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

REPORTABLE

Case No. 2615/05

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 "NM4" **Third to One Hundred and Fifteenth Respondents.**

JUDGMENT: 28 JULY 2005 AS CORRECTED ON 24 AUGUST 2005

DAVIS J

Introduction:

Applicant is a rights holder in the pelagic fishery industry, the main species of which are pilchards, sardines and anchovies. It was awarded pelagic fishing rights for the 2002 -2005 seasons. Dissatisfied with the allocation of pilchards which it received in 2002, it sought to review and set aside the allocations which had been made by first and second respondents. The application was heard by **Van Zyl J** whose judgment is reported at 2004(5) SA 91(C). The learned judge dismissed the application with costs. This judgment was overturned on appeal by the Supreme Court of Appeal. This judgment is

reported at [2005] 1 ALL SA 531 (SCA). In essence, **Harms JA,** on behalf of a unanimous court, found that the medium-term rights of allocation process for the pelagic industry produced some glaring and unexplained anomalies and, to this extent, the allocations were irrational, inexplicable and consequently unreasonable, (see in particular paragraph 18). In January 2005, first respondent made a fresh allocation for the 2005 season on an interim basis. It then made a final allocation in March 2005. Appellant contends that the 2005 allocation, like the 2002 allocation, is unreasonable and irrational and should similarly be set aside.

Background.

The history of this dispute begins with the allocation of commercial fishing rights to pelagic fish for the 2002-2005 fishing season. For the purpose of this dispute the term pelagic fish includes two important species of fish namely pilchard and anchovies. The rights were granted in terms of section 18(1) of the Marine Living Resources Act 18 of 1998 ('the Act') by first respondent in terms of powers delegated to him by second respondent acting in terms of s 74 of the Act. Before granting any fishing rights, second respondent must determine the total allowable catch ('TAC') which has to be allocated between different interest groups such as commercial fisheries (section 14(1) and (2) of the Act). For the purposes of this dispute, second respondent determines an allowable commercial catch which has to be divided between the different commercial fishers who qualify for a quota. To so qualify a fisher must score a minimum number of points on a table devised to ensure that the objects and principles of the Act are attained.

The essence of the dispute in this case (and the previous case) turns on the application and consequences of a formula employed by first and second respondent for allocating the allowable commercial catch between the successful applicants.

The history of the development of this formula is set out comprehensively by **Van Zyl J** at paras 5 – 16 of his judgment. Briefly stated, it appears that the regulation of commercial catches of anchovy and pilchards began in the 1950's. However, it was only in the 1980's that scientific management measures based on bi-annual acoustic surveys of pelagic fish stocks were introduced initially, for anchovy and shortly thereafter for pilchard. Up until 2001 the operational management procedure ('OMP') for anchovy was based on a 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 TAC for the following year. This survey was followed by further surveys during May and June of the following year with a view to revising the TAC on the basis of he estimated 'recruitment' of juvenile anchovy and pilchard.

From the evidence made available, it appears that the anchovy fishery concentrates on the winter months. This appears to be the time when the greatest number of juvenile pilchard is found among the anchovy shoals. Hence the greater the anchovy catch, the greater the pilchard by-catch and the smaller the amount of directed adult pilchards that may be allowed. This situation caused first and second respondent to develop a new OMP ('OMP-02') that would take account of this development and further respond to participants in the pelagic fishing industry who preferred either pilchard or anchovy depending upon whether their processing facilities were geared towards canned fish or fish meal production. OMP-02 effectively introduced a policy that gave participants in the industry the opportunity to choose their own notional OMP to reflect their desired pilchard – anchovy mix. This preferred ratio was to be calculated from the information contained in the application of each fisher.

In an answering affidavit deposed to in the earlier application by Mr Kleinschmidt, who was the first respondent in that application, the background was set out thus: 'An important aspect of OMP-02 is that it moves away from a policy where the Department unilaterally selects an OMP to reflect a particular average pilchard/anchovy mix or trade-off, and introduces one where the industry participants can each chose their notional OMP to reflect their desired pilchard/anchovy mix or trade-off. Those choices become part of the input into a tested and peer reviewed mathematical model, which allows the appropriate TAC'S and quota allocations to be calculated…. A result of the new OMP-02 is that it expresses each industry participant's rights as proportions of the fishery <u>as a whole</u> rather than of the TAC for each species separately.'

