REPORTABLE

Republic of South Africa

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

CASE NO: 15572 / 2007

In the matter between:

OSCAR DELMORE FISHER First Applicant

SOUTH AFRICAN ABALONE INDUSTRY ASSOCIATION Second Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM Second Respondent

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JUDGMENT : 20 MARCH 2008

BOZALEK, J:

[1] On Thursday, 25 October 2007 second respondent, the Minister of Environmental Affairs and Tourism, announced in a press release the

complete suspension of the commercial fishing of wild abalone, otherwise known as "perlemoen". This decision has far-reaching consequences, not least for the rights-holders in the sector, and led ultimately to these proceedings in which the applicants seek to review and set aside that decision.

[2] In taking his decision second respondent purported to act in terms of s 16 of the Marine Sources Act, 18 of 1998. Insofar as it is relevant s 16 provides as follows:

> ***"EMERGENCY MEASURES***
> ***1. If an emergency occurs that endangers or may endanger stocks of fish or aquatic life, or any species or class of fish or aquatic life in any fishery or part of a fishery, the Minister may –***
> ***(a) suspend all or any of the fishing in that fishery or any specified part of it;***
> ***(b) restrict the number of fishing vessels fishing in that fishery; or***
> ***(c) restrict the mass of fish which may be taken from that fishery.***
> ***2. The particulars of any measures taken in terms of the section shall be made known by notice in the gazette and in any other appropriate manner."***

[3] Second respondent duly published a notice in the government gazette on 26 October 2007 in terms of the aforesaid section which reads as follows:

> ***"The Minister of Environmental Affairs and Tourism, hereby publishes for general information, that an emergency has occurred that endangers the stocks of wild abalone (haliotis), as defined in regulation 1 of the Regulations promulgated in Government Notice 1111 of 2 September 1998 as amended. The wild abalone stock is at such a low level that a complete suspension of all fishing is required in order to promote the recovery and rebuilding of the abalone resource. In terms of s 16 of the Marine Living Resources Act, 1998 (Act No.18 of 1998) all fishing in the aforesaid sector is accordingly hereby suspended until further notice.***
>
> ***The suspension will come into operation immediately."***

[4] In his press release of 25 October announcing this decision, second respondent stated *inter alia* as follows:

> ***"We are unfortunately at a point where the commercial harvesting of wild abalone can no longer be justified because the stock has declined to such an extent that the resource is threatened with commercial extinction, The main causes of the decline in abalone stocks are poaching and the migration of West Coast rock lobster into the abalone areas…***
>
> ***For the past few years the recommendation of my department's managers and researchers has been that the fishery is in crisis and that closure could not be avoided. We are now at the point where the total allowable catch (TAC) reached a record low of 125 tons for the 2006/7 season. The only responsible option left to me as Minister, is to take the unfortunate decision to suspend fishing in the abalone industry in terms of s 16 of the Marine Living Resources Act. …over the past ten years, due to declining resources the TAC has had to be reduced annually from 615 tons in 1995 to a record low of 125 tons for the 2006/2007 season... To ensure the suspension of harvesting is observed, monitoring control on the part of the Department will be upscaled. Abalone population dynamics will also be monitored through regular research surveys."***

[5] Directly affected by second respondent's decision were the 302 rights holders operating in this sector, comprising 262 individual divers and 40 legal entities. Days after the suspension, on 30 October 2007, an urgent application brought by the present applicants was served on second respondent, citing also the President of the Republic of South Africa as first respondent.

[6] First applicant is a rights holder in his personal capacity in the sector whilst second applicant describes itself as an industrial body registered in terms of s 8 of the Act and recognised by the second respondent. According to Mr. Scott Russell ("Russell") who describes himself as the "spokesperson" and "recognised representative" of second applicant, it represents all the rights holders in the sector. However, no proof was tendered of this claim and it is disputed by respondents. Applicants initially sought far-reaching interdictory and mandatory relief against respondents, in effect seeking to reverse second respondent's decision suspending fishing in the commercial abalone fishery. The application was set down for hearing on 31 October 2007 but, by agreement, was not heard that day pending a further announcement to be made by

second respondent. On the same day second respondent issued a further press statement announcing the suspension of his earlier decision until 1 February 2008 and establishing a TAC of 75 tons in the commercial abalone fishery for the intervening three month period. His statement reads *inter alia* as follows:

