REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO : 1539/ 2003

In the matter between:

SCENEMATIC FOURTEEN (PTY) LIMITED Applicant

and

THE HONOURABLE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM First Respondent

THE DEPUTY DIRECTOR GENERAL: DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM Second Respondent

JUDGMENT: DELIVERED ON 12 DECEMBER 2003

2.On 28 February 2003 the Applicant applied, on review, to set aside the decision, first, of Second Respondent in terms whereof, acting in terms of section 18 of the Marine Living Resources Act, Act 18 of 1998 ("the Marine Act"), no commercial fishing rights in the hake long line sector of the fishing

industry for the 2002 to 2005 season were allocated to the Applicant; and second, the decision of the First Respondent on appeal, acting under section 80 of the Marine Act, in terms whereof he dismissed Applicant's appeal against this decision of the Second Respondent.

3.BACKGROUND

4.In setting out the factual background to his matter I have relied heavily on the thorough and lucid exposition thereof in the helpful heads of argument drafted by Mr. Burger SC and Ms. Davis on behalf of Applicant.

5.During 1994 to 1998 hake long line fishing was only permitted as a controlled experimental fishery. A limited number of experimental allocations of hake was made. The first allocation of hake long line rights for commercial purposes took place in 1999 for the 1999 fishing season by the then Fisheries Transformation Council which allocated 7 770 tons of hake out of the total of 8 400 tons available to it for distribution.
6.This allocation was challenged on review and subsequently set aside.
7.In May 2000 the hake long line allocations for the 2000 fishing season were announced and 43 applicants received allocations. Appeals were lodged against this allocation and 131 appellants were successful in this regard. The Applicant was one of these successful appellants.
8.In November 2000 two review applications were heard in respect of these appeal allocations both of which succeeded and the appeal decisions were set aside.
9.A further application was brought in which an order was sought that the Court make an order directing the State Respondents to reconsider the appeals and to reallocate the hake reserved for the appeal process within a specific period.
10.The State Respondents opposed this relief. Applicant drew the court's attention to a statement made by Second Respondent an affidavit in that matter that "**The best that can be done is that the abovementioned Respondents undertake to use their best endeavours to deal with the appeals as expeditiously as possible, and I hereby give such an undertaking on behalf of all three of the said Respondents**".

11.No new applications for hake long line rights were entertained in 2001. First Respondent exercised his power in terms of section 18(6)(A) of the Marine Act to extend the validity of the hake long line rights granted in 2000 for the 2001 season ("the roll over"). The roll over pertained only to the 43 allocations of rights in terms of section 18 of the Marine Act and did not include the appeal allocations which had been set aside and had not been reconsidered.
12.The roll over of hake long line rights in 2001 and the impending allocation of medium terms rights for 2002 to 2005 made it crucial for those formerly successful appellants, whose 2000 allocations had been set aside, that their appeals be reconsidered in order that they might, if successful a second time around, participate in the roll over and be treated as existing rights holders in the 2002 to 2005 allocation.
13.The appeals were in fact never reconsidered apparently because it was decided in May 2001 that a reconsideration would be futile given the fact that the medium term rights allocation process was imminent.
14.On 27 July 2001 the First Respondent published in Government Gazette number 22517 the Policy Guidelines with regard to applications for the granting of rights in terms of the Marine Act ("the Policy Guidelines"). Applications for fishing rights in the various sectors for the 2002 to 2005 seasons were simultaneously invited.
15.The closing date for the submission of applications for hake long line rights for 2002 to 2005 was 13 September 2001.Applicant lodged its application for HLL rights for 2002 - 2005 on 11 September 2001.
16.On 21 December 2001 the hake long line allocations were announced. Second Respondent released to the media a document entitled "Allocation of Rights and Quantum in the Hake long-line Fishery and General Reasons for those Decisions"("the General Reasons").
17.Applicant was formally notified in January 2002 by means of a letter from the Department that its application for a hake long line right had been refused.
18.On 24 February 2002 Applicant lodged an appeal in terms of section 80 of the Marine Act against the refusal of its application for a hake long line right.
19.On 9 August 2002 Second Respondent compiled the requisite regulation 5(3) report in respect of Applicant's aforementioned appeal.
20.On 12 August 2002 First Respondent took the decision to reject Applicant's appeal.
21.On 26 September 2002 First Respondent gave Applicant written notice of this rejection.
22.On 28 February 2003 Applicant issued the Notice of Motion in the present review application and served the application on the State Respondents. Originally these proceedings included reviews of the decisions by Second Respondent to allocate hake long line fishing rights to 3rd to 143rd Respondents as well as First Respondent's decisions on appeals made by these Respondents against the Second Respondent's decision. Consequent

