IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPEHIGH COURT, CAPE TOWN]

Case No: **356/13**

In the matter between:

JUDITH ANNE SOLE N.O.

THE PEOPLE OF THE REPUBLIC OF

SOUTH AFRICA Applicant

and

MINISTER OF THE DEPARTMENT OF

AGRICULTURE, FORESTRY AND FISHERIES First Respondent

DEPUTY DIRECTOR-GENERAL OF THE

FISHERIES BRANCH:

DEPARTMENT OF AGRICULTURE, FORESTRY AND

FISHERIES Second Respondent

MINISTER OF THE DEPARTMENT OF

FINANCE Third Respondent

MINISTER OF THE DEPARTMENT OF

SOCIAL DEVELOPMENT Fourth Respondent

THE PARTIES LISTED IN ANNEXURES "A"

AND "B" TO THE ORDER DATED

21 FEBRUARY 2013 Further Respondents

JUDGMENT DELIVERED: 13 JUNE 2013

FOURIE, J:

[1] The applicant, who purports to act in the public interest on behalf of *"the people of the Republic of South Africa"*, seeks a final interdict on an urgent basis, compelling the first and second respondents to, *inter alia*, suspend all commercial fishing activities in the South African West Coast Rock Lobster ("WCRL")fishery, with immediate effect so as to allow the WCRL stock to recover to above a minimum standard of 20% of its pre-exploitation level. The ancillary and alternative relief sought,entails the introduction of measures aimed at the achieving of the main goal, namely to save the WCRL from, what

applicant perceives to be, over-exploitation which will lead to the commercial and/or biological extinction of the species.

[2] The application is opposed by the governmental respondents (first andsecond respondents), as well as the further respondents, the latter being entities representing the interests of some 2500 holders of commercial fishing rights for WCRL, who are directly dependent on the WCRL fishery for their livelihood. In the main, the respondents oppose the application on the basis that there are no factual, legal or scientific grounds which call for the suspension of commercial fishing activities in the WCRL fishery. The respondents further contend that, if the court were to grant the drastic and far-reaching relief sought by the applicant, it would cause irreparable financial prejudice and hardship to the rights holders, which is not justified, especially having regard to the scientific and efficient manner in which the WCRL fishery is managed by the Fisheries Branch of the Department of Agriculture, Forestry and Fisheries ("the department").

[3] At the outset, it is necessary to reiterate that the requirements for the granting of a final interdict, are the following:

a) Firstly, the applicant has to show that she has a clear right which she seeks to protect by means of an interdict.

b) Secondly, she has to show an interferenceby the respondents with the exercise of the right which she possesses.

c) Thirdly, she has to prove that there is no other satisfactory remedy available to her than the granting of a final interdict.

[4] In view of the conclusion that I have reached in this matter, it is not necessary for me to dwell on the issue of applicant's *locus standi* which has been pertinently raised by respondents.Nor do I have to spend much time on the first requirement mentioned above, i.e. whether applicant has shown the existence of a clear right. It would suffice to say that she apparently bases this right on section 24 (b) (iii) of the Constitution, 1996, which reads as follows:

> *"Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that secure ecologically sustainable development and use of natural resources by promoting justifiable economic and social development".*

[5] For purposes of this judgment, I accept that applicant has satisfied the first requirement for the granting of a final interdict, i.e. that she has a clear right to the protection of the environment, including the protection of the WCRL. With regard to the second requirement for the granting of a final

interdict, it has to be determined whether applicant has shown that her right is being interfered with by the respondents. She has to show, at least, that a reasonable apprehension of injury exists and she is required to set out the facts grounding this apprehension in her founding affidavit.

[6] The main thrust of the applicant's case for the granting of the interdict, is the allegation that the WCRL resource has been commercially over-exploited to the extent that it has been reduced to only 3,1% of its pristine pre-exploitation level for the 2012-13 season. On the strength thereof, she contends that the WCRL is on the brink of extinction and that the "*tipping point may already have been reached"*. Therefore, she arguesthat immediate intervention is required.