> ***"I remain of the view that the abalone resource is endangered due to ecological changes and poaching. The fishery is in a crisis and should be managed as an emergency. The closure of the abalone fishery is the right thing to do. There is also broad acknowledgment that the resource is in a crisis.***
>
> ***I have applied my mind to the numerous pleas I have received from communities regarding the implementation date of the decision. After carefully considering these appeals I requested the Department to see if there could be a scientific basis to delay the implementation date of this decision. After receiving a report from them earlier this morning and taking into account the socio-economic implications of this important decision, I have decided to delay the implementation of the decision to 1 February 2008.***
>
> ***I have accordingly determined, on the recommendation from the Department's researchers and management, a total allowable catch of 75 tons with the following conditions:***
> - ***The global TAC will be apportioned proportionately amongst right holders;***
> - ***Right holders will expected to follow the normal permitting process;***
> - ***A limited group of harvesters and vessels be nominated by right holders to fish on behalf of the rest;***
> - ***Right holders be consulted on specific allocation and harvesting arrangements;***
> - ***The fishery will close on 31 January 2008…***
>
> ***To ensure that the suspension of harvesting is observed we will continue efforts to clamp down on poaching… furthermore, the department will consult with stakeholders on the possibility of imposing a diving ban in certain areas to further protect the abalone resource. The department will continue to closely assess the stock levels of abalone."***

[7] Applicants remained dissatisfied with second respondent's decision and the application which they had launched in this Court was pursued with amended relief being sought. The proceedings were in effect converted into a review of second respondent's decision with the following relief being sought in terms of an amended notice of motion. I quote only those substantive prayers with which the applicants persist:

> ***"3. That the following decisions by the second respondent be reviewed and set aside:***
> ***3.1 To suspend the commercial fishing of wild abalone; and/or***
> ***3.2 That the total allowable catch (TAC) be set at 75 tons; and/or***

3.5 That the fishery will close on 31 January 2008."

[8] In argument it was tentatively suggested on behalf of applicants that second respondent should be ordered, under a prayer seeking further and/or alternative relief, to set aside a TAC of 125 tons to be caught over a full season. However, applicants were eventually content to ask that second respondent be ordered, within a week of his decisions as aforesaid being set aside, to take a further decision on the allocation of a TAC.

[9] It is worth noting that the combined effect of second respondent's decisions, as initially published in the government gazette together with his amending decision of 31 October 2007, was in effect to suspend fishing in the commercial wild abalone sector indefinitely from 1 February 2008 but, prior thereto, to have established a TAC of 75 tons in the sector for the 2007/2008 year albeit over a shortened period of 3 months rather than the customary period of 9 months.

THE GROUNDS UPON WHICH THE APPLICANTS SEEK TO REVIEW THE SECOND RESPONDENT'S DECISION/S

[10] Second respondent's decisions were criticised on numerous grounds by applicants in their founding papers but there was no coherent attempt to list the grounds of review as set out in s 6 of the Promotion of Administrative Justice Act, 3 of 2000 (as amended) ("PAJA") either in the papers or in argument.

[11] The main complaints made by applicants in the founding and supplementary affidavits are the following:

1. that second respondent acted irrationally since, although he identified the main cause of the decline in abalone stocks as poaching, he suspended lawful commercial in the fishing sector in an attempt to ensure the survival of the species in so doing "punishing" the wrong parties;

2. in reaching his decision, second respondent purported to rely on scientific studies which show that unless decisive and immediate action was taken, the abalone resource would collapse completely. However, to second respondent's knowledge, these studies had shown the opposite. Under this heading applicants allege, furthermore, that second respondent's department had manipulated "scientific studies". It was also alleged that second respondent's own scientific advisors had not recommended the closure of the commercial abalone industry;

3. The applicants accuse the second respondents and/or his Department of not having performed their duties of combating poaching, either effectively or at all. They contend that the Minister's decision constitute an expropriation of rights without consultation and as such, an abuse of the audi alteram partem principle.

[12] As I have stated, in their founding affidavits applicants raised numerous points of criticism against second respondent's decisions, the "Social Plan" which sought to alleviate the hardship caused by the decision, his reasons for the decision, his department's policy, and the manner in which the policy was executed. None of them, however, add any substantive ground of review to those which I have enumerated above. Various possible procedural grounds of review were specifically mentioned in Russell's founding affidavit but were not pursued in argument. For this reason, I do not propose to set them out either.

[13] A recurring theme in applicants' founding affidavit is that second respondent and his department, through ineffective combating of

poaching, are themselves to blame for the situation in which the wild abalone fishery finds itself.

[14] After second respondent announced his decision on 30 October 2007 to temporarily suspend his earlier suspension of fishing in the wild abalone sector, the applicants filed a supplementary affidavit. In it Russell renewed his attack on the scientific validity of second respondent's decision to close the fishery. He also criticized various aspects and consequences of second respondent's decision to in effect establish a shortened three month 2007/2008 season for the commercial fishing for abalone with a TAC of 75 tons. Many of these criticisms had become academic by the time that the matter was heard in late February 2008. After receipt of Russell's affidavit respondents filed the record of the decision-making process. Applicants chose not to supplement their case in response thereto.

