesh sizes. Scientific management measures, based on the biennial acoustic surveys of pelagic fish stocks, were introduced for anchovy in the mid-1980s and shortly thereafter for pilchard. Up to 2001 the operational management procedure (OMP) for anchovy was based on a simple formula determined by running tests on a simulation model of the dynamics of the anchovy population. Key inputs to this model were age-structured biomass estimates established in a November survey and used to determine the "total allowable catch" (TAC), that is the maximum mass of fish available for exploitation in terms of the Act, for the following year. This survey was followed up by further surveys during May and June of the following year with a view to revising the TAC on the basis of the estimated "recruitment" of juvenile anchovy and pilchard.

[10] Pelagic species are short-lived, anchovy having an average life span of two years and pilchard five years. Pilchard is commercially the more valuable, one ton of pilchard

generally being the equivalent of five tons of anchovy. Both pilchards and anchovies may be canned for the consumer market, although anchovies are more frequently used for the production of fishmeal. The nature of catching, processing and distributing products made from pilchard for canning, or freezing for bait, differs from the fish meal processing and distribution process. Canned pilchards are for human consumption. This requires the removal of heads and guts in a hygienic process of cooking and canning the product. Fish meal is essentially manufactured by the grinding of unprocessed fish into fish meal for consumption by animals. Different forms of equipment are required for each of the processes. Some of the holders of rights to pelagic fishing do not have factories whilst others are engaged in one or the other of the manufacturing processes aforesaid. The applicant and several other holders of rights are engaged in both canning of pilchard and manufacturing fish meal processes. The applicant in fact has adjacent but separate factories for each of these processes at Laaiplek in the Western Cape.

[11] Juvenile pilchard tend to shoal or school with anchovy. As a result juvenile pilchard are frequently caught in nets meant for anchovy. This is known as the pilchard "by-catch" in respect of anchovy. Inasmuch as the shoaling tends to diminish during the period May to August, the exploitation of the anchovy resource tends to have a smaller effect on the pilchard population from the beginning of September as the pilchard by-catch diminishes. As from 1986 provision was made for by-catch as opposed to "directed catch". Directed pilchards are caught when the aim of catching the fish is directed at catching pilchards with nets having openings of 25mm by 25mm, thus allowing anchovy to escape through the openings. Directed anchovies, in turn, are caught with nets with smaller openings, namely 12,7mm by 12,7mm, making it impossible for the pilchard to escape. For practical reasons, related to the difficulty of separating the pilchards from the anchovies when caught in the same net, the by-catch of pilchards is, usually, utilised for fish meal along with the directed anchovies.

[12] Within the boundaries of optimal utilisation of the pelagic resource, bearing in mind the need for its conservation and precautionary approaches to its management and development, a general policy objective has been set to maximise the catches of pelagic species. This is subject to a minimal risk that the resource as a whole may, at any time, be reduced to 20% of the average level of pilchard and 15% of the average level of anchovy, even if there should be no fishing. In this regard human exploitation constitutes only one of the pressures on the pelagic species, which form an important component of the marine ecology. They feed on smaller creatures near the surface of the open ocean, but are themselves a food source for many other fish, birds and marine mammals. They are also subject to other ecological pressures that may have a profound effect on their continued survival.

[13] As may be expected from the operational interaction between catching anchovy and pilchard, the greater the anchovy TAC the greater the juvenile pilchard by-catch. This again affects the recruitment of juvenile pilchard into the adult pilchard population, leading to a reduction in the pilchard-directed TAC. This may be regarded as a biological trade-off between the exploitation of pilchard and that of anchovy. Currently the maximum annual TAC for pilchard-directed catch is in the vicinity of 250 000 tons,

while that of anchovy-directed catch is some 600 000 tons. These limits are flexible, however, and may be exceeded in exceptional circumstances without putting the pelagic resource at any substantial risk.

[14] To maintain stability in the pelagic fishing industry a limit of 20% is set on the maximum amount by which pilchard-directed catch may be reduced from year to year. In addition there is a lower limit of 90 000 tons on that catch. In exceptional circumstances, should the pelagic resource drop to very low levels, these limits may be exceeded. In the case of anchovies the relevant limits are 30% and 150 000 tons.

[15] The policy framework for the pelagic industry is set forth in chapter 1 of the Act, section 2 of which deals with its objectives and principles. Predominant among them is the need to achieve optimum utilisation and ecologically sustainable development of marine living resources (section 2(a) of the Act). This requires consideration of the role and position of the fishing industry in relation to the relevant sector. Equally important is the need to conserve marine living resources for present and future generations and to apply cautionary approaches in respect of the management and development of marine living resources (sections 2(b) and (c) f the Act). This requires consideration of the nature of the resource. Sections 5, 6 and 7 of the Act provide for the establishment, composition and functions of a consultative advisory forum (CAF). More particularly this body advises the second respondent on any matter he refers to it, including issues relating to the total allowable catch (TAC) and the establishment and amendment of operational management procedures (OMPs).

