IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NO: 11907/13

In the matter between:

COASTAL LINKS LANGEBAAN	First Applicant
HENRY MAKKA	Second Applicant
MARK BURLING	Third Applicant
ALBERT MARTIN BLAKE	Fourth Applicant
HARRY BLAKE	Fifth Applicant
WILLIAM BLAKE	Sixth Applicant
FRED MAKKA	Seventh Applicant
LES MAKKA	Eighth Applicant
ALBERT OCKS	Ninth Applicant
TOMMY PREZENS	Tenth Applicant
ROBERT SMITH	Eleventh Applicant
JOHN VAN BOVEN	Twelfth Applicant
OSLEN VAN BOVEN	Thirteenth Applicant
TOM VAN BOVEN	Fourteenth Applicant
DEON WARNICK	Fifteenth Applicant

and

THE MINISTER OF AGRIGULTURE, FORESTRY AND FISHERIES	First Respondent
DEPUTY DIRECTOR-GENERAL OF THE FISHERIES BRANCH OF THE DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES	Second Respondent

THE MINISTER OF ENVIRONMENTAL AFFAIRS Third Respondent

DEPUTY DIRECTOR-GENERAL OF THE OCEANS AND COASTAL MANAGEMENT BRANCH OF THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS Fourth Respondent

SOUTH AFRICAN NATIONAL PARKS Fifth Respondent

WEST COAST NATIONAL PARKS Sixth Respondent

Heard on: 9 June 2016

Judgment delivered: 31 October 2016

JUDGMENT

SHER, AJ:

[1] The Langebaan lagoon is the only non-estuarine tidal lagoon in South Africa. It is situated on the West Coast, approximately 100 kilometres north of Cape Town. The mouth of the lagoon, on its northern side, is entered via Saldanha Bay[1]. The lagoon is a highly legislated area. It was proclaimed a marine reserve in 1973 in terms of the Sea Fisheries Act[2] and in 1985 it was proclaimed part of the Langebaan National Park, whose name was later changed to the West Coast National Park. The Park covers approximately 40 000 hectares, and includes not only the lagoon (which extends over some 6 000 hectares), but also the Malgas, Jutten, Marcus and Schaapen islands. These islands are home to almost a quarter of a million sea birds including gannets, cormorants and gulls. In 1998 the lagoon was listed on the Ramsar

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[1] Named after the Portuguese explorer, Antonio de Saldanha in 1503.

[2] Act 58 of 1973.

List of Wetlands of International Importance[3] and in 2000 it was proclaimed a "*marine protected area*" ("MPA") in terms of the Marine Living Resources Act[4] (*"*MLRA*"*). It is thus an area of immense ecological significance. It is home to some 282 bird species, 23 of which are so-called *"waders"* which include 15 species of Palearctic migrant birds who travel each year to the wetlands surrounding the lagoon from regions as far afield as Greenland, and Siberia. Up to 55 000 water birds have been recorded at the lagoon during the summer season.

[2] Because it is entirely marine and has a relatively stable salinity level it supports dense populations of molluscs and crustaceans, as well as some 71 species of marine algae which serve as a food source for birds and fish. Dr Sue Jackson, a zoologist employed by the Department of Botany and Zoology at the University of Stellenbosch who prepared a report in this matter at the instance of the Legal Resources Centre,[5] explains that most warm marine environments are in the tropics and are thus relatively unproductive whereas the Langebaan lagoon *"is an island of warmth within the highly productive cold upwelled waters of the Benguela Large Marine Ecosystem",* and as a result it is an important breeding site and refuge for more than 30 species of

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[3] In terms of the Convention on Wetlands otherwise known as the *"Ramsar"* Convention, because it was signed in Ramsar, Iran, in 1971.

[4] Act 18 of 1998.

[5] Who are acting on behalf of the applicants.

bony fish and sharks.[6] Amongst the fish which spawn in the lagoon is the southern mullet or "*harder"* as it is more commonly known.[7]

[3] The high productivity of the lagoon has important implications for the harder fishery. Harders which breed within the lagoon are on average approximately 3 cm longer than the next largest harders on the South African coast[8] and their fecundity results in their stocks being more resilient to exploitation than slower growing populations elsewhere.