upon a settlement agreement between Applicant and 3rd to 143rd Respondents, this relief sought by Applicant that related to their fishing rights (including the decisions of both First and Second Respondents) was withdrawn.
23.The review application was set down for 13 March 2003 on which date a *rule niisi* with a return date in respect of the review together with procedural directions pertaining to the delivery of the rule 53 record, service on further respondents and the filing of further affidavits was made.

24.DELAY

25.The first assault on the application made by the Respondents was that Applicant failed to meet the 180-day deadline for the institution of review proceedings imposed by section 7(1) of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA"). This section provides that:

> **26." 7 (1) Any proceedings for judicial review in terms of section 6 (1) must be instituted ` without unreasonable delay and not later than 180 days after the date-**
>
> **(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or**
>
> **(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."**

It was common cause that sub-section (b) was applicable by virtue of the Applicant's appeal to First Respondent I terms of section 80 of the Marine Act which constituted the internal remedy contemplated by section 7(1)(b).

Applicant contended that, for the purposes of section 7(1)(b) of PAJA this internal remedy was concluded, not on 12 August 2002 when the First Respondent made his decision to dismiss Applicant's appeal, but on 26 September 2002 when the First Respondent sent a letter to Applicant informing them of the fact that their aforementioned appeal had been dismissed. Respondent, on the other hand, whilst not arguing that the appropriate date

was 12 August 2002, contended that this appeal was concluded some time earlier than 26 September 2002, viz. on 20 August 2002 when one Shamera Adams, a former employee in the department, sent an email **"to all addresses on MCM's mailing list of persons interested in the hake long line sector"** allegedly notifying them of the appeal results. This email, so it is contended, constituted notice to Applicant of the refusal of its appeal to the First Respondent and that the institution of the review proceedings on 28 February 2003 accordingly fell outside the prescribed 180 days period which, on the basis of this contention, ended some 11 days prior thereto on 17 February 2003.

It was not contended by Respondents that even were it to be found that the review application were brought within the 180 day period in terms of section 7(1)(b) that Applicant had in any case delayed unreasonably in bringing such proceedings. This was an argument advanced by the other Respondents however as a result of the Applicant's withdrawal against these Respondents it is not necessary to consider this contention.

The word "conclude" in section 7 (1) is not defined in the Marine Act and no reason was put up by either side why it should not be given its normal and ordinary meaning.

It was contended by Applicant that the ministerial appeal concluded, not when he decided the appeal, but when Applicant was notified of this refusal. (See **Clan Transport Co. (Pty) Ltd. and others v. Road Services Board and Others** 1956 (4) SA 26 (SR) at 28H-29C and **Leyds N.O. v. Simon** 1964 (1) SA 377 (T) at 383C.)

The correctness of this principle was not seriously challenged by Respondents and, and in my view, correctly so. The common law position has always been that an Applicant in review proceedings is required to bring such proceedings within a reasonable period of time and that this period is determined either by the statute concerned or by the court in the exercise of its discretion having regard to all of the facts of the matter. (See **Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad** 1978 (1) SA 13 (A) at 39 *prem*- D) The rule is an expression of the principle *interest reipublicae ut sit finis litium.* (See **Sampson v S A Railways & Harbours** 1933 CPD 335 at 338; **Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad** *supra* in which Miller JA delivering the majority decision stated **"Dit is wenslik en van belang dat finaliteit in verband met geregtelike en administratiewe beslissings en handelinge binne redelike tyd bereik word."** at 41 D-F) furthermore it is **"niks meer as 'n prosesregtelike reel nie."** (**Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad** *supra* at 45 G-H).