[16] From the Department's point of view the objective is to take account of all the factors set forth above and to integrate them into a flexible and adaptable management strategy that allows for quantification of the TAC for various species and for rights allocations to individual commercial participants. The OMP adopted by the CAF in 1999 (OMP-99) recommended pelagic TACs and by-catch allowances for 2001. The pilchard-directed TAC and by-catch allowance were recommended at the beginning of the year and were not revised. The initial anchovy TAC and pilchard by-catch allowance were revised mid-year after the winter recruitment survey.

EVENTS GIVING RISE TO THE PRESENT APPLICATION

[17] The anchovy fishery concentrates on the winter months because that is when the fish aggregate sufficiently and close enough to the coast to make catching economically viable. Unfortunately that is also the time when the greatest number of juvenile pilchard is found amongst the anchovy shoals. Hence the greater the anchovy catch the greater the pilchard by-catch and the smaller the amount of directed adult pilchard that may be

allowed. This prompted the Department to develop a new OMP (OMP-02) that would take account of the aforesaid problem and of the fact that participants in the pelagic fishing industry prefer either pilchard or anchovy, depending on whether their processing facilities are geared towards canned fish or fish meal production. Central to OMP-02 was that it moved away from a policy in terms of which the Department unilaterally selected an OMP to reflect a particular average pilchard/anchovy mix or trade-off. In its stead it introduced a policy that gave participants in the industry the opportunity to choose their own notional OMP to reflect their desired pilchard/anchovy mix or trade-off. This would then constitute an important component of the data used to develop a mathematical model for calculating the appropriate TAC's and quota allocations.

[18] A significant facet of OMP-02 was that it expressed each participant's right as a proportion of the pelagic fishery as a whole rather than of the TAC for each species separately. This resulted in appropriate individualised quota allocations being made on the basis of an inter-species trade-off and of individually preferred ratios. The rights were allocated as a single percentage of the combined anchovy/pilchard fishery for a four-year period from 2002 to 2005. The development of OMP-02 was based on an additional three years of scientific data and refinements of the interpretation of such data. This means that the data spanned some twenty years, thereby allowing for a more sophisticated understanding of the resource and more reliable mathematical modeling, albeit in a somewhat complex format.

[19] The rationale for the policy shift, according to the first respondent, was threefold. It permitted greater catches of pilchard and anchovy on average without increasing the risk of unacceptable depletion of these two resources. It provided greater stability for the industry. It would reduce the maximal inter-annual TAC decrease for pilchard from 25% to 20% and for anchovy from 40% to 30%. This demonstrated that the decision to revise and implement OMP-02 involved difficult and complex policy matters ranging from optimum utilisation of the pilchard/anchovy resource and the conservation of these species, to the need to apply precautionary approaches in the management of the pelagic fishery. The first respondent was, at all material times, fully aware of the process followed in developing and implementing OMP-02 and approved the rationale and policy considerations underlying it.

[20] It appears that an extended consultative process with all interested parties took place before the

adoption of OMP-02. This included a number of research and communication forums at which participants were duly represented. Professor D S Butterworth and Dr J A A de Oliveira compiled a document describing how single percentage rights for pilchard and anchovy would work and what related changes to the management of the pelagic fishing industry would be required. A supporting affidavit by Professor Butterworth and excerpts from Dr de Oliveira's doctoral thesis on *The Development and Implementation of a Joint Management Procedure for the South African Pilchard and Anchovy Resources* (PhD: University of Cape Town, 2002) were annexed. Likewise annexed were a large number of further documents reflecting the process of development from OMP-99 to OMP-02.

[21] On 20 March 2001 a meeting was held between the Department and the South African Pelagic Fishing Industry Association ("the Association") which represents the interests of holders of pelagic rights. The main aim of the meeting was to confirm that formal communication lines regarding resource management were open between participants in the pelagic industry on the one hand and pelagic scientists and fisheries managers of the Department on the other. In addition it was resolved that a wide front of representation of various sectors of the pelagic fishing industry would, in future, attend meetings of the Industry Sea Fisheries Forum ("INSEF") and the Pelagic Working Group ("PWG") of the Department. A meeting was convened for 13 August 2001 to discuss the revisions to be introduced by OMP-02.

[22] In the meantime an invitation to apply for rights to undertake commercial fishing during the 2002 to 2005 seasons was issued in Government Notice No 1171 dated 27 July 2001 and published in the *Government Gazette* 22517 of the same date. In a departure from previous years pilchard and anchovy were not identified as separate sectors for which rights could be allocated independently. Instead they were combined as a single pelagic sector and applicants were requested to indicate whether they preferred, if successful, to be allocated anchovies or pilchards or both. If they preferred both, they were requested to

indicate what ratio of anchovy to directed pilchard was preferred. They were also asked to state the nominal mass of anchovy, directed pilchard, red-eye and other by-catch that would be fished by the vessel that they had indicated would fish their quota. This was fully consonant with the policy and rationale underlying the newly developed OMP-02.