The parties

[4] First applicant is a nation-wide voluntary association which was established in 2003. It operates as a community organisation which assists "*small-scale"* fishers, such as the applicants, to secure their livelihoods and protect their rights.

[5] Second to fourteenth applicants describe themselves as *"small-scale"* net-fishers. Seven of them[9] are so-called *"commercial netfish rights-holders"* ie persons who are in possession of permits which grant them a statutory right to fish on the lagoon, pursuant to allocations which were made in 2006. The remaining seven[10] are so-called *"interim relief rights-holders"* who similarly enjoy a right to fish on the lagoon. This right was granted in terms of an

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[6] At para 1 of her report dated 9 August 2014.

[7] Its scientific name is *Liza richardsonii*.

[8] Which are from the Oliphants River estuary.

[9] Fifth to ninth applicants, and eleventh and fourteenth applicants.

[10] Second to fourth applicants, and tenth, twelfth, thirteenth and fifteenth applicants.

Order of the Equality Court in 2010 in the so-called *"Kenneth George"* matter, details of which are set out in the historical background below.

[6] Although second – fourteenth applicants have been given a right to fish on the lagoon, this right is not unrestricted. In this regard it is a condition of the fishing permits and exemptions which were granted to the applicants that they may fish only in a certain 'demarcated' section of the lagoon known as Zone A, and in the waters south of the iron-ore loading jetty in Saldanha Bay. They are not permitted to fish in the other zones ie Zone B and Zone C. By way of explanation Zone A, which is at the northernmost end of the lagoon and which feeds into Saldanha Bay, is a so-called *"controlled multi-use" z*one where recreational and commercial line-fishing and commercial and traditional net-fishing is allowed, together with other activities such as boating, and yachting. Zone B is a so-called *"restricted"* zone where the right to fish can only be obtained on the issue of the necessary permit and where boating under motor power is generally not allowed. Zone C is an *"exclusion"* zone and sanctuary where no access whatsoever is allowed either on foot or by boat.

[7] Applicants contend that the imposition of the condition in their permits and exemptions which restricts them from fishing in Zone B of the lagoon is arbitrary and irrational. In this regard they allege that the scientific evidence available does not indicate that net-fishing in Zone B will have an unacceptable ecological impact and there is no scientific basis for the current zonation and boundaries between the various zones. They point out that the available data used by the respondents to justify the restriction is based on

scientific studies which were conducted before 2000 in other areas along the West and South Coast and not specifically on the lagoon. They also aver that the current restriction unfairly discriminates against them on the grounds of race and perpetuates past patterns of discrimination. Consequently, they seek an order setting aside the decisions in terms of which the restrictive conditions were imposed in their permits and exemptions, a declaratory order granting them the (temporary) right to fish in Zone B of the lagoon and a *"structural interdict"* directing the Department of Agriculture, Forestry and Fisheries to consult with them and, under the court's supervision, to work out a long-term arrangement enabling them to have long-term rights to fish on the lagoon.

The historical background

[8] Net-fishing in the Langebaan lagoon began in the 1600s when the Dutch colonists established beach-seine net-fishing (also known as *"trek net"* fishing) which targeted the harder, white steenbras and white stumpnose species.[11] Gill nets were first introduced by Italian and Portuguese fishermen during the 1860s.[12] Conflict between gillnet fishermen and other fishermen occurred as early as 1905,[13] but there were no formal controls on the fishery

[11] State of the Bay Report, 2013/2014 (Saldanha Bay Water Quality Trust).

[12] Hutchings and Lamberth *"Likely Impacts of An Eastward Expansion of the In-shore Gill Net-fishery in the Western Cape SA – Implications for Management"* Marine and Freshwater Research 2003, Vol 54 p 39.