In the earlier application, applicant did not attack second respondent's determination of the TAC nor the use of the formula to determine the allocation of fishing rights. As **Harms JA** put it: 'The appellant's problem is with the blind application of the formula

and this can best be explained by reference to the facts raised pertinently in the founding affidavit. During 2001, the applicant's pilchard allocation was 5,6% of the TAC. This translated into 10,125 tons of pilchards. One reason that appellant had such an allocation is because it has a large canning facility that can process 32,000 tons in a season….Additionally, the appellant received 0,1% as a bait quota (which amounted to 310 tons). Two other companies, Lamberts Bay and SASP that have no canning facilities, received for bait 0,0057% (10 tons) and 1% (1713 tons) respectively of the pilchard TAC.

On 7 February 2002, under the OMP-02 formula, the appellant received 4% of the TAC (a reduction of 1,7% of the TAC) while Lamberts Bay and SASP received massive increases to 3,4% and 3,2% of the TAC respectively. Taking into account the fact that the provisional TAC for pilchards was substantially lower, this translated into 5524 tons for appellant and 4674 and 4414 tons for the other two companies respectively. The upshot was that appellant's allocation was reduced from 10435 tons to 5524 tons while Lamberts Bay's was increased from 10 tons to 4674 tons and SASPs from 1713 to 4414 tons. **Harms JA** concluded thus: 'In other words, while during the 2001 season Lamberts Bay had an allocation equal to one thousandth of the appellant's allocation, it was now increased to 84% thereof, an increase of 84,000%. The relative increase of SASP's quota was from 16,9% to 79,9%, an increase of 472%' (at para 14-15).

After examining the results of this application of the formula, **Harms JA** held: 'One does not need to understand the 'complex processes, mathematical or otherwise'….to realize that at least some of the results produced by the simple application of the formula were irrational and inexplicable and consequently unreasonable'. Some participants were inexplicably and unreasonably favoured; at least the appellant was prejudiced but not only the appellant. A reconsideration of the formula or of the input fed into it would have been called for. If the problem had not been solved thereby, the result would have been adjusted to make some sense.' (at paras 18-19).

In response to this judgment of the SCA, a departmental memorandum was prepared on 7 March 2005 to advise second respondent as to the proper course of action by which to respond to the decision of the SCA. For the purposes of this dispute the relevant portion of the memorandum reads thus:

> 'A recent decision of the Supreme Court of Appeal referred the matter of the distribution of the pelagic TAC for the 2005 season back to the Department for fresh determination,

To allow the pelagic fishing industry to commence operations at the normal time of mid-January while this matter could receive thorough attention, interim allocations of the sardine and initial anchovy TACs for the 2005 season were made at the start of the year. This allocation was made at a level to ensure that right holders could commence fishing,

and in a manner that guaranteed that subsequent allocations would not be less than these interim allocations, and also as far as possible, did not seriously constrain decisions on the revised distribution.'

'The ruling of the Supreme Court of Appeal arose from an application by a rights holder dissatisfied with their allocated quantum of sardine. In February 2002, when the original basis for allocations was finalised, rights holders were each given the opportunity to adjust their preferred average ratio of sardine to anchovy in their future quotas. This led to a general move amongst rights holders towards a greater favouring of sardine over anchovy, to the extent at that time that had the adjustments requested been accepted in totality, it appeared that the anchovy resource would have been wastefully under-utilised. Consequently the Department imposed a cap on the extent of change allowed each rights holder, with the result that certain rights holders received less sardine (and more anchovy) than their adjusted preference sought….

The situation ha now been re-examined in the light of further biological information that has subsequently become available (and which has also been incorporated in a revised TAC formula now used to make recommendations for the pelagic fishery, which is known as "OMP-04"). This exercise has shown that the consequent revised scientific perceptions of resource status now allow the full extent of all the original preferred ratio revision requests to be accommodated without undue under-utilisation of anchovy, through a slight adjustment to the OMP-04 formula…...