[23] In completing the application form, the applicant stated that its "target species" were both anchovy and directed pilchard in the preferred ratio of 67:33. This was roughly in proportion to the size of the quotas awarded the applicant in 2001. It was then allocated 10 435 tons of pilchard (including bait of 310 tons), comprising 5,7% of the 2001 pilchard TAC of 182 000 tons, and 17 304 tons of anchovy, comprising 3,8% of the 2001 anchovy TAC of 451 000 tons. If the 2002 pilchard and anchovy TAC should replicate the 2001 TAC, an allocation as requested would be consonant with the respective capacities of the applicant's fish meal (anchovy) and canning (pilchard) plants. During February 2002, when successful applicants were given the opportunity of revising their preferred ratio, the applicant amended its ratio to 65:35. When revised allocations were subsequently made, however, the applicant's ratio was reduced from 65:35 to 52:48 on the basis that a maximum increase of 15% was allowed in respect of the pilchard ratio per applicant. This was ostensibly to prevent the under-exploitation of the anchovy resource over the long term.

[24] The provisional TACs for 2002 were determined in December 2001 on the basis of a report dated 21 December 2001 by Dr G Pitcher, the acting director of research in the Department. In terms of a notice dated 25 January 2002, the Department announced that the provisional TAC for the pelagic fishery had been determined at 393 600 tons for the 2002 season. This was made up of 136 500 tons of pilchard, 222 600 tons of anchovy and 34 500 tons set aside for pilchard by-catch in the anchovy and red-eye sectors. This amount would not form part of the rights. There would, however, be "revisions" of the TAC in February 2002 (pilchard and anchovy) followed by two further revisions (anchovy only) in May 2002. As it eventuated, there was indeed a significant increase in

the TAC of pilchard during May 2002, namely from 136 500 to 257 978 tons. The anchovy TAC increased from 222 600 to 259 726 tons.

[25] The first respondent thereupon considered applications for commercial fishing rights in the pelagic sector during December 2001 and January 2002. He granted medium-term pelagic rights to 91 out of the 187 applicants who applied. Of these 105 were 2001 rights holders and 82 were "potential new entrants". Of the successful applicants 75 had been rights holders in the 2001 season and the remaining 16 were "potential new entrants". In addition he awarded rights to 2 applicants for their own use as bait in order to exploit a commercial fishing right. On appeal a further 19 rights were granted, of which 13 were to 2001 rights holders and 6 to new entrants. This still contrasted significantly with the 161 applicants who had been granted rights in the 2001 season, comprising 52 anchovy rights holders, 77 pilchard rights holders and 32 pilchard bait rights holders.

[26] The process followed in the allocation of rights is contained in the summary of recommendations, considerations and decisions in respect of pelagic fishing rights for the 2002 to 2005 seasons. The first respondent has summarised it as follows. After converting the 2001 separate allocations of pilchard and anchovy to a single percentage for both species combined, the smaller 2001 rights holders had their percentages increased to a minimum single percentage of about 0,3% of the combined pilchard and anchovy fishery, in order to ensure greater economic viability. New entrants were initially allocated about 0,3% each. A further 0,3% was set aside for allocation to persons who catch pelagic fish for their own use as bait. The combined percentages were then adjusted *pro rata* 90% to yield 10% for appeals and the reserved decisions. The preferred pilchard/anchovy ratio based on the information contained in their applications and subsequently revised was subsequently determined for each rights holder.

[27] The quota or share of the TAC for each rights holder was calculated in accordance with the formula prescribed by OMP-02. In this regard the first respondent relied heavily on the expertise of Professor Butterworth and chapter 5 of Dr de Oliveira's aforesaid thesis (par 20 above), in which the mathematical aspects are dealt with comprehensively. Dr de Oliveira prepared a series of calculations reflecting slightly larger minimum allocations to the smallest rights holders with a view to reducing "paper" quotas. His calculations resulted in a range of quantification options of which the first respondent selected the one that accorded most closely with this objective. This was explained by Professor Butterworth at a forum of rights holders held on 6 February 2002, subsequent to an exchange of documentation indicating confusion among rights holders as to exactly what was expected of them and what allocations they should anticipate.

THE GROUNDS OF THE APPLICATION

[28] In his founding affidavit Mr J A van Niekerk, the chief executive officer of the South African fishing division of the applicant, was stridently critical of the method of allocation proposed for 2002 to 2005. He averred that the first respondent had not personally arrived at the results of the decision but had relied entirely on Professor Butterworth's calculation. Any error or misunderstanding by Professor Butterworth of the relevant facts or of the industry and the relative commercial values of pilchard and anchovy had been "built into" his programme or formula without the first respondent even being aware of it. This was, in Van Niekerk's opinion, "fundamentally wrong in that it does not take into account the realities of the fishing industry, nor the relative commercial values of the pilchard and anchovy catches". Applicants could not be expected to know what their share of the pilchard and anchovy TACs would be and they could not calculate a reliable value of such rights.

[29] When the various applicants applied for rights in the pelagic fishing industry the first respondent had not, according to Van Niekerk, made his intention clear nor had he clarified the position in subsequent explanations appearing from the relevant documentation. The applicants had, therefore, completed their application forms without the benefit of any explanation or guidance as to the significance of the preferred ratio. They were likewise ignorant of the way in which the amounts of the allocations in the pelagic sector would be determined or how it would be divided among the various pelagic species. In any event on 13 September 2001, the final date for submission of applications for the 2000 to 2005 rights, there was as yet no indication of what the TAC for the pelagic sector, or for pilchard or anchovy as such, would be.