[13] *Id*.

until the promulgation of the Sea Fisheries Act[14] in 1973. The Act made the licensing of gill nets compulsory and introduced various restrictions on the gear that was used including the mesh size and lengths of the nets, with a view to reducing linefish by-catch. In terms of the Act the allowable fishing effort was also reduced and confined to the Western Cape, and legal catch was limited to two target species only ie harders and St Joseph sharks.[15] In addition the landing of by-catch linefish species was limited to a maximum of 10 fish per permit per day, and was further subject to minimum size, closed season and 'bag limit' regulation.[16]

[9] The applicants' descendants were traditional net-fishers who were involved in beach-seining up to at least the early 1700s. They supplied salted harders to the VOC establishment at the Cape from as early as 1673. Initially these traditional fishermen used seine (also called *"trek"*) nets which were rowed out into the lagoon and then pulled in from the shore. In the late 1890s – 1900s the fishermen began to make use ever-increasingly, of gill nets, which are hung vertically in the water and drift, thereby trapping fish by catching them on their gills. By adjusting the size of the mesh the fishermen were able to determine the size and species of fish they wished to catch. The traditional fishermen of Langebaan gave the different trekking areas on the lagoon their own names such as Grootaas, Kleinaas, Witgat and Grootkos. Various

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[14] Act 58 of 1973.

[15] *Id*.

[16] *Id*.

families had their own ‘trek’ sites which were uniformly recognised and respected.

[10] In a supporting affidavit Prof Lance Van Sittert[17] has described how the arrival and spread of gill nets in the 1890s and the combustion engine in the early 1900s destabilised the beach-seine fisheries and led to the demarcation of proclaimed areas which sought to conserve such fisheries in reserves, until the late 1900s, when white urban middle-class recreational users and marine scientists began to ascribe the wide-spread decline in marine fish species (which was largely caused by wholesale industrial fishing, urbanisation and pollution), to the net-fishers and lobbied for legislation to be passed to curtail their activities on conservation grounds.

[11] The applicants point out that in the 1950s almost everyone in Langebaan was involved in net-fishing activities in some way or another and harders formed a major component of the staple diet of the local community, together with other species of line fish and rock lobster. In or about 1967–1968 (ie even before the introduction of the Sea Fisheries Act in 1973), a fishing permit system of sorts was introduced, which was aimed at distinguising recreational fishers from netfishers. In 1969 the net-fishers lodged a complaint with the local municipal board about the negative impact which the recreational fishers were having on their fishery. In order to resolve this conflict municipal officials demarcated the lagoon by means of beacons, into two zones. The net-fishers were given the right to fish in Zone B ie in that area of the lagoon which lay

[17] An historian in the Department of Historical Studies at the University of Cape Town.

roughly south of a demarcated 'line' and the recreational and other fishers were limited to fish in Zone A ie that section of the lagoon which lay to the north of this 'line' into the mouth of Saldanha Bay (in the direction of the iron-ore jetty which was later erected to provide for the transportation of shipments of iron ore from the steelworks in Saldanha Bay). On the promulgation of the lagoon as a marine reserve a further zone, Zone C, which is situated in the southernmost portion of the lagoon and which consists largely of tidal wetland, was added to the demarcation. No access to or fishing in Zone C was allowed, as it was designed to serve as a complete sanctuary for fish and birds.

[12] During the 1970's many of the applicants' predecessors who had been living on farms or land adjacent to the lagoon were forcibly moved to Langebaan North in terms of the Group Areas Act, in accordance with *apartheid* spatial planning policy.

[13] In 1985, after the lagoon was declared a national park in terms of the National Parks Act[18] it was placed under the management of the South African National Parks Board ("*SANP*"). At that time net-fishers were still allowed to fish in both Zones A and B, whereas recreational fishers were excluded from Zone B and were restricted to fishing in Zone A only. Shortly after this SANP started acquiring land aound the lagoon from a number of white farmers and landowners.

[18] Act 57 of 1976.

[14] In her supporting affidavit Sunde[19] has pointed out that whereas ancestors of the Langebaan net-fishers had lived and worked on these lands for several generations and had enjoyed beneficial use of the waters of the lagoon and its marine resources for decades, no regard was had for their customary fishing rights in the contractual arrangements which SANP entered into with the adjoining landowners. At or about this time the 'trek' (seine) net-fishery was also outlawed and fishers were restricted to gill ('drift') net-fishing only. Nonetheless, the net-fishers still continued to enjoy access to Zone B.