[7] However, what does not appear from the applicant's founding papers, is that the WCRL resource has, in fact, fluctuated in a range between 2% and 4% of pristine pre-exploitation levels since about the 1960's, but this notwithstanding, the resource has continued to be fished sustainably. As pointed out by the respondents, the statistic of 3,1% referred to by applicant, did not suddenly arise in the 2012-13 season, necessitating any emergency measures. This is borne out by the department's status report, annexed to applicant's

founding affidavit, which illustrates the annual biomass of male rock lobsters in relation to pristine values for the resource as a whole. It is clear from this graphthat the WCRL resource has been fluctuating between 2% and 4% of pristine pre-exploitation levels since 1960.

[8] It is so that all the parties concerned accept that it is constantly necessary to take steps to enhance the recovery of the WCRL resource, but first and second respondents contend that this is exactly what has been done by the department. To put it differently, the first and second respondents emphatically deny any suggestion that they, and in particular the department, have interfered with or infringed upon the applicant's constitutional right to have the WCRL resource protected.

[9] Section 24 of the Constitution envisaged the introduction of legislation to, *inter alia,* secure ecologically sustainable development and use of natural resources.To this end the Marine Living Resources Act No. 18 of 1998 ("the MLRA"), was introduced. The MLRA regulates the allocation and management of long term fishing rights, including the WCRL fishing rights. The Act embodies the pillars of the new fishing policy, which are sustainability, equity and stability within the industry. The MLRA confers an array of statutory

powers and responsibilities on the first respondent and she, or her delegate, is required to strike the balance of achieving the optimum utilisation and sustainable development of marine living resources, whilst at the same time ensuring that marine living resources are utilised to achieve economic growth and employment creation.

[10] The deponent to the answering affidavit of the first and second respondents, has at length explained the steps and procedures taken by the Minister and the department in fulfilling their duties and obligations in terms of the MLRA. Whilst these respondents concede that the WCLR resource is under pressure, they maintain that it is being carefully monitored and managed within a sound scientific framework that has sustainability as a foundational objective. They contend that the department has taken extensive measures over the years to ensure that the WCRL fishery is managed in an equitable, stable and sustainable manner. To this end, the department has established a Scientific Working Group ("the SWG") for WCRL, to provide scientific advice in the management of the fishery. The SWG consists of several well-respected scientists who, together with fisheries management experts and other stakeholders, meet regularly to assess the status of the WCRL resource. They consider all available data and evidence in order to determine the status and projected growth of the resource, and to recommend on the rebuilding strategy

for the resource.The SWG also advises on the size of the total allowable catch ("the TAC") of WCRL, in terms of an Operation Management Procedure("OMP") which has been developed to provide a basis for setting the TAC for the resource.

[11] The first OMP was developed in 1997, after intensive consultation with the industry and other role players.It applied a precautionary approach in respect of managing the WCRL resource, in accordance with scientifically accepted guidelines. The 1997 OMP also introduced a rebuilding strategy for the WCRL resource, with a target recovery of 20% above the 1996 level of the exploitable biomass by the year 2006. By 2003, the resource had improved to 16% above the 1996 level. However, by 2006,the resource abundance had decreased to 18% below the 1996 level. The commercial TAC was therefore decreased by 10% for the following three consecutive fishing seasons, in an attempt to rebuild the stock to the new target of 20% above the 2006 level by 2016.

[12] The OMP was subsequently revised in 2000, 2003, 2007 and 2011. The OMPs that have been developed and used in managing the WCRL resource over the years, have also been subjected to rigorous international scientific peer review by leading fisheries scientists and have earned significant praise and

respect. The OMP adopted in 2011, aimed to rebuild the exploitable male component of the WCRL resource to 35% above the 2006 level by 2021.