This is bolstered by the provisions of section 9 of PAJA which allows the court to extend this 180 day period referred to in section 7(1) **"…where the interests of justice so require."** (See section 9 (2) of PAJA.).

These considerations must govern the court's determination of the dispute between the parties as to whether this application should be refused for delay reasons alone.

The email on which Respondents relied by the Respondents is informative.

There are several matters that are immediately noteworthy;

1. There is nothing on the copy of the email annexed to Ms Adam's affidavit that informs the court who sent it. In her affidavit she does however state that she sent it and she states further that at the time she was employed by the Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management. She does not state the capacity in which she was so employed;

2. According to Ms Adams the email was sent **"to all addresses on MCM's mailing list of persons interested in the hake long line sector"** and that one of these addresses was Mr. Arnold Slater **"...the Applicant's authorized principal contact person and representative."**;

3. The email appears to have contained two attachments. The one was a document entitled **"Decisions on Hake Long Line Appeals"** and the other an annexure "A" to this document entitled **"Successful Appellants: Hake (Longline) 2002)"** containing a list of 26 names;

4. The former document consisted of 3 paragraphs, the first and third are formal in content and the middle states:

> "On appeal, the Minister allocated 1 795 tons to successful appellants. See Annexure A attached hereto. The Minister reserved his decision in

respect of three appeals (Jaffa's Bay Fishing CC, S Achmad and R Poggenpoel CC). The hake long line sector is a sector which is significantly transformed.";

Neither First Respondent nor Ms Adams inform the court of the reason for this email being sent out, however, in her affidavit she states that, "**…the First Respondent's decision together with annexure "A" were e-mailed to all employees of MCM who might have needed to know of the allocation, including Allan Robertson, the then Project Manager in the employ of MCM and inspectors at the various MCM inspectorate offices throughout the country.**"

This appears to explain why the two documents report on and contain a list of the successful appellant's and the tonnages allocated to them because the MCM employees, particularly the inspectorate, would need this information for purposes of determining whether any such persons had acted in contravention of the Marine Act.
This email informs the reader of the fact that the First Respondent allocated 1 795 tons to the 26 successful appellants listed in annexure "A". Whilst one of the logical corollaries (arguably the most obvious) may well be that those appellants whose names were not on the list in annexure "A" should assume that their appeals had been dismissed, it is certainly not the only necessary conclusion to be drawn therefrom. It may well be that from the point of view of those 26 Appellants listed in annexure "A" it could be contended that the appeal process concluded for them upon receipt of this email (and on this point, as this is not an issue before me, I refrain from commenting thereon). For Applicant whose name is not mentioned in either of these documents, the information contained in this email is at best equivocal as to the fate of its appeal. Applicant would be left to speculate whether the corollary mentioned above, whether obvious or not, is to be assumed.
This speculation was only ended when the Applicant received the First Respondent's letter of 26 September 2002. Different from the email;
1. It is clear that it is from the Minister as it is signed by him;

2. It was specifically addressed to Applicant at its post office box address in Elands Bay; and

3. It advised the Applicant in terms that **"...your appeal against the decision of the Deputy Director General: Marine and Coastal Management ("the DDG") was, after due consideration by the Minister of Environmental Affairs and Tourism ("the Minister"), rejected by him."**.

To my mind therefore, at best, the email of 20 August 2002 was equivocal as to the fate of Applicant's appeal to First Respondent. Given the apparent purpose of section 7(1) of PAJA and the dispositive effect that a failure to come within the 180 day period set out therein may have on an Applicant's application for review, it could never have been the legislature's intention that this drastic an effect could be founded on an equivocal act.