[15] During December 1991 SANP concluded the so-called *"Churchaven"* agreement in terms of which certain portions of the Stofbergsfontein farm were acquired and incorporated into the West Coast National Park. According to Sunde at that time all local landowners who were resident in the Park were permitted to fish in Zone B, but fishermen resident in Langebaan including black fishermen and descendants of the applicants, were not permitted to do so even though the Churchaven agreement provided that fishermen who complied with *"traditional"* fishing methods would receive preferential treatment in the allocation of permits.[20]

[16] On 12 June 1992, Regulation 27A(1) of the Regulations made in terms of the National Parks Act[21] was promulgated. It prohibited the catching or disturbing of any fish in Zone C under any circumstances, and the catching and

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[19] A doctoral student in the Department of Environmental and Geographical Science at the University of Cape Town.

[20] Clause 10.1.2. of the Churchaven agreement.

[21] S 29 of Act 57 of 1976.

disturbing of any fish, or the use of any vessel powered by an engine, in Zone B, without a permit.

[17] As at 1997 some 27 permits allowed for net-fishing in Zones A and B. In September 1997 a new draft "*Policy and Guidelines for Net-fish Permits"* was introduced and subsequent thereto the total number of net-fishing permits was reduced to 21. The new Policy also provided that future permits would only be issued for net-fishing in Zone A, but permits issued prior to 1992 in respect of Zone B would continue to be honoured and would be renewed annually, as would the fishing permits of rights-holders in Churchaven and Stofbergsfontein. However, this distinction became unworkable and eventually all of the net-fishing permit-holders were allowed to fish in Zone B.

[18] Sunde points out that with the expansion of residential development in Langebaan and the increase of recreational fishing there were increasing complaints from recreational anglers (who, at that time, were still largely white), that the net-fishers were unfairly targeting their fish stocks.

[19] With the advent of the MLRA in 1998 the Department of Environmental Affairs and Tourism took over the allocation of fishing permits from SANP.

[20] On 29 December 2000 the Langebaan lagoon was declared to be a MPA in terms of the MLRA, and the Act confirmed the pre-1998 zonation and restriction on fishing in Zone B, save under the authority of a fishing permit. The MLRA sought to introduce a new dispensation in terms of which rights to fish were to be allocated for a number of years at a time, instead of annually.

The Act also provided that the Minister was to determine the *"Total Allowable Catch"* (*"TAC"*) and the *"Total Applied Effort"* (*"TAE"*) which was to be apportioned in any year to subsistence, recreational, commercial and foreign fishing respectively.[22] The Minister was also empowered to determine the TAC or TAE or a combination thereof in any particular area, or in respect of any particular species of fish, and in respect of the use of particular gear, fishing methods or types of fishing vessels.[23] In the result the MLRA envisaged that future rights to fish were to be awarded on the basis of a pre-determined TAC or TAE.

[21] In 2000 the Minister approved a 40% reduction in the TAE for the netfishery, declaring that this was done in order to facilitate the rebuilding of the harder stock and to remove part-time fishers from the fishery. In this regard, and by way of explanation, the MLRA defines the TAE as the maximum number of fishing vessels or fishing method for which fishing vessel licences or permits to fish may be issued in respect of a particular species (or group of fish species), or the maximum number of persons on board a fishing vessel for which fishing licences or permits may be issued in respect of such species. It appears that subsequent to the promulgation of the MLRA, the total number of net-fishing permits issued in respect of the lagoon was reduced to 11 and later 10.

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[22] S 14(1) and (2).

[23] S 14(3)(a)-(b).

[22] In 2003 and 2004, the National Environmental Management: Protected Areas Act (*"NEMPAA"*),[24] and the National Environmental Management: Biodiversity Act,[25] were passed. The NEMPAA provided that Zone B would continue to be excluded for commercial net-fish rights-holders, save for the Churchaven and Stofbergsfontein net-fishers who were allowed to continue to net-fish on a commercial basis in Zone B.

