

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER:

7056/2006

DATE:

20 AUGUST 2008

5 In the matter between:

GLEN DUNCAN

APPLICANT

and

THE MINISTER OF ENVIRONMENTAL

AFFAIRS & TOURISM

1ST RESPONDENT

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CHIEF DIRECTOR: RESEARCH,
ANTARCTICA & ISLANDS OF THE
DEPARTMENT OF ENVIRONMENTAL
AFFAIRS & TOURISM: MARINE &

15 COASTAL MANAGEMENT

2ND RESPONDENT

DEPUTY DIRECTOR-GENERAL:

MARINE & COASTAL MANAGEMENT

3RD RESPONDENT

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JUDGMENT

VAN REENEN, J.:

The applicant, who has been actively involved in the fishing
industry since 1996, submitted an application for long term

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fishing rights in the traditional line fish sector on 4 November 2005 and nominated the "Endeavour" as a suitable vessel, despite the fact that it failed to comply with the prescribed criteria for a vessel to be utilised in that sector of the fishing industry.

The application was unsuccessful as the applicant's name did not appear on the list of successful applicants, which was published on 28 February 2006. The first respondent conveyed the outcome of the application to the applicant by letter dated 6 March 2006, which appears to have been received by him only on 4 April 2006. The applicant, on 8 March 2006, lodged an urgent application in terms of Section 81 of the Marine Living Resources Act 18 of 1998, to which I shall refer as in the MLRA, for exemption in order to have enabled him to continue utilising the "Endeavour".

After publication of the "general reasons for decisions on the allocation of rights etcetera" in the traditional line fishing industry on 10 March 2006, the applicant lodged an urgent appeal in terms of Section 80 of the MLRA on 26 April 2006 to the first respondent, within the time limit prescribed by Regulation 5(1) of the regulations promulgated in terms thereof. In terms of Regulation 5(3), it triggered an obligation upon the second respondent to have submitted a report to the

first respondent by no later than 26 May 2006.

Despite the fact that the applicant's attorneys, on 10 May 2006 and 6 June 2006 respectively, addressed letters to the first and second respondents requesting an urgent finalisation of the appeal and exemption application by no later than 13 June 2006, the second respondent appears to have provided his report to the first respondent only on 14 August 2006. In the meantime an off-the-record-meeting took place on 7 June 2006. A proposal was made to the applicant on 19 June 2006 to nominate a substitute vessel, which was purported to be accepted by the applicant on 26 June 2006, but without his having complied with the requirements for a substitute vessel.

15 As neither the appeal nor the exemption application had been finalised by then, the applicant, on 7 July 2006, launched an urgent application – set down for hearing on 11 July 2006 – in which primarily the following relief was sought on an urgent basis. That –

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“2. First respondent, alternatively third respondent, or their duly appointed delegates, be directed and directed forthwith to consider and take a decision in respect of:

25 2.1 The vessel nominated by applicant pursuant to

the exemption granted by first respondent, alternatively third respondent on 19 June 2006 to applicant to engage fishing in the traditional line fish sector in terms of Section 81 of the Marine Living Resources Act 18/1998.

2.2 The urgent appeal lodged by applicant with the first respondent on 26 April 2006 in terms of Section 80 of the MLRA in regard to second respondent's refusal of the applicant's application (number NLNFM 5133) for commercial fishing rights in the traditional line fish sector in terms of Section 18 of the MLRA."

The application was by agreement between the parties postponed to 5 September 2006. The respondent filed and delivered their answering affidavits on or about 4 August 2006 and the applicant, his replying affidavit, on or about 16 November 2006. Meanwhile the first respondent who had scheduled the appeals against the refusal of the traditional line fish rights to commence on 7 August 2006, decided the applicant's appeal and on 22 August 2006, notified him that it had failed. The applicant thereupon on 21 September 2006 launched an application reviewing the first respondent's decision. The review was duly heard and dismissed by Nagan, A J on 28 February 2007.

In view of the foregoing it is common cause that the relief sought in prayer 2 of the notice of motion, has become moot and all that needs to be considered by me is the question of costs. It is trite that questions of costs is entirely within a Court's discretion. The approach to be followed as regards unresolved issues of costs in matters where the merits of the issues between the parties are no longer live, is that the Court must endeavour to make a proper allocation as regards the costs along broadly general lines on the material at its disposal and without a painstaking analysis and adjudication of the merits. (See Gamlan Investments (Pty) Ltd v Trillion (Cape) (Pty) Ltd 1996(3) SA 692 (C) at 700 to 701). The relief sought in the application was based on the provisions of section 8(2)(a) of the Promotion of Administrative Justice Act 2000, (PAJA) directing the first respondent to take a decision it was obliged to have taken on the ground that there had been an unreasonable delay within the meaning thereof in Section 6(3)(a)(iii) of PAJA.