THE GROUNDS UPON WHICH APPLICANTS RELIED

[15] Notwithstanding the plethora of grounds of attack upon second respondent's decision, in the heads of argument filed on the their behalf, applicants confined themselves to one main ground of attack, namely, whether second respondent was correct in deciding that there was an "emergency" in the commercial wild abalone fishery which justified invoking the provisions s16 of the Act. It was submitted that in order to consider this attack it was necessary to analyse and evaluate the advice of the scientists and government officials in second

respondent's department and upon which advice he claimed to have relied in reaching his decisions. In this regard applicants argued that there was an unbridgeable contradiction between the advice of the abalone scientific working group, which recommended a TAC for the abalone fishery for the 2007/2008 season, and that of Dr. CJ Augustyn ("Augustyn"), a scientist and Chief Director in the department who recommended to second respondent that the abalone fishery be closed. Applicant's counsel contended furthermore that Augustyn's advice was self-contradictory in that on the one hand he recommended the closure of the fishery but on the other hand he recommended, in the alternative, a TAC for the fishery for the relevant season for the 2007/2008 season in the amount of 125 tonnes. In the light thereof, it was submitted, second respondent "could never have come to a decision" that an emergency existed compelling him to close down the abalone fishing sector. Instead, it was argued, he should have followed Augustyn's alternative recommendation.

[16] In argument, Mr. Knoetze, who appeared on behalf of applicants, refined his position even further, contending that in essence applicants relied on one ground, namely, that second respondent erred in finding that in deciding that an "emergency" existed in the abalone fishery and therefore invoking his powers in terms of s 16 of the Act. Instead, submitted counsel, all that existed in the fishery was a "crisis" which required to be "managed". In substantiation of this argument, counsel relied again on what he contended was the discrepancy between the

scientific advice of the scientific working group and the primary recommendation made by Augustyn. In this regard applicants' counsel developed a point which was anticipated neither in applicants' founding or supplementary affidavit nor in its heads of argument. In essence the point was that, although the cabinet decision endorsing second respondent's initial decision to suspend the fishery indefinitely was taken on 25 October, Augustyn's recommendation to this effect was only made five days later on 30 October 2007. Accordingly, the argument was that, to the extent that second respondent purported to rely on scientific advice from his officials, the sequence of the decision-making process revealed that he did not, with fatal consequences for the validity of his decision.

[17] Notwithstanding the many points of criticism of second respondent's decision aired by applicants the grounds for the review thereof second respondent's decision are not easy to discern. This is a result of a number of factors. In the first place the application was initially framed as an interdict and a "shotgun" approach was adopted with the applicants raising numerous criticisms of second respondent's decision but seldom identifying them as a ground of review. Secondly, applicants did not see fit to focus the basis of their attack on the decisions after the filing of the record of the decision and after amending their papers to seek review relief. They have, moreover, repeatedly changed their case from founding papers to heads of argument to argument. Even when the matter was argued applicant's

counsel did not identify on which of the grounds codified in terms of s 6 of PAJA the attack was founded.

[18] It would appear, however, that applicants' case is best described as being founded on one or more of the following provisions of section 6(2)(b):

> ***"A mandatory and material procedure or condition prescribed by an empowering provision was not complied with."***

This most closely relates to the argument that no "emergency" existed but only a state of "crisis".

- Sections 6(2)(e)(iii), (v) and (vi) – the action was taken

> ***"because irrelevant considerations were taken into account or relevant considerations were not considered", "in bad faith" or "arbitrarily or capriciously".***

These grounds would cover the arguments that the sequence of the decision-making process was reversed and that second respondent relied on incorrect or unfounded scientific advice or ignored advice which he should have heeded.

- and/or section 6(2)(h)

> ***"the exercise of the power... in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function"*.**

This last ground comprehends the overall attack on the alleged irrationality (or unreasonableness) of second respondent's decisions. Although this ground was ultimately not pertinently relied upon nor argued by applicants' counsel, I propose to deal with it since it underlies the entire challenge to second respondent's decisions.

RESPONDENTS' PRELIMINARY OBJECTIONS

[19] Mr. Duminy, who appeared on behalf of the respondents together with Mr. Jacobs, raised a preliminary objection, arguing that applicants' attack based on the alleged reverse sequence of the decision-making process had not been made out in applicants' founding or supplementary papers. To a lesser extent the same objection can be raised to what eventually was the other main ground of applicants' attack, namely, that the state of affairs prevailing in the wild abalone fishery prior to the suspension decision did not amount to an "emergency" as envisaged by the Act.