[30] When the implication of the new ratio became known, Van Niekerk stated, almost all the rights holders applied for an amendment of his or her ratio by providing for larger percentages of pilchard. This was necessary, he suggested, because, whatever the first respondent's intention might have been, it had not been achieved and the result was inequitable. To add high volume anchovy rights and low volume pilchard rights of various rights holders, and then to divide the total tonnage of both species by the total

tonnage of each of the rights holders, single percentages for each rights holder were created based purely on tonnage. This did not take into account the respective commercial values of the species or the unusual nature of the 2001 season.

[31] According to Van Niekerk the applicant "initially chose the ratio between the species without at the time fully understanding the implications of the proposed allocation process". This gave rise to inequity and "a distortion of the rights as ultimately granted, when compared to the 2001 rights". It was not taken into account that a rights holder with a large anchovy tonnage was awarded a larger percentage of the total pelagic TAC than would have been the case had the species been treated separately or the relative commercial values taken into account.

[32] In this way, Van Niekerk averred, the holder of rights with a high tonnage in anchovy would be awarded a larger percentage of the total than would have been the case in previous years. Thus the Lamberts Bay Fishing Company (40threspondent) in 2001 had a 0,0057% share of the allocated rights to pilchard and received only a 10 ton bait right to pilchard alongside its 8,4% (37 523 tons) of the allocated rights to anchovy. In 2002, however, it was allocated 3,9% (4 674 tons) of the allocated pilchard rights (later revised upward to 4,1% or 9 508 tons) and 6,8% (14 133 tons) of the allocated anchovy rights (revised to 6,7% or 16 224 tons). Similarly South African Sea Products Limited (73rdrespondent) went from 1,0% (1 713 tons) of allocated pilchard (bait) rights to 3,7% (8 622 tons) of allocated pilchard rights. Neither of these respondents, however, had their own pilchard canning factories.

[33] The applicant, by contrast, received a single percentage pelagic fishing allocation of 4,15689%. According to Van Niekerk this means that it lost a significant percentage (1,1%) of the pilchard rights allocation between 2001 (10 435 or 5,7% of the allocated pilchard TAC) and the revised allocation of 2002 (5 524 tons or 4,6% of the allocated pilchard TAC). It made a material gain (1,3%) in the anchovy rights allocation between 2001 (17 304 tons or 3,8% of the allocated anchovy TAC) and 2002 (10 509 tons or 5,1% of the allocated anchovy TAC). This represented a loss of some R6 million on pilchard and a gain on anchovy of approximately R500 000,00. In his affidavit Professor Butterworth queried these figures and pointed out that the applicant's actual pilchard allocation had in fact increased from 10 435 tons in 2001 to 10 832 tons in February 2002. This constituted a small increase and could not justify an alleged loss of R6 million. The anchovy figures did demonstrate a slight reduction from 17 304 tons in 2001 to 15 648 tons in 2002, but this constituted an increase of 0,6% in its share of the anchovy TAC for 2002. Van Niekerk, however, persisted with his allegation in his replying

affidavit on the basis, it would seem, that the loss represented the difference between the applicant's projected income under the separate percentage system as opposed to the combined single percentage system. In this regard it had to be borne in mind that the TAC for pilchard increased substantially in the period 2001 to 2002. As a result all successful applicants were rewarded with an increased actual allocation.

[34] The appeal procedure, according to Van Niekerk, was neither practical nor feasible as a means of remedying this situation and was, in general, a protracted and time-consuming process. The only way in which the first respondent's erroneous computation of allocations could be rectified was by requesting this court either to effect the rectification *mero motu*or to refer it back to the first respondent for a corrected decision.

[35] In effect the applicant seeks with this application to restore the previous situation in terms of OMP-99 by granting separate percentages for pilchard and anchovy fishing rights. It has indicated a preference for this court to effect the necessary correction rather than for the first respondent to reconsider his decision. In this regard Van Niekerk suggests that the correction is a simple one and so apparent that there is no need for further consideration thereof. If the court should correct the decision the matter would be resolved forthwith, whereas if the first respondent should be given a further opportunity to consider the matter he might well make a decision that subsequently requires further review. To assist the court the applicant has prepared a revised decision with amended annexures and schedules on the basis of separate percentages for pilchard and anchovy.

SUBMISSIONS ON BEHALF OF THE APPLICANT

[36] Mr Burger argued on behalf of the applicant that the reduction in the applicant's share of the provisional 2002 pilchard TAC, as well as the way in which this TAC was actually distributed, was arbitrary and grossly unreasonable. It indicated inherent flaws in the process used to allocate pilchard and anchovy rights to successful applicants for the 2002 to 2005 seasons. This was illustrated by the opportunity given to successful applicants to revise their preferred ratio of pilchard and anchovy and also by the "compromise preferred ratio … imposed by the Department in the course of doing running repairs on its allocation system mid-season". This was in conflict with the

Department's professed intention no longer to impose the trade-off between pilchard and anchovy catches "externally" but to leave it to the rights holders to decide for themselves.