Essentially this adjustment to the OMP-4 formula leads to an increase in the sardine TAC. This does not increase the risk to the sardine resource, however, because there is a concomitant decrease in the anchovy TAC, which in turn reduces the likely bycatch of juvenile sardine made with anchovy in a manner that "balances" the effect of the larger directed sardine catch.'

Pursuant to the SCA decision, in January 2005, first and second respondent made a new allocation for the 2005 season on an interim basis. In terms of this allocation, rights holders such as Lamberts Bay and SASP were given considerably less pilchards than they had been awarded from 2002 to 2004, although still larger allocations than they had enjoyed in 2001.

Final allocations, after revision of the pilchards and anchovy TACs, were made in March 2005. The comparable allocations for the relevant years are set out in the following table. (Table 1):

Name of rights holder	2001 pilchards tonnage	% of 2001 pilchards TAC	Final 2002 pilchards tonnag	% of final 2002 pilchards	Final 2004 Pilchards Tonnag	% of final 2004 pilchards	Final 2005 Pilchards Tonnag	% of 2005 pilchards TAC

	[TAC-182 000 ts]		e TAC	TAC	e [TAC-457 000 ts]	TAC	e [TAC-397 000 ts]	
Food-corp	10 125 ts (excl. Bait [10 435 ts with bait.	5.6% [5.7% with bait quota]	10 832 ts	4.2%	21 700 ts	4.75%	20 464 ts	5.15%
Lambert's Bay	10 ts for bait	0.0057 %	9.508 ts	3.7%	18 578 ts	4.07%	15 913 ts	4.01%
SASP	1713 ts for bait	1%	8 622 ts	3.34%	16 273 ts	3.56%	13 938 ts	3.51%

Pursuant to an analysis of this table, applicant contends that both itself, Lambert's Bay and SASP are roughly in the same position as they were prior to the SCA judgment in respect to the 2002 review application, notwithstanding that the SCA held that the 2002 allocations to Lamberts Bay and SASP were anomalous, irrational, unreasonable, and inexplicable.

The present dispute.

Mr Burger, who appeared with Mr Farlam on behalf of applicant, submitted that, as the final 2005 pilchard allocations were little different from the final 2002 pilchard allocations which had been set aside for the SCA, they could similarly be considered to be anomalous and unreasonable. According to Mr Burger, there was no reason why the percentage share of the pilchards TAC of a rights holder such as applicant should decline, notwithstanding its catching and canning facilities and its ability to process a considerably higher allocation than it had hitherto been awarded while the pilchard quotas of companies, such as Lamberts Bay and SASP, which, at the time of the medium

term rights allocation, had no facilities for processing pilchards and thus merely had to employ their pilchards for fish meal, had increased exponentially.

According to Mr Burger, the primary anomalies which had been identified in the 2002 review application and had been fatal to the validity of that decision were first and second respondent's failure when converting the 2001 pilchards and anchovy allocations to an equivalent single percentage right ('ESPR') to take cognizance of the abundance of anchovies in 2001 and the failure to make allowances for the fact that pilchards were five times more valuable than anchovies. Mr Burger contended that the greater economic value of pilchards prompted rights holders with little previous involvement in the sector, to choose opportunistically a large allocation of pilchard rights, thereby reducing their anchovy allocation but increasing dramatically the value of their total allocation.

In his answering affidavit, Mr Moolla, who deposed to an affidavit on behalf of first and second respondent sought to respond to applicant's attack in the following manner:

1. He conceded that in the 2002 allocation process some small rights holders 'went from zero sardine holdings to a small amount, thus in percentage terms they received an infinite increase though this was not to the practical disadvantage of others. Consideration only of percentage changes allocations, compared with 2001, proved not to be sufficient, as they do not take account of resultant changes to the TAC itself.'

2.. He contended that it would be unfair to take away tonnage from some rights holders, merely to satisfy the demands of applicant 'without there being any overall benefit to the fishery or other rights holders'.