[20] It is an accepted procedural principle of our law that, generally speaking, an applicant must make out his case in his founding papers. See *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (TPD) at 368 H – 369 A and *Administrator, Transvaal and Others v Theletsane and Others* 1991 (2) SA 192 specially at 196 H - 197 D. There is no reason why this principle should not apply to review proceedings taking into account that an applicant has an additional opportunity of supplementing its case after the filing of the record of the decision-making process.

[21] However, to the extent that the ground of attack relating to the existence or otherwise of an "emergency" is not a point of law, it was foreshadowed in the founding affidavit, albeit somewhat fleetingly. The second ground relied on, that relating to the alleged reverse sequence

of recommendation and decision-making, was indeed sprung upon the respondents late and is fact-based. On the strength of their objection, however, respondents were allowed to file a further affidavit by Augustyn dealing with the nature, timing and the sequence of the twin processes whereby both he and the scientific working group made separate recommendations to second respondent on the TAC for the fishery and the possible suspension thereof. In my view, being afforded this opportunity eliminated any prejudice which the respondents might otherwise have suffered as a result of the late challenge by applicants on this ground.

[22] Respondents also challenged the applicants' *locus standi*. In the case of second applicant the basis therefor was that it had not shown that it was a *universitas* with constitutional objects that gave it capacity to sue in its own name. The point was effectively conceded by applicants. As far as first applicant's *locus standi* was concerned, an individual rights holder in the sector purporting to be representative of many others, the initial complaint was that he was not properly before the Court for lack of a signed affidavit by him. This was remedied at the eleventh hour when an affidavit was put up in which first applicant confirmed the allegations contained in his unsigned founding affidavit. Respondents thereupon abandoned their challenge to first applicant's *locus standi*.

GENERAL APPROACH

[23] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 CC the Constitutional Court noted that the ten objectives identified in s 2 of the Act are, by their nature, incapable of immediate or short term fulfilment. O'Regan J, speaking for the Court went on to say, at page 499 para 6:

> ***"In particular, the Act recognises that the industry exploits a scarce marine source that may be destroyed if not carefully managed and monitored. Most of the other objectives flow from this realisation."***

The learned judge went on to list the various statutory objectives. Amongst them, are the following:

> ***"(a) the need to achieve optimum utilisation and ecologically sustainable development of marine living resources;***
>
> ***(b) the need to conserve marine living resources for both present and future generations;***
>
> ***(c) the need to apply precautionary approaches in respect of the management and development of marine living resources; ...***
>
> ***(e) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;***
>
> ***(f) the need to preserve marine biodiversity."***

These objectives are not the only ones which are relevant to the present matter but they in particular do emphasise that, in regard to wild abalone, the department and second respondent are the custodians of a fragile resource which must be jealously guarded if it is to remain a long-term asset for both the wider community and those actively engaged in this particular fishery.

[24] In *Foodcorp v Deputy Director-General, Department of Environmental Affairs and Tourism* 2005 (1) ALL SA 531 (SCA) at page 535, para 12 the Court made the following remarks regarding the approach to be adopted in a review application concerning the allocation of commercial fishing rights:

> ***"In assessing whether the allocation of the commercial fishing rights... was 'so unreasonable that no reasonable person could have so exercised the power' to grant rights, a number of matters must be kept in mind: The right to just administrative action is derived from the Constitution and the different review grounds have been codified in PAJA, much of which is derived from the common law. Pre-constitutional case law must now be read in the light of the Constitution and PAJA. The distinction between appeals and reviews must be maintained since in a review a court is not entitled to reconsider the matter and impose its view on the administrative functionary. In exercising its review jurisdiction the court must treat administrative decisions with 'deference' by taking into account and respecting the division of powers in the Constitution. This does not 'imply judicial timidity or an unreadiness to perform the judicial function.' The quoted provision, s 6(2)(h) of PAJA, requires a simple test namely whether the decision was one that a reasonable decision-maker could not have reached or, put slightly differently, a decision-maker could not have reasonably reached."***

[25] Also quoted with approval was the approach of the Constitutional Court in *Bato Star* to this question as expressed in paragraph 44 of that judgment where the following was stated:

> ***"Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."***

In elucidating the approach of the courts in judicial review matters to the decisions of the administrative agencies, O'Regan J stated as follows at para 48:

> ***"In treating the decisions of administrative agencies with appropriate respect, the Court is recognising the proper role of the Executive within the Constitution. In so doing a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of the government. A Court should thus give weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the***

> ***goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."***

I consider that the above principles and approach should be followed in determining the questions posed in this review.