Accordingly I find that the appeal procedure to First Respondent concluded on 26 September 2002 and accordingly that Applicant has complied with the provisions of section 7(1)(a) of PAJA by instituting these proceedings for judicial review not later than 180 days after the conclusion of the internal remedy of appeal in terms of section 80 of the Marine Act.
Even if I am wrong in this regard and the conclusion of the appeal process was on 20 August 2002 (the date of Ms Adams' email), Applicant asked, in the alternative, that I exercise my discretion in its favour in terms of section 9(2) of PAJA.
This discretion is obviously a judicial discretion that must be exercised in **"the interests of justice"**. An exercise of this discretion against the Applicant has obvious prejudice in that its review proceedings would thereby fail. The Respondents have put up no reasons why an exercise of my discretion in terms of section 9 of PAJA against them would not be in the interests of justice and indeed none appear to be apparent. Even on the Respondents` version, the

application for review was instituted some 9 court days late. If this is so, this lateness, to my mind arguably constitutes a *de minimis non curat lex* situation. In the circumstances, I would grant the application in terms of section 9 of PAJA and extend the 180 day period in section 7(1) to the date of the institution of these proceedings on 28 February 2003.

REVIEW OF SECOND RESPONDENT'S SECTION 18 DECISION

Applicant contended that Second Respondent's decision not to grant it a fishing right in terms of section 18 of the Marine Act is reviewable essentially because the procedure which he employed in arriving at this decision was procedurally unfair as contemplated by section 6(2)(c) of PAJA.

It was common cause that, as regards Second Respondent's decision, the provisions of section 6(2)(a) to (i) read with section 1 of PAJA have been complied with in that this decision was an "**administrative action**" that adversely affected Appellant's rights.

Section 33(1) of the Constitution of the Republic of South Africa 108 of 1996 ("the Constitution") requires all administrative action to be "**lawful, reasonable and procedurally fair**". In **Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of South Africa and Others** 2000 (2) SA 674 (CC) Chalskalson P held that "**The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution.**" at 692 E-G paragraph 33. In **Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight** 1999 (3) SA 771 (SCA) Hefer JA held "**What is lawful and**

procedurally fair within the purview of s24 (of the Interim Constitution) is for the Courts to decide and I have little doubt that, to the extent that there is no inconsistency with the Constitution, the common-law grounds for review were intended to remain in tact." at 786 D-F.

The Constitutional Court in the **Pharmaceutical Manufacturers** case reaffirmed the role of the courts in controlling public power (*supra* at 694 G-H paragraph [40]) and Chaskalson P quoted with apparent approval the following passage from **Boulle, Harris and Hoexter:** *Constitutional and Administrative Law: Basic Principles*:**. "The basic justification for judicial review of administrative action originates in the Constitution. In the constitutional State there are, by definition, legal limits to power, and the courts are bestowed with judicial authority, which incorporates the competence to determine the legality of various activities, including those of public authorities."**

(See also: **Bel Porto School Governing Body v Premier, Western Cape** 2002 (3) SA 265 (CC) at paragraph [87]; **Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Others,** 2003 (2) All SA 616 (SCA) at 631 paragraph [46]; **R v Secretary of State for the Home Department, ex parte Daly** [2001] 3 All ER 433 (HL); **First National Bank of SA v Commissioner, SARS** 2002 (4) SA 768 (CC) at paragraph [63]).

In considering the courts role in this constitutional framework, the Supreme Court of Appeal in a judicial review of the exercise of an administrative power (in that case also section 18 of the Marine Act) Schutz JA quoted, with approval, the following passage from **Logbro Properties C v Bedderson N.O. and Others** 2003 (2) SA 460 (SCA) at paragraphs [21] and [22], that judicial review called for:

> **"… 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 mal-administration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by 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."

(See **Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Others** *supra* at 632 paragraph [47]. See also **Du Plessis and Others v De Klerk and Another** 1996 (3) SA 850 (CC) at paragraph [180]; **S v Lawrence** 1997 (4) SA 1176 (CC) at paragraph [42]).)