3 The 2001 allocations were not considered to be a basis for comparison. These allocations were made under a different policy regime and were made before the more comprehensive approach to rights allocations was introduced in 2001 for the 2002 to 2005 years.

4 The Department considered that if the capacity of rights holders to catch and

process for their own account was a criterion, then smaller and newer entrant companies would have received substantially smaller allocations, making those allocations unviable. Consequently it was considered that this approach would impact negatively on first and second respondent's overall policy objective and the statutory imperative of increasing transformation in the fishing industry.

Mr Rose-Innes, who appeared together with Mr Breitenbach on behalf of third to one hundred and fifteen respondents, submitted that there were a number of additional fundamental flaws in applicant's approach. These can be summarized thus:

1. Applicant failed to acknowledge the inevitable interrelationship and trade-off between the permitted exploitation of pilchard and anchovy. It sought to examine first and second respondent's latest fisheries management decisions regarding pilchard in isolation from those regarding anchovy.
2. Applicant failed to acknowledge that first and second respondents allowed applicants for small pelagic commercial fishing rights for the 2002 – 2005 period to select their own trade-off between pilchard and anchovy instead of relying upon the earlier Departmentally imposed trade-off applicable to all rights holders.
3. Applicant misunderstood the reasoning and effect of the SCA judgment. It did so in that it failed to afford significance to the absence of any attack on the OMP—02 or on the decision to allow rights holders to determine their own preferred pilchard-anchovy ratio, (central to OMP-02) and that was no attack on the revised individual ratio preference made by each of the rights holders. In short, Mr Rose-Innes contended that the SCA

judgment should be understood as holding that the 'massive', 'anomalous' increases of the pilchard allocations to Lamberts Bay and SASP were irrational, inexplicable and unreasonable. However, the judgment did not preclude the government respondent's from employing a choice exercised by the rights holders, including applicant, in February 2002 as a basis for determining rights allocations for 2005 and from applying a formula similar to OMP-02 when making the determination for the 2005 season, provided that they properly considered the results produced by the application of the formula and determined that these results were rational, explicable and reasonable.

4. Applicant's proposed solution was based on the allocations for the 2001 season which in turn were based on the 2000 season. In the 2005 season there was an abundance of both pilchard and anchovy compared with 2002. Consequently, both resources would be substantially under-utilized if catch levels continued to be set in terms of earlier levels. Between 2002 and 2005 the maximum possible annual pilchard directed TAC increased from 25 000 to 50 000 tons.

Evaluation.

There are two essential issues which are central to the resolution of this dispute, namely the exact meaning and scope of the judgment delivered by **Harms JA** of the SCA and related thereto, the approach which this court must adopt towards section 6 (2)(e)(vi), (f) (ii) and/or (h) and section 6(2)(e)(iii) of the Promotion of Administrative Justice Act 3 of 2000('PAJA') which provisions form the legal basis of applicant's challenge.

In his gloss on the SCA judgment, Mr Rose-Innes submitted that the central holding of the court was that first and second respondent should have given careful consideration to the results achieved by the OMP-02 to determine whether they were reasonable and appropriate in all of the circumstances. On the facts which had been placed before the SCA, there was no explanation afforded as to why the factual basis of the allocation process was the correct one.

In Mr Rose-Innes' view, the allocation decision made in 2005, which was the subject of this application, differed in a number of material respects from the allocation decision of 2002 which was the subject of the 2002 review application and consequently the SCA judgment. In particular, the 2005 allocation had been conducted under a new formula, the OMP-4 (the form of equations employed were essentially the same however as those employed under OMP-02). The maximum possible annual pilchard – directed TAC had been increased from 250,000 to 500,000 tons. Furthermore, the procedure for limiting the amount by which the TAC can be reduced in any given year had been changed to a two-tier system, whereby there was no limit on the reduction of the TAC above a certain maximum threshold. Below the maximum threshold the maximum annual reduction of the TAC had been reduced. For the first time every rights holder was permitted to catch the ratio of pilchard to anchovy that it requested in February 2002 which was an important departure from a system in which the rights holders' February 2002 changes to their initial expressed preferences were capped.