[26] I turn firstly to applicants' argument that second respondent over-reacted to what was no more than a crisis in the abalone fishery by declaring an emergency. Rather, it was argued, second respondent, through the department, should "manage" the crisis. By this I understood applicants to contend he must keep the fishery open as normal, regularly allocating TAC's but at the same time taking steps to reduce or eliminate poaching and to combat the problems caused by the migration of rock lobster into abalone areas which factors together have led to a drastic diminution of wild abalone stocks.

[27] The Act does not define what constitutes an emergency as envisaged by section 16 but it does give clear guidance when it states, by implication, that the emergency must be one which "endangers or may endanger stocks of fish or aquatic life or any species or class of fish or aquatic life in any fishery".

[28] In my view the papers in this matter adequately prove the existence of an emergency in the abalone fishery. By way of an example, the statement by second respondent on 25 October 2007 that the TAC had reached a record low of 125 tons for the 2006/2007 season, being

reduced annually from 615 tons in 1995, was not disputed. Nor was his statement that the main causes of the decline in abalone stocks are poaching and the migration of West Coast rock lobster into abalone areas. On applicants' own version the commercial abalone industry is worth R30 million per annum while the illegal abalone poaching industry is worth R3 billion per annum. Although no authority was given for these figures they give some indication of the dimensions of the poaching problem. On the same topic Russell avers in his founding affidavit that poaching "has spiralled out of control", although he lays the blame for this at the door of second respondent and the department.

[29] An "emergency" is defined in the *Oxford English Dictionary, Tenth Edition, Revised* as "a serious, unexpected and potentially dangerous situation requiring immediate action". A "crisis" is defined *inter alia* as a "time of intense difficulty or danger". Applicants' counsel himself conceeded that there was a fine line between a crisis and an emergency. In the context of the provisions of section 16, I consider that no useful purpose will be served in seeking to make fine distinctions between a crisis and an emergency. Any judgment in this regard inevitably will be subjective and reasonable persons could easily differ on whether a particular state of affairs constitutes a crisis or an emergency.

[30] In my view the continuing drastic decline in the wild abalone stocks as a result of wide-spread poaching, although a long-standing problem, together with the more recent phenomenon of encroachment on stocks by West Coast rock lobster, constituted, in October 2007, what may reasonably be regarded as an emergency as envisaged in s 16 of the Act. In his opposing affidavit, Augustyn, who holds the position of chief director in the research function of the department, explained that he was closely involved in the processes which led to the decisions in the present matter. He formulated a number of the relevant recommendations and was, furthermore, the senior manager responsible for evaluating and providing scientific recommendations relating to the status and the utilisation of the abalone resource. Augustyn explained that the resource had been under severe threat for the past decade or more. This was due to a ecosystem arising from an increased population of West Coast rock lobster and high levels of "poaching", being illegal, unregulated and unreported harvesting of wild abalone. A new policy, known as TURF, (standing for Territorial User Rights in Fisheries), had been introduced in 2003 for the allocation of commercial fishing rights in the fishery. It had been hoped the policy would result in a substantial reduction in the rate of illegal harvesting but it was ultimately unsuccessful in this respect. That policy was based on the notion that coastal communities would play a significant role in enforcing compliance in the fishery and would work with rights holders and the department's fishery control officers.

[31] In 2004, when announcing the TAC for the wild abalone fishery, second respondent had publicly warned that unless there was a drastic decline in poaching he would have to consider a complete ban on all abalone harvesting to allow the resource to recover. In 2006 Augustyn commissioned a report from scientists in the department's research deputy directorate. That report stated that the "complete collapse and closure of the fishery seems inevitable given the *status quo*". Under the heading "danger of non-recoverable collapse" the authors had written that…

> ***"the resource has now reached a point where there are additional dangers associated with allowing fishing (and poaching) to continue. For these reasons the option of immediate closure is favoured over that of delaying closure by three years..."***.

[32] In 2006, on the basis of the above report, another report prepared by an outside consultancy and the department's own assessment of the situation, the commercial abalone fishery was effectively closed in three zones. Prior to this in 2003 the recreational abalone fishery was suspended indefinitely. Despite these drastic measures the pressure on the resource remained severe and ultimately led to a recommendation being made by the Director-General of the department to second respondent on 22 August 2007 for the suspension of wild abalone commercial harvesting as an emergency measure. Second respondent accepted that recommendation but refrained from taking a decision pending its submission to the cabinet for approval. Applicants placed no independent data before the court to challenge the conclusion by the department's officials that there was an emergency or, at the least, a "crisis" in the abalone fishery. Instead the

main focus of their attack was to lay the blame for the parlous state of the resource at the door of the department and second respondent in not effectively combating poaching.