It is this court's function and duty therefore to determine the legality of Second Respondent's action in refusing to grant Applicant a hake long line fishing right for the 2002 to 2005 fishing season in terms of the constitutional and common-law principles of judicial review.
Applicant identified a number of alleged flaws in the manner in which applications under section 18 were dealt with. These include;

1. The difference between what potential applicants were informed before they applied and the way in which their applications were actually dealt with afterwards. This information is contained in the Policy Guidelines published in the Government Gazette of 27 July 2001.;

2. These Policy Guidelines state that the Second Respondent would be assisted by a panel of specialists called an advisory committee. This, so it was contended, gave the reader the reasonable impression that the advisory committee would have specialised knowledge of the fishing industry which, Applicant alleges, it did not have;

3. Under the heading "Evaluation of Applications" it is stated in the Policy Guidelines that applications would be dealt with in accordance with section 2 of the Marine Act and the policy guidelines and that **"No precedence, ranking or weighting is implied by the order or content of the policy guidelines".** These are then set out under the following headings

   a) Business plan, fishing plan or operational and investment strategy.

   b) Equity, transformation, restructuring and empowerment.

   c) Impact on the resources, environment and the fishing industry.

   d) New entrants.

4. Applicant then contends that potential applicants reading these guidelines had a justified expectation that their applications would be considered on a discretionary basis, with a flexible application of the abovementioned

considerations. They contend however that the opposite happened. That the advisory committee was instructed to mark all applications according to a rigid score sheet. *Inter alia*, the advisory committee was instructed:

a) To draw a distinction between applications by 2001 rights holders and applications by new/other rights holders These two categories were to be judged according to different criteria; and

b) They were to apply a weighting of criteria by means of a rigid scoring system. In terms of this system various parts of an application could earn points for an applicant up to a fixed maximum and, the weighting or ranking was achieved by fixing different *maxima* for the various parts.

5. Applicant complains further that potential applicants under section 18 were never informed that they were to be streamed into “rights holders” and “new entrants” with different criteria applying to each stream, nor were they informed that different portions of the form they were to fill in could earn more marks than other portions. They contend further that this failure to supply such information timeously or at all was therefore procedurally unfair to applicants by defeating their legitimate expectations based on the Policy Guidelines published on 27 July 2001.

In his answering affidavit Second Respondent explained that this system that was employed to consider the applications in the fishing sector was because **"It was realized that there would be unprecedented interest in medium-term fishing rights and that a large number of applications would be made. Applicant's were to be invited in 22 fishing sectors, and hundreds of Applicant's could be expected in each one."** and that **"It was obvious that it would be very onerous for one person to scrutinize and assess all the anticipated applications in every detail."**

In emphasizing the parameters within which the court must exercise its powers of judicial review in **Bel Porto School Governing Body v Premier, Western Cape**, *supra*, Chaskalson CJ stated that:

> "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." at paragraph [45]

In **Pharmaceutical Manufacturers of SA: in re Ex Parte President of the RSA** *supra* the constitutional Court held that a court **"cannot interfere with a decision simply because it disagrees with it or considers that the power was exercised inappropriately."**

at 709 F paragraph [90]

This delineation of power is, of course, one of the cornerstones of our constitutional and political framework and it's the maintenance of these provinces of power that ensures its continued efficacy.

Whilst it is the function of the executive to run the various departments of government and to make such decisions of policy necessary to do so, it is the court's function to ensure that all such executive actions that adversely affect the rights of citizens are rational and legitimate, and where they are not, to interfere appropriately.
Therefore, whilst I can well appreciate the administrative difficulties that the Second Respondent might have faced with the expectation of an unprecedented large number of applications in the fishing industry owing to the advent of the medium-term rights, and the consequent necessity of devising a system to cope with this administrative load, it is my function to determine whether the system that he has employed, as applied to Applicant's case, is rational and legitimate or not.
Furthermore, it is not for the court to decide whether the Second Respondent's decision to stream Applicants into existing rights holders and new entrants was correct or incorrect. This a decision within the executive's province and is one in respect of which the court cannot interfere. The court can, however determine whether the manner in which the Second Respondent made his decision was legitimate or not. This is a decision within the judiciary's province.
In performing this task the court, whilst appreciating the Second Respondent's difficulties, must determine whether the manner in which he has chosen to exercise his statutory function in the instant case is legitimate
Having considered all of the aforementioned complaints raised by the Applicant in respect of the Second Respondent's decision to reject Applicant's application it appears to me that the fundamental question that has to be answered is whether the Applicant has shown, on a balance of probability, that the Second Respondent has failed to apply his mind to the task that section 18 of the Marine Act requires him to do.
The much quoted decision of Innes ACJ in **Shidiack v Union Government (Minister of Interior)** 1912 AD 642 according to the Constitutional Court remains good law. (See **Pharmaceutical Manufacturers of SA: in re Ex Parte President of the RSA** *supra* at 707 D *en fin*. Where the following passage from **Shidiack's** case was quoted with apparent approval:)