Mr Duminy, who appeared together with Ms Bawa on behalf of first and second respondent, submitted that first respondent had carefully taken account of the approach to the previous allocations adopted by the SCA. He submitted that the result derived from the revision of the models contained in OMP-4 was reasonable, justifiable and fair in that the results gave effect to rights holders for revised preferred ratios took account of the resource status, treated all participants on a similar footing and took proper account of the interrelationship between sardine and anchovy fisheries. Responding to the contention that rights holders should have their sardine allocations reduced to 2001 values Mr Duminy referred to the following passage from Mr Moola's answering affidavit.

> [U]nder OMP-02 and OMP-04 the anchovy allocations of those companies would then be increased. That would necessitate an increase in the anchovy TAC and hence in the sardine by-catch allowance. The directed sardine TAC would then

have to be reduced. Prof D Butterworth has caused this to be approximated, and the result is a reduction of the directed sardine TAC to some 360,000 tons, i.e about 40,000 tons less than the TAC of 397,000 tons. At the Applicant's preferred ratio and given the new TAC, the Applicant would get virtually the same quantum of sardine in as is allocated to it now, although it would have a higher proportion (percentage) of the sardine TAC seen in isolation.'

Mr Duminy contended that the SCA judgment had set out the steps that a reasonable decision-maker using a formula such as OMP-04 should have taken. These steps amount to the following:

1. A consideration of whether the application of the formula gave reasonably justifiable results bearing in mind the facts.
2. If the answer was positive that was the end of the matter. If not, there was three possibilities:

2.1 A reconsideration of the formula.

2.2 A reconsideration of the input fed into the formula

2.3 If either of these solved the problem that was again the end of the matter. If not, there would be a need for an adjustment of the result 'to make some sense".

Mr Duminy correctly contended that the SCA judgment was confined ultimately to a consideration of the results of the allocation without commenting adversely on the reasons for the decision. The results were regarded as unreasonable because the results had not been sufficiently scrutinized and contended. Accordingly the allocation was set aside.

As the table set out above in respect of pilchard allocations illustrates, the percentage of the pilchards TAC of 2001 which was allocated to applicant prior to the review application before the SCA amounted to 5.6% and the final allocation for 2002 upon which the SCA considered the application was 4.2%. By contrast, Lamberts Bay, prior to the allocation, had a percentage of the 2001 pilchard TAC of .0057%. This had increased to 3.7% in terms of the 2002 allocation. SASP enjoyed a percentage of 1% which increased to 3.34% at the 2002 allocation, being the allocation which was reviewed by the SCA. According to the allocations which are now the subject of this review, applicant's percentage of the 2005 pilchards TAC amount to 5.15% compared to Lamberts Bay's 4.01% and SASP's 3.51%. The final 2005 pilchard allocation for Lamberts Bay and SASP have increased from those which were considered by the SCA. Applicant's percentage is still some way below that which it was in 2001 but .95% above that which was the subject of the initial review.

For the first time, there is no cap placed upon the allocations. Thus, every rights holder was permitted to catch the ratio of pilchard and anchovy that it requested in February 2002.

The argument relating to the need to evaluate the total allocation of pilchards and anchovies has been raised to distinguish the facts upon which the the SCA judgment is predicated from that of the present dispute. Thus, Mr Rhodes-Harrison who deposed to an affidavit on behalf of 40th, 64th and 75th respondent stated: 'I would emphasize that as there is no limit on the preferred pilchard/anchovy ratios in 2005, for the first time every rights holder is permitted to catch the ratio of pilchard and anchovy that it requested in February 2002. This is an important departure from the 2002, 2003 and 2004 seasons, in which the rights holders' February 2002 changes to their initially expressed (September 2001) preferences were 'capped'. Notwithstanding the fact that Foodcorp is now able to fish for all the pilchard it preferred (a ratio of 0.65 compared with it sinitial preference for 0.33) Foodcorp now seeks to review, set aside and correct the 2005 determinations.'.

The SCA judgment dealt exclusively with the allocation of pilchards between the various fishers. Similarly, the argument concerning the existence of interrelationship between the rights holders expressed preferences for anchovy and pilchard was relevant in respect of the OMP-02 formula.