[13] It should be borne in mind that OMP-2011 also makes provision for *"exceptional circumstances"* measures, which would allow for more radical reductions in TACs, should resource monitoring data indicate that trends in abundance are proving worse than projected. Appendix 6 thereto, sets out the process for determining whether exceptional circumstances exist. This provides for written representations to be made to the relevant working group and if, upon the consideration thereof, the working group agrees that exceptional circumstances exist, it will determine the severity of the exceptional circumstances and enact the process of action set out in Appendix 6.

[14] The respondents contend that the information placed before the court shows that the department has, after considerable scientific and management intervention, determined that the continued utilisation of the WCRL resource is possible on a sustainable basis. In particular, the TACs recommended under the OMPs are projected to result in increases in abundance in the future and hence are less than the sustainable levels of catch would be. There is, according to the respondents, no scientific basis for the conclusion that the WCRL source is

over-exploited to the extent that it faces extinction. On the contrary, the respondents contend that the management of this resource by the Minister and the department, having regard to the goals set by the MLRA, has resulted in some recovery whilst keeping the probability of further reduction of the WCRL source low.

[15] In view of this body of evidence produced by the respondents, it surely cannot be said that the Minister and/or the department have interfered with or infringed upon the applicant's constitutional right, by failing to take reasonable measures to secure or enhance the ecologically sustainable development of the WCRL. The applicant cannot dispute that the extensive measures put in place by the department in an attempt to protect the WCRL source, are scientifically justified and have received wide acclamation from experts in this field.

[16] The applicant was accordingly constrained to argue that the steps taken by the department are insufficient, as the WCRL resource is in far more danger of commercial extinction than the department realises. In this regard, she submitted that all commercial fishing activities in the WCRL fishery should be suspended immediately, so as to allow the WCRL stock to recover to above the internationally accepted minimum standard of 20% of its pre-exploitation level.

According to the applicant, 20% is the point at which, according to international best practice, all fishing activities should be suspended. The difficulty that I have with this submission, is that applicant has not referred to any expert scientific evidence or other credible authority to substantiate this so-called best practice rule. She has attempted to rely on certain USA legislation, but no clear principle emerges, particularly as there are so many variables and imponderables,which show that matters of this nature can only be properly dealt with and managed on a case by case basis, having regard to the peculiar circumstances of each case.It is clear to me that there is no proof at all of an internationally accepted minimum benchmark of 20%, as contended for by the applicant.

[17] The applicant has also pointed to the fact that the first and second respondents have failed to implement the recommendations of the SWG, in determining the TAC allocation for the 2012/13 WCRL fishing season. However, as pointed out by respondents, thisdecision has not been attacked by means of an appeal in terms of section 80 of the MLRA, with the result that the 2012/13 TAC allocation stands unchallenged. In any event, it has to be borne in mind that, in determining the TAC, the department had to balance competing factors and in the process decided to allocate the same TAC as was allocated in the 2011/12 season. Although the SWG's recommendations for the TAC

allocation for 2012/13 WCRL fishing were not accepted, the recovery plan for the WCRL resource remains intact. As pointed out in their answering affidavits, the first and second respondents remain committed to rebuilding the 2006 exploitable male biomass level of the WCRL by 35% by 2021.

[18] In conclusion, I find that the applicant has not advanced any basis at all for a finding that her constitutional right, or the constitutional right of the people of South Africa, with regard to the environment, and in particular with regard to the WCRL resource, has been prejudiced or infringed by any of the respondents. It follows that she has failed to satisfy this requirement for the granting of a final interdict.

[19] Furthermore, and in any event, the applicant has dismally failed to prove the third requisite for the grant of a final interdict, namely that there is no other satisfactory remedy available to her. It should be borne in mind that a final interdict is a drastic remedy and the court has a discretion to grant or refuse same. The court will therefore not, in general, grant an interdict when the applicant can obtain adequate redress in some other form of ordinary relief. An applicant for a permanent interdict must allege and establish, on a balance of probability, that he or she has no alternative legal remedy.