[37] Mr Burger submitted that the main error in the allocation process related to the decision to commence computation of the quantum to be awarded to 2001 rights holders by calculating their percentage of the combined anchovy/pilchard TAC in 2001. Allied to this was the first respondent's failure, when computing the equivalent single percentage right ("ESPR"), to take into account factors such as the respective sizes of the pilchard and anchovy TACs in 2001 and the relative commercial value of these species, namely 5:1. To make matters worse, Mr Burger argued, the first respondent had not himself made the relevant decisions, but had "impermissibly delegated his functions". In this regard the allocation process was fundamentally flawed in that the applicants were not given the requisite information when completing their application forms. This resulted in the need to amend the preferred ratios, a power that the first respondent did not have. In any event he did not even use such amended preferred ratios, but imposed "an artificial preferred ratio" on applicants.

[38] With reference to the *Promotion of Administrative Justice Act* of 2000 ("PAJA") Mr Burger contended that the 2002 to 2005 allocation should be set aside because it was arbitrary, not rationally connected to the information before the decision-maker and grossly unreasonable (sections 6(2)(e)(vi), (f)(ii) and (h))). In addition the decision-maker took critical parts of the decision without authorisation, failed to take into consideration all relevant factors and acted beyond his powers in determining the final allocations (sections 6(2)(a)(i) and (ii), (e)(iii) and f(i)). Finally the decision was procedurally unfair (section 6(2)(c)). The respondents' denial of these allegations, through Professor Butterworth, was, Mr Burger submitted, bare, cryptic and unsustainable. It did not appear from the relevant documentation appended and fell to be rejected on the papers. In the alternative, he suggested, the matter should be referred to oral evidence.

[39] Much of the further argument was directed at illustrating the alleged arbitrariness, unreasonableness and substantive unfairness of the 2002 allocation of pelagic fishing rights, demonstrating that the first respondent had failed to apply his mind. Once again Mr Burger was critical of the combined 2001 pelagic TAC being the starting point of the calculation of the 2002 rights. In addition the first respondent had ignored the unusually high 2001 anchovy TAC and the fact that pilchards were five times more valuable than anchovies. He had likewise given no recognition to the resources, capacities and facilities

of the various applicants nor had he taken into account their previous pilchard rights or past performance in relation to a particular pelagic species. Applicants desirous of increasing their share in the more lucrative pilchard market could do so irrespective of their resources or the prejudicial consequences to existing pilchard rights holders such as the applicant.

[40] The inherent arbitrariness of the 2002 allocation, Mr Burger suggested, could be seen in the decrease of the applicant's share in the pilchard TAC from 2001 to 2002, in contrast with the shares allocated to other rights holders in the same period. In this regard he compared the applicant's unjustifiably decreased share with the enormously increased share of the Oceana Group, the Lamberts Bay Fishing Company Ltd and South African Sea Products Ltd. Although the applicant's plight was ameliorated by the revised allocations of May 2002, the final pelagic quotas still revealed striking anomalies, particularly when comparing that of the applicant with those of Lamberts Bay and SA Sea Products aforesaid. This, Mr Burger submitted, could not be reasonably or logically justified.

[41] Mr Burger took note of the reluctance of our courts to become involved in issues of policy, particularly where it relates to the development and application of a highly technical and complex system. The applicant was not, however, asking the court "to tinker with a mathematical formula or correct an improper balancing of applicable considerations". Its review was directed at setting aside the results of the allocation process because they were unreasonable and unjustifiable, and reflected a failure by the first respondent to consider all relevant factors.

[42] On the issue of procedural unfairness Mr Burger submitted that the applicant had not been informed of the nature of the allocation process at the time it completed its application form. Only during 2002 was an explanation forthcoming, long after the application had been submitted. This, he argued, was procedurally unfair.

[43] Another argument raised by Mr Burger was that the first respondent had not taken the relevant decision himself, but had abdicated his responsibility to the experts who devised that various mathematical formulae and models. In any event the final allocation of pilchard and anchovy during May 2002 was *ultra vires* powers in that he was, by that time, *functus officio*and did not have the power to request applicants to amend their preferred ratio. This could only be done on appeal to the second respondent.

[44] In the result Mr Burger requested this court to substitute its own decision for that of the first respondent. More particularly he asked that it substitute any reference to single percentages and preferred ratios in the general reasons relating to the distribution of TAC amongst successful applicants, with separate percentages for pilchard and anchovy and with the allocation method employed in the 2001 season. This was a logical, simple and practical way of resolving the difficulties that had arisen from the new

system. In the alternative the allocations should be set aside and the matter referred back to the respondents for a fresh determination. In the further alternative it should be referred to oral evidence on the main issues set forth above.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

[45] On behalf of the respondents Mr Duminy submitted that the relief sought by the applicant was certainly novel and far-reaching. It was also incompetent. On the one hand it was requesting the court to set aside a portion of the first respondent's decision that could not be regarded as administrative action. On the other hand it required that the court replace it with the applicant's own effort to determine an appropriate allocation of rights in the pelagic fish industry. In the process it was suggesting that the court usurp the functions of the respondents while disregarding their expertise in a policy-laden and polycentric issue.