[33] In regard to poaching Augustyn observed, as regards compliance and enforcement of the Act and the regulations framed thereunder, that Fisheries Control Officers (FCO's) are appointed under chapter 6 of the Act and in theory have extensive powers of inspection, search and seizure. However, due to budgetary and legal constraints not all FCO's are armed and in practice have no cohesive capability. FCO's in the department rely on the co-operation of the departments of law and order and justice and, at times, the South African National Defence Force in combating poaching. However, these departments and agencies have their own priorities and budgets which constrain their operations. Unfortunately, therefore, Augustyn testified, although enforcing compliance in the abalone fishery is of vital and paramount importance to the department it does not rank highly with other state departments and agencies. The result thereof has been that some enforcement initiatives that were launched in the past had to be curtailed and in cases discontinued.

[34] Augustyn also pointed out that there were numerous instances of FCO's being threatened and intimidated by illegal harvesters of abalone. According to him unarmed FCO's have often reported being confronted by large groups of armed and aggressive harvesters who

threaten them with violence to their families, persons and properties. These officers are consistently outnumbered by aggressive armed poachers and do not enjoy the support of the community. Augustyn also observed that, from a practical point of view, it was difficult to distinguish between illegal harvesting of abalone carried on by rights-holders, i.e. operating outside their permit conditions, and that conducted by poachers, pure and simple. The suggestion that poaching was carried on by rights holders was understandably met with vociferous disapproval from the side of rights-holders during argument but common sense suggests that the existence thereof cannot be discounted. The notion was given some credence by Russell unfortunate remark in his founding affidavit to the following effect:

> ***"Members of the second applicant have already informed me that they are painting their boats black, "as we speak", the reason for this is to be able to sustain their livelihood by poaching at night."***

As I understand Augustyn's reasoning and that of his fellow departmental decision-makers, the significance of a suspension of the fishery as a whole lies in the fact that the practical difficulties in distinguishing between out and out poaching and illegal harvesting by rights holders are thereby eliminated. This of course has positive implications for compliance and enforcement.

[35] Based *inter alia* on the report from scientists in the department commissioned in 2006, to which reference has already been made, the conclusion was reached within the department that emergency measures in the form of the indefinite closure or suspension of the abalone fishery was justified and such a recommendation was made to

second respondent . Augustyn describes the process which resulted in the initial decision to suspend the fishery as "*multi-faceted, protracted, thorough and very difficult*". He goes on to state:

> ***"The input of outstanding experts in many fields was received and considered. That included biological scientists in respect of resource assessment, applied mathematicians in respect of the appropriate use, modelling and interpretation of data, social scientists in respect of community impacts, lawyers in respect of legal implications and members of the Department experience in resource management who had the unenviable task of making the final policy recommendations."***

As Augustyn's evidence recounts, top management in the department, including the forum where the Directors-General meet with the Director-General, was *ad idem*, in August 2007, that given the situation in the abalone fishery, indefinite closure was justified. It was on this recommendation that second respondent acted.

[36] Applicants produced no independent scientific evidence contesting the general view expressed by the department's experts on the state of the abalone fishery and little hard evidence disputing the underlying causes thereof. In those few instances where facts rather than the interpretation of facts were in dispute, applicants are constrained, of course, by the rule in *Plascon Evans*. The high-water mark of applicants' case on the scientific front was an e-mail from a member of the abalone working group, Dr. E Plaganyi-Lloyd, apparently a senior lecturer in the Department of Maths and Applied Maths at the University of Cape Town, in which she expressed disagreement with statements made by second respondent in the press release announcing his initial decision to close the wild abalone fishery. Her essential complaint was that where second respondent referred to

"scientific studies", she was aware of no other studies other than those in which she and several colleagues had participated and those studies did not justify the conclusions and reasons which second respondent gave for the closure of the fishery. She concluded her e-mail with the following statement:

> ***"This is not to dispute that an argument could not be made for the closure of the entire resource, but the reasons given are incorrect and misleading."***

Even if some weight is given to the views expressed by Dr. Plaganyi-Lloyd, it does not advance applicants' case that no reasonable decision-maker could have taken the decision that years of declining stocks of abalone caused by uncontrolled poaching, coupled with encroachment on abalone stocks by West Coast rock lobster, had resulted in an emergency situation justifying the indefinite closure of the fishery. I find, therefore, that the first point relied upon by applicants, namely, that the situation faced by second respondent in the abalone fishery could not reasonably have been dealt with as one justifying the emergency measures invoked in terms of s 16 of the Act, to be without substance.