[23] In January 2005 a number of fishermen launched proceedings in the Equality Court on behalf of traditional artisanal fishermen and their communities across the country, including the Langebaan net-fishers. In their papers it was submitted that the Government's failure to provide subsistence and artisanal fishers with access to marine resources violated a number of their constitutional rights, including the right to equality and the right not to be unfairly discriminated against, the right to engage in a trade or occupation and the right to access sufficient food. The application coincided with the allocation of long-term (10 year) fishing rights in 2005. In terms of these allocations only 7 net-fishing permits were allocated to members of the Langebaan fishing community. As a result of the launch of the application in the Equality Court, the Minister of Environmental Affairs agreed to a court Order which was granted on 2 May 2007, in terms of which the State undertook to develop a policy for traditional fishers which would give due consideration to their socio-economic rights and which would ensure equitable access to marine resources. The Order also made provision for

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[24] Act 57 of 2003.

[25] Act 10 of 2004.

interim relief for *"small-scale"* fishers whilst the policy was finalised, although the net-fishers were excluded from such interim relief, as it was intended that they would be accommodated separately.

[24] Subsequently, meetings were held between representatives of the net-fishers and officials of the Department of Environmental Affairs and Tourism with a view to discussing the inclusion of the net-fishers in the interim relief package. However, it appears that no real progress was made in developing a 'small-scale' fishing policy and on 19 November 2008 the interim Order and the deadline for the promulgation of the policy were extended to 31 July 2009.

[25] In December 2008 the Department produced a draft "*Small-Scale Fishing Policy"* which also made no express provision for the accommodation of net-fishers. The applicants aver that the draft policy was subject to widespread criticism and was subsequently withdrawn.

[26] In December 2009 the applicants approached the Equality Court once again in the application which had been launched (and which was known as the *"Kenneth George"* matter) and an Order was made by agreement in terms of which the Minister was directed to finalise the policy by 30 July 2010. The Order also made provision for the Minister to provide the net-fishers with interim relief of sorts, on or before 28 February 2010. The applicants allege that despite this Order the Minister and Department did not consult them and by April 2010 they were still in limbo. As a result, the net-fishers of Kleinvishoek, Langebaan and Struisbaai returned to the Equality Court in April 2010 to seek interim relief. In support of their application they provided

affidavits from a number of experts, including Sunde and Van Sittert. In their reports these experts dealt with the net-fishers' historical dependence on traditional fishing as a source of livelihood and analysed how they had historically been victim to discriminatory policies, and bias in favour of commercial interests in the fishing industry.

[27] On 1 July 2010 a further Order was made by agreement in terms of which net-fishers were granted certain interim relief. In this regard the Order recorded that an additional 3 exemptions were to be provided to the Langebaan net-fishers which would be shared on a rotational basis amongst the 9 listed *"drift"* fishermen (ie gillnet fishers). The Order provided that the exemptions would be in place subject to conditions to be determined by the Minister pending the promulgation, implementation and rights allocations in terms of a new policy framework, which would accommodate traditional artisanal net-fishers.[26] The subsequent 'interim relief' exemptions which were issued provided that the holders thereof were not allowed to fish in Zone B of the lagoon and could only do so in Zone A and in Saldanha Bay up to the iron-ore jetty. Although the Order provided further that a draft of the new policy would be circulated for public comment on or before 31 July 2010 (and to this end that the parties would report bi-monthly to the court on their progress on developing and implementing the new policy), it was not produced for public comment by the date stipulated. Nonetheless, it appears that the parties engaged one another in consultation on formulating a new policy throughout 2011 and for the early part of 2012, as a result of which on

[26] Para 5 of the Order.

20 June 2012 the new so-called *"Small-scale Fishing Policy"* ("SSF Policy") was finally gazetted. Although the terms of this policy are of crucial significance to a proper consideration of this matter, prior to discussing them it is necessary to set out further important events that transpired between 2005 and 2012, particularly in regard to the issue of other policies.