An examination of the affidavit deposed to by Prof Butterworth in the earlier application reveals that this issue was raised expressly in this application. Prof. Butterworth said the following:
'The Applicants' complaint cannot be addressed only by having separate percentage rights in respect of pilchard and anchovy. In 2001 the Applicant's allocations constituted 5.92% of the pilchard resource and 3.86% of the anchovy resource. Depending on the global industry-wide trade-off that would also have to be selected, the Applicant could

expect very different tonnages of pilchard and anchovy to be awarded to it depending upon the result of that selection. For instance, if there was a very strong pro-pilchard trade-off, 5.92% of the high pilchard TAC's for the next few years might be quite valuable, whereas 3,86% of a low anchovy TAC's may have relatively little value. On the other hand, if the trade-off selection were to lean heavily towards anchovy, the balance of value would also shift towards anchovy. Merely considering the absolute percentages that applied in 2001 does not take this issue any further. In addition, it would fail to take into account that the previous approach is being superseded by one which has been designed to accommodate the more sophisticated thinking being applied to the multi-species resource and its proper exploitation a a whole, in a manner that makes room for desirable additional flexibility for the industry participants.'

In summary, the essence of the judgment of the SCA was that 'some participants were inexplicably and unreasonably favoured; at least the appellant was prejudiced, but not only the appellant. A reconsideration of the formula or of the input fed into it would have been called for.' (at para 9).

As Mr Burger correctly observed, the allocations which were made for 2004 will affect the long term rights allocations to be awarded for the 2006 season onwards for these allocations will invariably be based on the 2005 allocations. The draft **Policy for the Management and Allocation of Commercial Fishing Rights in the small Pelagic (Anchovy and Sardine Purse-Seine), Fishery: 2005** which was published for comment in March 2005 is instructive. Thus in para 7.3 it is stated 'In respect of rights holders, the Department will use as a basis the 2005 allocations, add to that the proportion of the TAC of existing right holders that were unsuccessful or that did not apply, and then apply…..the following redistribution mechanisms'. This passage reveals the key point: the 2005 allocation becomes the new base line.

Manifestly, therefore, the allocations which were made in 2005 will have a long term effect on the rights on the various participants in the industry. Having a lower percentage than that which was allocated at the time of the 2001 pilchard TAC, will result in applicant suffering prejudice, in that, were the 2001 allocation to have been maintained, applicant could have expected a larger allocations in the 2006 allocation than that which it would obtain, were the existing 2005 allocations to be confirmed.
This complex dispute is made even more difficult by the critical need to have recourse to the scope of the judgment in the earlier application. Judgments are not designed to be read in the manner of a statute, particularly insofar as the question as to whether adjusted percentages fall within the ambit of the earlier finding and the factual matrix upon which the key finding was predicted However, in my view the SCA judgment should be read thus:

The applicant proceeded to court in the first review application on the basis of a contention that the 2002 to 2005 allocations should be set aside as being arbitrary and so unreasonable that no reasonable person would have so exercised the power of allocation

in that manner. (s 6(2)(h) of PAJA.) This argument was upheld In the words of **Harms JA,** '[a]t least some of the results produced by the simple application of the formula were irrational and inexplicable and consequently unreasonable' (para 18).

In my view, the results produced by the application of the formula in the revised allocation did not appear to show any significant difference from those which were found to be irrational, inexplicable and unreasonable by the SCA. The ratio turned on a comparison of pilchard allocations which the court found to be anomalous. Viewed accordingly, there is little difference in the factual matrix which the court considered to be significant from the key facts in the present dispute.

Mr Duminy urged that this court follow the **dictum** in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others** 2004(4)(SA 490 (CC) at para 50: 'If we are satisfied that the Chief Director did take into account all the factors, struck a reasonable equilibrium between them and selected reasonable means to pursue the identified legislative goal in the light of the facts before him, the applicant cannot succeed. The task of allocation of fishing quotas is a difficult one, intimately connected with complex policy decisions and requires ongoing supervision and management of that process by the departmental decision-makers who are experts in the field'.