[37] This brings me to the second major point relied upon by applicants, namely, that the sequence of recommendations received by second respondent reveal a flawed and *mala fide* decision-making process. The thrust of this attack was that whereas the cabinet had eventually endorsed second respondent's decision to indefinitely suspend the abalone fishery on 25 October 2007, when regard was had to the various reports and recommendations drawn up by the departmental

officials making up the decision-making chain, the ultimate recommendation (and its preceding conclusion) to second respondent to take such a step had only been arrived at on 30 October 2007. Thus, it was argued, the decision-making process was illogical, flawed and the ultimate decision had to be set aside.

[38] These allegations appear to have been made after a study by applicants' representatives of the documents produced by respondents comprising the record of the decision-making process. As mentioned earlier, since applicants did not take this point initially or when they had an opportunity to supplement their founding papers, Augustyn was afforded an opportunity of filing a supplementary opposing affidavit at the hearing in order to explain the apparent discrepancies.

[39] In this affidavit he explained that a distinction had to be drawn between two processes which had been conducted simultaneously and in both of which he had been involved. The suspension recommendation had first been made in August 2007. The report of the director-general of the department and her recommendation to this effect, annexure "CJA 6", bears testimony to this. However, work in relation to a TAC recommendation, in which the scientific working group played a key role, had to continue because of the possibility that second respondent might not accept the suspension recommendation. This remained the position even after second respondent had accepted the

recommendation on 22 August 2007 since the matter had still to go before the cabinet.

[40] The scientific working group's terms of reference in relation to the wild abalone fishery were to deal with the relevance of certain scientific aspects including biological issues in the use, modelling and interpretation of data. In August 2007 the group recommended a TAC for the commercial abalone fishery of either 50 or 125 tons. This is borne out by annexure "CJA 8" which reveals furthermore that the group was aware that second respondent was then considering the closure of the abalone fishery. It expressed the view that *"(c)losure of the commercial fishery, in the absence of a revised compliance approach and community buy-in, cannot result in resource recovery and could worsen poaching"*. The expression of this view, however, according to Augustyn, fell outside the group's terms of reference and could not supplant the views of the department's management.

[41] Augustyn testified that he applied his mind to the scientific working group's TAC recommendation and continued to work on his during September 2007. This explains why "CJA 9" bears this date on its front page. He did not complete his recommendation at that stage since second respondent had supported the closure recommendation. After second respondent's decision to suspend activity in the fishery was made public on 25 October 2007, and in response to representations from various parties, he asked the department to assess whether

postponing the implementation of the suspension decision could be justified on a scientific basis. That request was referred to Augustyn. Although he remained of the view that immediate closure of the fishery was vital he accepted that there were scientific arguments which provided a basis for a TAC of 125 tons, one of the alternatives proposed by the scientific working group in August, and he duly made this recommendation on 30 October 2007, hence the date on annexure "CJA 9".

[42] On the following day, 31 October 2007, the director-general in the department made two alternative recommendations to second respondent: either immediate closure of the abalone fishery until further notice, alternatively suspension of the fishery until further notice, such suspension to take place on a date to be announced by second respondent with a global TAC of 75 tons for the intervening period. The same document which evidences this recommendation, annexure "CJA 10", reveals second respondent's handwritten decision to accept the second alternative recommendation, with the season opening on 1 November 2007 and closing on 31 January 2008.

[43] I am satisfied therefore, that the recommendation and decision-making process was thorough, sequential and regular and that there is no evidence of the decision or decisions reached being justified by reports or recommendations produced *ex post facto*.

[44] What remains of applicants' case are the many and varied reasons which they put forward in contending that second respondent's decision was ill-advised or irrational coupled with the far-reaching economic consequences of the suspension for the established rights holders.

[45] Not least amongst these criticisms were the direct impact of the suspension upon the rights-holders' ability to earn a living and the inadequacy of the social plan proposed by the department to ameliorate the effects of the suspension upon rights-holders. I do not underestimate the hardship caused and still to be caused as a result of the suspension decision but do not consider that these factors alone can have a determinative effect on the reasonableness or otherwise of second respondent's decision or decisions. The exploitation of marine resources will always depend to some extent on factors beyond the control of man. This is explicitly recognised in the terms of the permits issued to rights-holders in the fishery. One such term states that the granting of rights "*is subject to the provisions of the Act, including the provisions which entitle the Minister to inter alia, declare an emergency and to alter, suspend, cancel or revoke rights*".