> "Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been ***bona fide*** **expressed, the Court will not interfere in the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of law either to make him change his mind or to substitute its conclusion for his own."**

The judgment goes on to hold that there are circumstances in which "interference would be possible and right. If for instance … he had not applied his mind to the matter or exercised his discretion at all … -in such cases the Court might grant relief." At 651 – 652.

In his answering affidavit Second Respondent sets out in some detail the reasons that underpinned his devising the system to deal with applications in the fishing industry and his involvement with this process and concludes by stating that he personally perused and checked the Applicant's application and confirmed the advisory committee's findings. He also referred to a handwritten remark written on a spreadsheet which was used to record the advisory committee's recommendations, and which remarks echoed Second Respondent's aforementioned statement in his affidavit that **"After perusing application: confirm finding. Also checked legal advice."**

Second Respondent's *bona fides* was not, and indeed on the papers before me, cannot be doubted. It is clear that Second Respondent duly and honestly applied himself to his statutory duties which appear to have been not

inconsiderable. But however commendable this conduct may have been that is not the standard that the law requires him to have achieved in order to pass muster. To paraphrase Chaskalson P in **Pharmaceutical Manufacturers of SA: in re Ex Parte President of the RSA** *supra* at 709 C-D the fact that Second Respondent was *bona fide* and acted duly and honestly, does not put the matter beyond the reach of the Court's powers of review.

As I have said, according to the Second Respondent, the system was devised to deal with the expected large numbers of applications for the medium-term fishing rights which he stated would be very onerous for one person to scrutinize and assess in every detail and also **"In the interests of independence and credibility and to break away from procedures employed in the past, which had not been credible in the eyes of the fishing community and industry…"**
The system devised and employed by Second Respondent was:

a. To appoint a Verification Unit by means of a public tender process whose function it was to attend to the receipt and initial sorting of the applications;

b. To appoint an Advisory Committee, also by means of a public tender process, of persons external to the department whose function it was to **"assist (Second Respondent) in evaluating the applications by analysing and extracting relevant information for (Second Respondent's) use, and identifying problems and difficulties that required particular attention."** This committee consisted of 6 persons garnered from the legal and accounting professions;

c. Second Respondent then compiled guidelines and instructions to this unit and committee. These guidelines and instructions were in typed form and set out in some detail the factors that had to be considered and, in regard to each factor, further sub factors were set out in even greater detail and a point value allocated to each such sub factor. By way of example **"Involvement and investment in a vessel"** is one such factor. The guidelines then provide that; **"(a)Weighting (i)Owner of vessel – 6 points (ii) Share in the ownership of vessel – 4 to 6 points (taking account the extent and value of investment according to the decision-makers guidelines e.g. part ownership of fleet of vessels) (iii) Purchase agreement without conditions – 4 points (iv) Purchase agreement subject to conditions of allocation – 3 points (v) Charter agreement, joint venture – 2 points (6) Divide the total points by 2 to get the score of involvement."** The guidelines also included negative scores for example where there was a suspicion of a subterfuge called **"potential paper quotas"**;

d. A prepared and printed document called an **"Evaluation Summary"** was used by the advisory committee to record the scores obtained by each applicant for a fishing right. This document was then completed and printed;

e. This information was then transposed onto a spreadsheet and a total score extracted in respect of each applicant. This spreadsheet was typed

up and then delivered to Second Applicant;

f. Second Respondent then made his decision "**...by perusing the summary spreadsheet(s).**"

In my view this system does not pass muster. The legislature, in terms of section 18 of the Marine Act, requires Second Respondent to make the decision whether to grant the fishing right and accordingly requires him to exercise this discretion. Section 79 of the Marine Act does not authorise Second Respondent to delegate any of his powers to this advisory committee (consisting of persons external to the department) and, under the common law the principle of *delegatus non delegare non potest* is applicable.(See **Shidiack v. Union Government** 1912 AD 642)

27.As regards the exercise of a discretion by a public official it has repeatedly been stressed in our courts that it is permissible for a public official to have a policy but that such a policy may not fetter the exercise of his discretion in individual cases and may not pre-determine the outcome of any individual case.