[46] By way of introduction Mr Duminy sketched the statutory scheme in the context of which the present application falls to be determined. He emphasised that the primary purpose of the Act, as it appears from its long title, is to provide "for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all citizens of South Africa". In this regard he highlighted the objectives and principles of the Act (par 15 above), pointing out that section 2 of the Act does not require the functionary to have regard to all relevant consideration in each case. Nor does it prescribe how the various considerations, which are not exclusive, must be balanced against one another.

[47] With reference to section 33(1) of the Constitution, which requires all administrative action to be "lawful, reasonable and procedurally fair", Mr Duminy adverted to the standard of review emanating from the common law and sections 3 to 6 of PAJA. He submitted in this regard that the subject matter of the administrative action and the context within it is assessed is of the utmost importance. He stressed that the decision-maker has a wide discretion in striking a balance with a view to furthering the objectives and principles of the Act. A court must hence be reluctant to intervene in the legitimate activities of administrative bodies on review. It must also take care that it does not blur the distinction between review and appeal by considering that a different decision might have been simpler, or even better.

[48] Mr Duminy then dealt systematically with each of the various grounds of review raised by the applicant. In the process he raised certain incorrect averments made by the applicant. Among them was the repeated statement that the first respondent had not taken

into account the difference in value between pilchard and anchovy. Mr Duminy pointed out a passage in the first respondent's affidavit where it was specifically mentioned that canned pilchard commanded a higher price than anchovy, the ratio being as much as 5:1. It was to be expected that the commercial fishing industry would prefer the higher valued species at any given time, provided they have the necessary facilities to process it.

[49] Mr Duminy stressed that OMP-02 moved away from a departmental policy of unilaterally selecting an OMP to reflect a particular average pilchard and anchovy mix or trade-off and introduced one in accordance with which participants could choose their own notional OMP to reflect their preferred ratio of pilchard and anchovy. This was a policy shift involving significant inputs by all interested parties, including scientists with special expertise and experience. In this regard it involved difficult and complex policy issues. It also involved a discretionary act of the first respondent, as delegate of the second respondent, directed at striking a balance in furtherance of the objectives and principles of the Act. It was clear from the first respondent's affidavit, as supplemented by that of Professor Butterworth, that this purpose had been achieved in a rational and logical way, in accordance with carefully formulated mathematical modelling and in accordance with well researched scientific data. The researchers had in fact applied a technique widely used in international and national scientific agencies throughout the world.

[50] Mr Duminy underlined Professor Butterworth’s statement that harvest control laws were an integral component of any OMP. In the case of South African pilchard resources, they served to specify the ratio between the TAC and the estimate of resource abundance provided by a research survey conducted every November, and aimed to ensure that pelagic resources remain above a certain fraction of what the average levels would be in the absence of human exploitation. The formulae chosen in this regard involved a combination of policy, marine biology and applied mathematics. They have been extensively simulation tested, peer reviewed and developed to give effect to the first respondent’s decisions and to furnish him with a means to implement them by making individualised allocations of rights in the pilchard and anchovy sectors of pelagic fishery. They have, in sum, been designed to give expression to and accommodate the range of variables that play a role in the management of the resource, in accordance with the policy choices made in developing and implementing OMP-02. This, submitted Mr Duminy, was both apposite and correct. In the process it rendered the OMP robust, stable, adaptive and characterised by the ability to self-correct over time.

[51] In view hereof, Mr Duminy submitted, it was clear that the first respondent had been well aware of the respective anchovy and pilchard quotas in 2001 and of the fact that pilchard has a greater commercial value than anchovy. This was reflected in the patterns of exploitation followed by participants in the pelagic fishing industry.

[52] Mr Duminy submitted further that the applicant has apparently misunderstood the way in which the equivalent single percentage right (ESPR) is calculated and has suggested no viable alternative to the 2001 TAC as a starting point for the allocation process. The applicant simply does not agree with the policy decision to deal with the

pelagic sector by means of a single percentage right and wishes to revert to the previous system.

[53] Regarding the applicant's suggestion that the first respondent had impermissibly delegated his decision-making power to the persons who had made the calculations, Mr Duminy submitted that the first respondent had indeed made the relevant decision by selecting one out of a number of quantification options presented to him by the researchers. Whilst consulting Professor Butterworth and others, it was he who finally took the decision that the applicant seeks to set aside on review.

[54] On the allegation that the applicant and other participants had been given insufficient information regarding the new policy, Mr Duminy pointed out that the documentation available to the applicant and such participants made it quite clear what was envisaged. And anyone who did not understand anything could simply have asked for guidance or information. The S A Pelagic Fishery Association took the trouble, prior to the deadline for submitting applications, to ask for guidance in completing the application form and received a response within days.

[55] Much of the information that was furnished to successful applicants at the forum for rights holders on 6 February 2002 (par 27 above) had become available only after their applications had been submitted. That is why they were given the opportunity to amend their preferred ratios. There was no question, Mr Duminy submitted, of any requirements in this regard.

[56] Mr Duminy concluded his argument by submitting that complexity was not a ground for review, nor was simplicity a requirement for valid administrative action. Where policy and other factors requiring consideration are multifaceted and complex in themselves, it is clearly desirable that the management system should deal with that complexity, rather than ignore or deny it. It is certainly not a basis, he argued, for this court to substitute its own decision for that of an administrative authority.