[28] Firstly, in 2005 a "*General Policy on the Allocation and Management of Long-term Commercial Fishing Rights"* (the "2005 General Policy") was published. It recorded that persons who had been previously historically disadvantaged on account of their race, had also been deprived of access to fishing rights and it was accordingly necessary to promote their participation within all branches of the fishing industry in order to address these historical imbalances and to achieve equity within the industry. Consequently, the policy expressly provided that in the allocation of long-term commercial fishing rights the race and gender of applicants and their members, management and workforce, would be taken into account.

[29] In November 2005 the Minister of Environmental Affairs and Tourism also issued a "*Policy for the Allocation and Management of Commercial Fishing Rights in the Beach-seine (Trek net) and Gill Net (Drift-net, Set-net) Commercial Fishery"* (the "2005 Net-fishing Policy"). It was recorded therein that prior to the 2001 medium-term rights allocation process, the net-fishery had landed approximately 6 000 tons of fish per annum of which only minimal reportage occurred on the compulsory monthly catch return forms. In addition, a survey of more than 50% of permit-holders revealed that less than

10% regarded themselves as full-time (beach-seine or gill-net) fishers and only 8% were *bona fide* full-time net-fishers who acquired more than 50% of their income from the fishery. In most areas permit-holders operated at a net loss per annum, with the exception being the gill-net fishers in the Saldanha Bay-Langebaan area where 50% of the operators were full-time fishermen. The policy noted that the main target species ie the harder was over-exploited and there was a direct correlation between the total applied effort and the status of the stock. In addition, there was 'substantial' line-fish by-catch which consisted mostly of over-exploited or collapsed line-fish species. Consequently, it was recommended that management of the net-fishery was not to take place outside of the traditional line-fish sector. In the circumstances the policy envisaged that the gill-net fishery in the Oliphants estuary on the West Coast would be phased out over a 5 to 10-year period, and because of general over-subscription prior to 2001 it was recommended that the 293 gill-net permits that were issued between Port Nolloth on the West Coast and Nature's Valley on the South Coast, and the further 100 gill-net permits issued to rights-holders in the Oliphants and Berg River estuaries, should be reduced to levels that would 'facilitate' recovery of the harder stock and ensure economically viable fisheries for *bona fide* full-time fishers. As a result of this, in the 2001 medium-term net-fish rights allocations the TAE was reduced to 162 gill-nets. The policy recorded further that its objective included allocating long-term rights in the beach-seine and gill-net fishery to traditional fishers in traditional fishing areas along the West and South-East Coasts and to *"improve the transformation profile"* of the sector, whilst at the same time supporting the economic viability of the fishery and ensuring its

environmental sustainability. Amongst the stipulated exclusionary criteria was a provision that rights should only be allocated to traditional net-fishers who had fished for a living for at least the preceding 10 years.[27] It was also indicated that preference would be given to applicants who relied on net-fishing for a significant portion of their gross annual income.[28] And in line with the General Policy, the Net-fishing Policy similarly emphasised the transformation imperative.

[30] Some 3 weeks after the grant of interim relief rights in July 2010 the net-fishers requested access to Zone B during the December holiday period, on the basis that Zone A was overcrowded. This request was granted and between December 2010 and January 2011, as well as during subsequent holiday periods in Easter 2011 and December 2011 – January 2012, they were allowed to fish in Zone B. On 19 April 2011 the Deputy Director of Line and Net Fisheries Management (Department of Agriculture, Forestry and Fisheries), motivated the grant of permission to fish over the Easter holiday period *"to ensure the viability of the net-fish commercial fishing rights granted to Langebaan net-fishers and to promote food security and secure the socio-economic profile of the commercial fishers in the lagoon, whilst consideration is given to sustainable utilisation of the marine living resources"* (sic).

[31] Notwithstanding these comments, in April 2012 a similar request to fish over the Easter period was declined by the Director: Coastal Biodiversity

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[27] Para 8.1(b).

[28] Para 8.2(e).

Conservation (Department of Environmental Affairs). His reason for refusing the application was that the area was a unique and sensitive environment which constituted an important nursery for the white stumpnose, and according to him *"net-fishing by its very nature is particularly destructive and should only be allowed in very limited circumstances"*.

[32] A similar request to fish in Zone B during the December 2012 holiday period was declined on the basis of the conservation importance of the Zone.