Of the three essential requirements that have been distilled from the provisions of that subsection, only one is an issue in the instant case, namely whether or not there had been an unreasonable delay in the deciding of the appeal. What constitutes an unreasonable delay, is dependent upon the facts of each particular case (see Minister of Health N.O. v

New Clicks SA (Pty) Ltd (Treatment Action Campaign as
amicus curiae) 2006(2) SA 311 (CC) and having regard to the
broad guidelines formulated in recent decided cases such as
Vumazonke v MEC for Social Development, Eastern Cape and
5 three similar cases 2005(6) SA 229 E at paragraphs 35 to 39
and MEC, Department of Welfare Eastern Cape v Kate 2006(4)
SA 478 (SCA) at 485.

As Mr Steenkamp, for the applicant, conceded that the relief
10 sought in Prayer 2.1 of the notice of motion lacks merit his
contention that the applicant is entitled to a cost order in his
favour, was limited to the relief sought in prayer 2.2. In
considering the reasonableness or otherwise of the delay in
deciding the applicant's appeal, I'm alive to the fact that
15 respondents had to deal with different categories of rights,
which had to be dealt with in a certain order dictated by
seasonal considerations and that a great number of
applications had to be considered and a substantial number of
appeals handled.

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Mr De Villiers-Jansen alluded to those facts, but as was
correctly pointed out by Mr Steenkamp, the respondents had
not on the papers directly invoked a lack of capacity and/or
resources as an explanation for the delay. In any event the
25 extent to which it is free for a public administration to invoke it

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in the face of the constitutional imperatives binding upon it, is highly contentious. (See Kiliko & Others v Minister of Home Affairs & Others 2006(4) SA 114 (C) at 126 E to H.

5 The respondents appear to be adopting the stance that the applicant's appeal had to be considered together with all the others and that it lacked urgency. That stance, however, does not appear to have been conveyed to the applicant prior to 20 June 2006, by which date the second respondent's reasons
10 were already overdue and furthermore is difficult to reconcile with the letter, Annexure H2, in which certain matters were specifically categorised as lacking urgency and did not include that of the applicant.

15 The respondents appear to have failed to recognise the fundamental difference between the appeal on the one hand and the pending exemption proceedings on the other. It would appear that the applicant's appeal was adjudicated on the basis of information contained in a detailed application form
20 and the extent to which prescribed criteria had been complied with or not. That means that no wide-ranging and time – consuming investigations were necessary as a prerequisite for it's being considered.

The applicant's application and subsequent appeal failed because the "Endeavour" did not comply with the prescribed criteria, as did the failed review application. It, therefore, appears that the consideration of the appeal would have been a fairly simple process which could have been disposed of expeditiously. The fact that the first respondent could dispose of the appeal by 22 August 2006, having received the second respondent's report by not earlier than 14 August 2006, bears testimony to that fact. If the time within which the first respondent dealt with the appeal is taken as a rough guide, namely 12 days, the appeal, in my view, could reasonably have been disposed of prior to the end of June 2006, had the second respondent provided reasons by 22 April 2008 as he should have. The failure to have done so by then, in my view, was unreasonable in all the circumstances of the case.

It follows that the launching of the application on an urgent basis was justified and that it is likely that the applicant would have been substantially successful had the matter run its normal course. I, accordingly, incline to the view that the applicant has succeeded in making out a case for an award of costs in its favour. However, as the mootness of the issues became amply apparent when the answering affidavit was filed, any order for costs must be limited to a date seven calendar days after the filing of that affidavit.

As the primary reasons for the delay appear to have been the second respondent's failure to have submitted his report timeously to the first respondent, as well as the latter's scheduling of appeals in respect of traditional line fish rights to commence only on 7 August 2008 and all the respondents opposed the relief sought, they, in my view, should be liable for the applicant's costs jointly and severely, the one paying the other to be absolved.

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Accordingly the following order is made:

- (a) The respondents are ordered to pay the applicant's costs jointly and severely, the one paying the other to be absolved.

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- (b) Such costs are to be taxed on the party and party basis as from a date seven calendar days after the date on which the respondents answering affidavits were filed.

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VAN REENEN, J

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