[46] Many of the applicants' criticisms are nonetheless weighty, particularly when regard is had to the fact that the primary reason for the crisis in the abalone fishery appears to be the uncontrolled and rapacious poaching of the resource over an extended period. However, the case

made out by the department's scientists and officials that, at this stage, only an overall indefinite suspension of the fishery will allow the resource to recover, is equally cogent. More importantly the decision, in my view, meets the test of reasonableness. Notwithstanding sympathy which the Court may have for the established rights holders and whatever doubts it may have as to the viability of the suspension of the fishery without a stringent and sustained anti-poaching drive, it is not this Court's function to second-guess reasonable decisions taken by decision-makers, contentious though they may be, if these are reasonable both on their own terms and in relation to the reasons given for them and if the decision will reasonably result in its ultimate goal of saving and rebuilding the resource. Of course, only time will tell if that goal will be achieved. Nor must sight be lost of the fact that the decisions are based on the recommendations of qualified departmental staff after a thorough process.

[47] The ultimate test remains whether the decision taken by second respondent was one which a reasonable decision-maker could take and, in my view, no case has been made out that the decision or decisions under review, is or are not ones which could be reached by a reasonable decision-maker. In arriving at this conclusion I have taken into account all the applicants' criticisms of second respondent's decision and the response of the department's officials thereto, even though these are by no means all mentioned in this judgment.

WAS THE MINISTER ENTITLED TO SUSPEND THE FISHERY INDEFINITELY?

[48] After the hearing counsel were requested to furnish an additional head on the question of whether second respondent was entitled to *indefinitely* suspend the fishery. Section 16, the emergency measures clause in the Act, states that "*the Minister may suspend all or any of the fishing in that fishery or any specified part of it*" without specifying the duration of any such suspension. Section 14 which deals with TAC's and other constraints on fishing provides that the Minister *"shall determine the total allowable catch, the total applied effort or a combination thereof"*. Subsection 14(2) provides that a Minister *"shall determine the portions of the total allowable catch, to be allocated in any year to subsistence, recreational, local, commercial and foreign fishing respectively"*. The argument can be made, therefore, that the Minister, having established the commercial abalone fishery and allocated rights to holders therein for a determined period, was required to determine the TAC on an annual basis in the fishery and by implication was precluded from suspending the fishery indefinitely.

[49] There are however provisions which point in the opposite direction. Subsection 14(5) provides that the provisions of the section in question shall not be construed as prohibiting the Minister from determining that the TAC shall be nil. Furthermore, given the wide terms of the Minister's powers under the emergency measures provisions in s 16 it

can be persuasively argued that the Minister's powers of suspension in a fishery are not limited as to time. When regard is had to the Director-General's recommendation to second respondent to suspend wild abalone commercial fishing it seems reasonably clear that the purpose of suspending the fishery is to enable the resource to rebuild and recover. Further, the notice in the gazette in terms of s 16(2) announces the suspension of the fishery "until further notice". In context that appears to contemplate notice that commercial fishing for wild abalone may again be undertaken at a time when the resources have recovered sufficiently. The press statement made on 25 October 2007 also suggested, in the reference to the monitoring of abalone population dynamics, that when they have recovered sufficiently to permit sustainable exploitation on a commercial basis, an abalone TAC will be fixed.

[50] Any concern that by suspending commercial fishing in the fishery indefinitely, second respondent might evade his responsibility to lift the suspension of the fishery and establish a TAC where that is appropriate, is met by the provisions of s 6(2)(g) of PAJA which allows for the institution of judicial review proceedings of administrative action where that action consists of a failure to take a decision.

[51] In the result I am satisfied, in all the circumstances, that the decision or decisions of second respondent cannot be successfully reviewed.

COSTS

[52] Respondents sought the costs of the entire proceedings including the costs of two counsel in respect of all the appearances in this Court since 25 October 2007. I have little doubt, however, that the interdict proceedings launched by applicants, later converted into this review, played an instrumental role in second respondent's decision of 31 October 2007 to postpone the suspension of the fishery and to allow limited harvesting for a three month period. Furthermore, given the drastic impact of the decision on the ability of the rights holders to earn their living, I consider they were justified in seeking access to the record of the decision-making which led to the indefinite suspension of the fishery.

[53] Taking all the circumstances into account, in my view the appropriate costs order would be to award costs to respondents for that period of the action commencing a reasonable period after their filing of the record of decision making in this matter. The record was filed on 8 November 2007 after which applicants had ten days within which to vary the terms of their notice of motion or supplement their supporting affidavits. In my view the applicants should not suffer a costs order for the period prior to 23 November 2007.

ORDER

[54] **The application is dismissed and the respondents are awarded costs with effect from 23 November 2007 onwards, such costs to include the costs of two counsel.**

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LJ BOZALEK, J