(See **Baxter** ***Administrative Law*** at. 416-8**; Johannesburg Town Council v. Norman Anstey & Co.** 1928 AD 335 at 340-341**; Computer Investors Group Inc. & another v. Minister of Finance** 1979 (1) SA 879 (T) at 898 C-E**; Hofmeyr v. Minister of Justice & another** 1992 (3) SA 108 (C))

It is clear that this was a carefully thought out and deliberate system constructed by Second Respondent, on his own version, because **"It was realized that there would be unprecedented interest in medium-term fishing rights and that a large number of applications would be made. Applicant's were to be invited in 22 fishing sectors, and hundreds of Applicant's could be expected in each one."** and that **"It was obvious that it would be very onerous for one person to scrutinize and assess all the anticipated applications in every detail."** For this very reason he appointed an advisory committee by an elaborate public tender process and incurred the costs (which I would assume would have not been inconsiderable) of 6 persons, external to the department, from two professional sectors.

To my mind it would have been inconceivable, or at the very least unlikely, that, having gone through this process and incurred these expenses, that Second Respondent would not have used this advisory committee for the very reason that he appointed them viz. to relieve him of the **"very onerous"** task of scrutinizing and assessing **"all the …applications in every detail."**. In that event, any discretion that may have been exercised in relation to any application, including the application of Applicant, appears to have been exercised by the advisory committee and it appears highly improbable that Second Respondent would have reconsidered each application *de novo* and exercised his discretion in relation to each such application, because to have done so would negate the very system that he deliberately and consciously (and, I assume, at what would have been a considerable cost) put in place to obviate this precise problem.

Furthermore in so far as the advisory committee performed its task, in accordance with the guidelines and instructions drafted by Second Respondent, it did so by allocating the points contained in these guidelines and instructions to each such factor. The degree of rigidity within which these points were allocated was a matter of some debate between the parties. It appears to me that whatever that degree may have been it constitutes the application of a policy which fettered such discretion as the members of the advisory committee may have brought to bear on their task.

The labours of the advisory committee were contained in a spreadsheet and entered thereon under some 16 printed headed columns. On his own version, what Second Respondent did was to make his decision **"…by perusing the summary spreadsheet(s)."**

Having regard to the system used by Second Respondent and applied to Applicant's application it appears to me that the conclusion is inescapable, or at the very least appears on a balance of probability, that Second Respondent did not exercise his discretion as he was required to do in terms of section 18 of the Marine Act either because, such discretion as he was required to exercise was exercised, not by him, but by the advisory committee to whom he was not permitted to delegate such discretion, or because he accepted the work done by the advisory committee and did not bring his own independent discretion to bear on the decision that he was required to make, or because by basing his

decisions on the scoring system and the totals arrived at thereby, the Second Respondent was applying a policy decision that unlawfully fettered his discretion he might have exercised.

In the circumstances I find that the decision of the Second Respondent not to grant Applicant a fishing right for the 2002 to 2005 fishing season should be set aside and such application referred back to the Second Respondent for reconsideration.

In view of the above decision it is unnecessary to consider the review of First Respondent's decision to refuse Applicant's appeal to him in terms of section 80 of the Marine Act. It is also unnecessary to consider Applicant's application to refer certain matters to oral evidence in terms of rule 6(5)(g) of the Uniform Rules of Court.

Accordingly the decision of the Second Respondent not to grant Applicant a fishing right for the 2002 to 2005 fishing season is set aside with costs, including the costs of two counsel, and such application is referred back to the Second Respondent for reconsideration.

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Brusser AJ