CONSIDERATION OF THE GROUNDS OF REVIEW

[57] The applicant has attacked the first respondent's decision on both common law and statutory grounds, many of which overlap. The common law grounds have in fact become subsumed under the Constitution, Act 108 of 1996, from which they draw their force and with which they are inextricably intertwined. This has been pointed out with great lucidity in *Pharmaceutical Manufacturers Association of South Africa and Another; In Re Ex Parte President of the Republic of South Africa and Others*2000 (2) SA 674 (CC) at 692 (par 33).

[58] The common law grounds raised by the applicant include the traditional ones of arbitrariness and unreasonableness (irrationality) of the decision in question, failure of the first respondent to apply his mind properly to the relevant facts and circumstances and *ultra vires*conduct in making his decision. The statutory grounds relate to section 33(1) of the Constitution, in that the decision constituted administrative action that was not "lawful, reasonable and procedurally fair". They also relate to certain provisions of section 6(2) of PAJA (par 38 above) on the basis that the decision was arbitrary, grossly unreasonable and procedurally unfair, while the first respondent, as decision-maker, acted without authority and beyond his powers in making the decision and determining the final allocations.

[59] These are serious allegations to make against any decision-maker burdened with the responsibility of implementing the policy-laden and polycentric objectives and principles of the Act (par 15 above). If they should be correct, the decision would have to be overturned and the decision-maker would probably be held incompetent to exercise the duties and functions adhering to his office. By the same token such allegations should not be made unless they are based on proper and justifiable grounds. It is obvious that this court, in reviewing the decision and the conduct of the decision-maker must take careful, and indeed meticulous, cognisance of all the relevant facts and circumstances in the context of the applicable legal principles and statutory provisions.

[60] Mr Burger quite correctly conceded (par 41 above) that our courts are reluctant to become involved in issues of policy, particularly when such policy relates to the development and implementation of a highly technical and complex system. In *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* (3) SA 265 (CC) at 292 (par 87) Chaskalson CJ stated this approach even more widely when he said:

> The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, Courts would not interfere with the decision.

[61] This *dictum*was quoted with approval by Schutz JA in a recent case emanating from the Supreme Court of Appeal, namely *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* [2003] 2 All SA 616 (SCA) at 631i-632*b*(par 46). The learned judge of appeal

proceeded to point out (par 47 at 632*b-c*) that the decision-maker in that case had a wide discretion to strike a balance in furtherance of the objectives and principles of the Act. In such capacity he gave effect, to a large extent, to government economic policies. Under such circumstances judicial review called for deference. Schutz JA referred in this regard to *Logbro Properties CC v Bedderson NO and Others* (2) SA 460 (SCA) at 471A-D (par 21 and 22), where it is stated that a judicial officer must demonstrate:

> … a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for - and the consequences of - judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal [quoted from Hoexter, par 64 below, at 501-502].

[62] After quoting further *dicta*from *Du Plessis and Others v De Klerk and Another*1996 (3) SA 850 (CC) at 931J-932B (par 180) and *S v Lawrence; S v Negal; S v Solberg* (4) SA 1176 (CC) at 1195G-1196E (par 42), Schutz J A concluded (at 633*e*par 50):

> Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary.

The learned judge of appeal supplemented this at 634*d* (par 53):

> Judicial deference is particularly appropriate where the subject matter of an administrative action is very technical or of a kind in which a court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds.

[63] As in the present case, Schutz JA was called upon to consider allegations that the decision-maker had acted arbitrarily, capriciously or irrationally. In this regard the following passage from his judgment is, with respect, extremely appropriate when considering the similar allegations in the present case (633*fa*par

51):

> The respondents' complaint is that in reaching his decision the Chief Director acted arbitrarily, capriciously or irrationally. But in pressing for what would be to the advantage of the respondents they show little concern for the interests of others, or the benefit of the public as a whole. This is not an approach that should or may be adopted by the Chief Director. He is obliged to have regard to a broad band of considerations and the interests of all that may be affected. If the Chief Director had indeed acted in accordance with the respondents' prescriptions one may imagine the fate of a review application brought by the "pioneer" companies, they pointing to trawlers rusting by the quayside, the one-time crewmen lounging in the streets and the fishing nets, like the regimental colours, laid up in the cathedral, the "pioneers" in consequence complaining of capricious action. The Chief Director's decision is indeed a polycentric one. And in deciding whether his decision is reviewable it should be remembered that even if the respondents had succeeded in proposing what to my mind would be a better solution than that adopted by him (they did not attempt to do so), it would not be open to me to adopt it, for the reason stated by Chaskalson P in *Bel Porto*above at 282F-G paragraph [45]:
>
> > "The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable."

In similar vein is *Pharmaceutical Manufacturers Association of South Africa and Another; In Re Ex Parte President of the Republic of South Africa and Others* (2) SA 674 (CC) at 709D-H (par90).

[64] Simply to suggest that the decision-maker is "wrong", Schutz JA opined (at 634*b*par 52), was the language of appeal and not of review. This is the word that is invariably used when the substance of the decision, and not the procedure by means of which it was made, is under attack. In this regard he quoted with approval from Hoexter *The Future of Judicial Review in South African Administrative Law* (2000) 117 *SALJ*484 at 485:

> The important thing is that judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision, and thus obliterate the distinction between review and appeal.