See C. B Prest, **The Law and Practice of Interdicts**, pages 45-46.

[20] In the instant matter there are several alternative remedies available to the applicant. She has not attempted to pursue any of them and merely contends that, as a lay person, she was not aware of her legal remedies. However, the absence of knowledge on her part, cannot overcome the difficulty presented by her failure to employ available alternative remedies, before approaching the court for the granting of a drastic interdict of this nature. The alternative remedies include the following:

a) A request directed to the first respondent in terms of section 16 of the MLRA, to declare emergency measures. The section provides that, if any emergency occurs that endangers or may endanger stocks of fish or aquatic life, the Minister may take steps which may include the suspension of all or any of the fishing in a fishery or part of a fishery.
b) The taking of steps to propose an exceptional circumstances review in terms of Appendix 6 of the 2011 OMP.
c) An internal appeal in terms of section 80 of the MLRA against the TAC allocation for the 2012/13 WCRL fishing season.
d) A review in terms of the Promotion of Administrative Justice Act No. 3 of 2000, for the setting aside of the TAC determination for the 2012/13 season.

[21] I should add that, in exercising its discretion, the court should also bear in mind the huge financial implications and social upheaval that would be caused by the granting of the interdict. The applicant conceded that the interdict sought by her could very well be of a perpetual nature, or at least endure for a number of years. In my view, it would be totally irresponsible for the court to consider the granting of an interdict in these circumstances, particularly in the absence of any convincing evidence, thereby causing financial prejudice and social upheaval on such a grand scale. Even the alternative measures suggested by the applicant, would cause severe prejudice and irreparable harm. I therefore conclude that, on the papers before me, the applicant has not made out a case for relief and the application therefore falls to be dismissed.

[22] This brings me to the issue of costs. The general rule is that costs are to follow the event. From this it follows that the respondents, as the successful parties, would ordinarily be entitled to a costs order in their favour. This general rule should only be departed from in exceptional circumstances.

[23] However, with the advent of our new constitutional era, the courts have on occasion held that litigants who seek to enforce constitutional rights and/or raise matters of public importance, should not be discouraged from enforcing

their rights by having to run the risk of having to pay the costs of their governmental adversaries. But this approach is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. The mere labelling of litigation as constitutional or in the public interest will in itself not be enough to invoke this approach. The issues must be genuine and substantive, and truly raise constitutional or public interest considerations relevant to the adjudication. See **Biowatch Trust v Registrar, Genetic Resources**, 2009 (6)SA 232 (CC) at paragraphs 21-25.

[24] The instant application was, for the reasons furnished above, doomed to failure from its inception. Normally, this would result in an adverse costs order against the applicant. However, as explained above, she professed to enforce her constitutional rights, while also acting in the public interest. I have no reason to doubt her *bona fides* and it was abundantly clear to me that she was wholly motivated by her real concern for the environment, and in particular, the survival of the WCRL resource. Although the application may have been ill-conceived, with the applicant rushing in without taking steps to properly consider the alternative remedies available to her, I cannot find that her conduct should be branded as frivolous or vexatious. The impression I gained is that she verily believed that, particularly the first and second respondents, were failing

in their constitutional duty to take proper measures to secure the ecologically sustainable development and use of the WCRL resource. In view thereof, I do not believe that applicant should be held liable for the costs of her governmental adversaries i.e. the first and second respondents.

[25] However, in my view, the relationship between applicant and the non-governmental respondents is radically different. She was not locked in battle with them regarding her constitutional rights or matters of public interest. These respondents were joined by order of court, as they had a direct and substantial interest in the outcome of the litigation. In effect, these respondents were obliged to oppose the application to protect their livelihood or the livelihood of their members, as well as their business interests. In the circumstances, I see no reason why these respondents, who have successfully opposed the application, should not be entitled to their costs.

[26] In the result the following order is made:

1) The application is dismissed.
2) The applicant is ordered to pay the costs of suit of the non-governmental respondents who opposed the application.

P B Fourie, J