In her judgment in **Bato Star** supra, **O'Regan J** sought to bring some clarity to the manner in which it has been suggested that courts should act deferentially when dealing with the evaluation of the decision making powers of other branches of government (see in this regard Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 SALJ 489): 'The use of the word 'deference' may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it is realized that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself' (at para 46).

In the present dispute, the interference by a court required by applicant does not breach the principle of separation of powers. It is for the executive and/or legislature to craft policy and for the executive to seek the most appropriate manner in which to implement such policy. However, policy needs to be implemented within the framework of our constitutional system. To the extent that the implementation of policy is irrational, inexplicable and unreasonable, a court must interfere to hold the executive accountable to a proper compliance with the values of the constitution; irrationality inexplicability and unreasonableness (as defined in PAJA and interpreted in **Bato Star** at paras 44-45) are three qualities which a decision cannot embrace if it is to be valid in a constitutional state. For this reason, the general position is that the second respondent is entitled to formulate and implement a policy for the allocation of valuable fishing rights and the courts should respect this role and their lack of institutional equipment to decide policy matters which relate to allocation of resources.

In the present dispute, however, the results produced by the application of the formula developed by Prof. Butterworth on behalf of first and second respondent has produced results, (marginal differences from the earlier application notwithstanding) which appear to be no less irrational, inexplicable and unreasonable than those which were considered by the SCA.

On Mr Duminy's own test gleaned from the **data** of **Harms JA** the SCA judgment , the results produced are not justifiable. Whether the formula or the information fed into the formula is the cause of the result produced is not the issue upon which a decision can be made based on these papers. The results produced as set out in Table 1 are so similar to those which were the subject of the first case that, based on the reasoning employed in that case, the legal consequences of an application of s6(2)(h) of PAJA must be the same.

The Remedy.

Applicant proposed that, if the review succeeded, the court should substitute its own decision for that of first and second respondent in terms of section 8 (1)(c)(ii) of PAJA and grant all small pelagic rights holders a pilchards quota which is in proportion to their share of the 2001 pilchards TAC. Section 8((1)(c)(ii) of PAJA provides that, where a review succeeds, the matter will be sent back to the administration unless there are exceptional circumstances for not doing so.

There are in applicant's view, a number of exceptional circumstances which justify this court deciding the issue.

1. The Department has twice made similar, unreasonable allocations.
2. The 2005 fishing season – the last season of the four year medium-term rights allocations – is almost halfway to completion.
3. If the 2005 rights allocations are set aside without a new decision immediately being put in its place, there will have to be a cessation of fishing, <u>something which will not be in the interests</u> of any of the <u>rights holders in the pelagic fishery.</u> (my emphasis).

4. The alternative proposed by applicant is reasonable and appropriate as a provisional measure. It grants rights holders a pilchards quota which is in proper proportion to their share of the 2001 pilchards TAC, the last allocation not to be tainted by the problems that have beset OMP-02 and OMP-O4. The reversion to a separately determined pilchards allocation is unobjectionable, as shown by the fact that the first and second respondents are seemingly proposing to revert to separate pilchards and anchovies allocations from 2006 (in other words to revert to the separate determinations which applied for many years up to 2001).

The process of allocation of rights is a complex task affecting a number of different fishers. If applicant's proposal is accepted, it may well be that rights holders such as Lamberts Bay and SASP could be deprived unfairly of their right to exercise a personal trade-off choice. The proposal may affect other small pelagic fishers whose rights interests have not been set before this court in a fashion which would allow this court to take on the task of making an allocation with any confidence.

I have arrived at this conclusion reluctantly because this is the second time in which the allocation by first and second respondent has been found to have been unreasonable. However, given the polycentric nature of this task, prudence and the limits of institutional competence dictate that this court should not assume the role of a fish allocater.

For these reasons, the application succeeds and the allocations of pilchards for the 2005 season are set aside together with costs to be paid by first, second and 40, 64, 73 and 75 respondents jointly and separately, including the costs of two counsel. The allocation decision is sent back to first and second respondent for a fresh determination on an urgent basis.

DAVIS J