[65] When these principles are applied to the facts in the present matter, despite Mr Burger's persuasive arguments to the contrary, it is clear that the applicant has done exactly what Schutz JA has said it should not do. It has attacked the first respondent's

decision because, in its view, it is wrong and should never have deviated from the previous formulae in terms of which pelagic fish allocations were made. It has suffered potential damage because of what it believes to be a diminution of the quantum of TAC for pilchard it should and would have received under the single percentage system. It has demonstrated little or no sensitivity to the interests of other participants or to the public at large or, for that matter, to the objects and principles of the Act within the context of the relevant policy framework (par 15 above). It is difficult to escape the conclusion that the present application is no more than an appeal disguised as a review.

[66] There is no merit whatever in the suggestion that the first respondent did not apply his mind in making his decision or that his decision was arbitrary, unreasonable or procedurally unfair. I have carefully studied the facts and circumstances set forth in the papers and various documents attached thereto, and have listened with great interest to the respective arguments presented by the parties. After serious consideration thereof I have come, inevitably, to the following conclusions.

[67] Quite clearly the first respondent went to a great deal of trouble, within the policy framework of the Act and with a view to achieving its objects and adhering to its principles, to develop the new system set forth in OMP-02. He made use of expertise of the highest order, as represented by Professor Butterworth and Dr de Oliveira, in considering the benefits of a combined single percentage ratio for pelagic fish as opposed to the existing separate percentages for the various species used hitherto. There was certainly nothing arbitrary or unreasonable in doing so and he must have applied his mind vigorously simply to grasp the recommendations made by the experts and to make them his own. At no stage was it suggested, in the papers or in argument, that he was not at all times acting with the utmost good faith in considering the complex mathematical formulae placed before him and in eventually making his decision as to which of various options he should accept.

[68] This is indeed one of those cases in which due judicial deference should be accorded to a policy-laden and polycentric administrative act that entails a degree of specialist knowledge and expertise that very few, if any, judges may be expected to have. Certainly I would not presume to have the kind of technical proficiency required for a full understanding of the complex processes, mathematical and otherwise, involved in developing and implementing a system such as that envisaged by OMP-02. Yet, despite these constraints, the reasoning behind the decision, in its historical and environmental context, appears to me to be eminently rational and logical. It may well be that the former

system, as contained in OMP-99, is equally rational and logical - and quite clearly it worked from 1984 to 2001 - but that does not entitle this court to make a choice which is pre-eminently within the domain of the first respondent. As the delegate of the second respondent, being the responsible Minister, he is fully empowered to make decisions such as that under attack in the present application.

[69] There is no merit in the suggestion that the first respondent did not himself make the relevant decision but simply left it to Professor Butterworth, or other officials in the Department, to make it. The first respondent made it quite clear that the decision was his and his alone. And in making that decision he undoubtedly took into account the realities of the fishing industry and the relative commercial values of pilchard as opposed to anchovy. Not only does this appear from the relevant documentation, but the first respondent also confirms it under oath. It was never suggested that his credibility should be questioned.

[70] The suggestion that the opportunity given to successful rights holders to amend their preferred ratio of pilchard and anchovy was indicative of the first respondent's realisation that the new system was not feasible or effective, must be rejected. It had nothing to do with the feasibility or effectiveness of the new system, but was simply a concession made to rights holders, who might have misunderstood the consequences of their selection of a preferred ratio, to remedy the situation. The applicant availed itself of this opportunity and it must be accepted that it knew full well what it was doing when it did so.

[71] The allegation that the decision was procedurally unfair must likewise be rejected out of hand. Preparatory talks commenced as early as March 2001 (par 21 above) and culminated in the forum held on 6 February 2002 (par 27 above). The documentation made available to applicants spelt out in detail what the new system would be and how OMP-02 would be implemented (see par 17-18 above). The rationale for the policy shift (par 19 above) and the process followed in making the allocation (see par 26 above) was carefully and logically explained. There was no reason why the applicant, or any other participant, could not seek information on any aspect causing misunderstanding. This was certainly done by the SA Pelagic Fishing Industry Association (par 21 above) and any interested party could have followed suit, or could even have approached the Association after its meeting with the Department and subsequent change of correspondence.

[72] I have some difficulty in understanding that the first respondent acted beyond its powers (*ultra vires*) in exercising its powers (par 38 and 43 above). The suggestion that he was *functus officio* the time he made the final allocation during May 2002 is without any substance. He was, at all relevant times, acting within his powers and authority. This included the right to amend the TAC and to revise allocations already made.

{73] Even if the applicant should have succeeded in making out a case requiring

reconsideration of the allocations on the basis suggested by it, I agree with Mr Duminy that it could never be the function of this court to make new allocations on the basis of the restored OMP-99.

CONCLUSION

[74] It follows from the above that the applicant has failed to substantiate a review of the first respondent's decision on any of the grounds alleged by it. The application must, therefore, be dismissed.

[75] In the event I make the following order:
The application is dismissed with costs, including the costs of two counsel.

D H VAN ZYL

Judge of the High Court of South Africa