[33] On 28 January 2013 second and third applicants were caught fishing at night in Zone B. A week later they were again caught in Zone B, on two boats the registration numbers of which did not match the permits which had been granted to them. On 10 August 2013 a number of the other applicants were found in Zone B whilst removing gill-nets from the water, and quantities of harders, white stumpnose, steenbras, shad and black-tail were confiscated from them, and they were arrested and their gear and motor vehicles confiscated. It appears that the criminal prosecutions which followed on these various infringements were what ultimately motivated the launch of these proceedings.

[34] Before turning to consider whether the conditions which were imposed on the Langebaan net-fishers' permits and exemptions in respect of Zone B were imposed rationally, it remains to refer briefly to the terms of the SSF Policy,[29] and the "*General Policy on the Allocation and Management of Fishing Rights*"

[29] GN 474 in *GG* 35455 published on 20 June 2012.

published in July 2013[30] (the "*2013 General Policy*"). It may be convenient to deal with the latter policy first. It provided for the grant of long-term rights for all sectors for a period not exceeding 15 years[31] and emphasised that its objective (together with the other fisheries-specific policies) was to achieve the optimum utilisation and ecologically sustainable development of marine living resources in order to conserve such resources for present and future generations and to this end, to apply a *"precautionary"* approach based on the protection of the eco-system as a whole, and the preservation of marine biodiversity.[32] As in the case of all the other policies referred to herein and the MLRA itself, it too emphasised that transformation of the fishing industry was a constitutional and legislative imperative[33] and *"an extremely important consideration"* in the *"comparative balance process"* which had to be engaged upon when allocating fishing rights, and it required the delegated authority to compare applicants with one another individually, rather than against an external benchmark.[34] It too emphasised the need to address historical imbalances in respect of persons who were previously disadvantaged on account of their race and gender *"particularly with regard to access to fishing rights"*.[35]

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[30] By way of GN 750 in *GG* 36675 of 17 July 2013.

[31] Para 7.1.1.

[32] Paras 3.1(a) – (c), and (e) – (f).

[33] Para 5.1.1 at Part B.

[34] Paras 5.3.1(c) and (d).

[35] Para 5.3.1(f).

[35] The SSF Policy in turn recorded that during colonial times and during the *apartheid* era many traditional fishing communities had been dispossessed of their lands adjacent to the coast. Consequently, the policy aimed to *"provide redress and recognition to the rights of small-scale fisher communities in South Africa previously marginalised and discriminated against in terms of racially exclusionary laws and policies, individualised-permit-based systems of resource allocation and insensitive impositions of conservation-driven regulation"*.[36]

[36] In line with the broader agenda of the transformation of the entire fishing sector, the policy seeks to provide a framework for the promotion of the rights of small-scale fishers in order to fulfil the *"constitutional promise"* of substantive equality. The policy points out that the commercial sector was previously dominated by wealthy white capital, which from the 1940s onwards was assisted by a range of measures introduced by the *apartheid* regime to support the establishment of an export-orientated industry, and as a result many previously disadvantaged persons were forced into working for white-owned fishing entities. This, together with the dispossession of land and the introduction of new fisheries management, led to many communities losing their customary access to harvest marine resources and the right to exercise their traditional fishing practices.[37]

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[36] Para 1.

[37] Para 1.1.

[37] The policy further points out that the small-scale fishery can contribute to the eradication of poverty and can support food security, issues which were not addressed by the MLRA.[38] It states that the allocation of long-term commercial fishing rights in terms of the 2005 General Policy was too complex and competitive for small-scale fishers and resulted in a large percentage of them being excluded.[39] It also recognises that the existing approach to fisheries management based on individual rights allocations on a long-term basis is orientated towards the export-driven commercial fisheries sector[40] and has contributed to the unfairness of prior decisions in regard to the allocation of fishing rights, principally in favour of commercial and recreational interests without due consideration for the vulnerability of most small-scale fishing communities who are required to compete within a commercial environment.[41] Consequently, the policy seeks to establish preferential access for small-scale fishing communities who have traditionally depended on marine living resources for their livelihood[42] and advocates a 'co-management' approach to the fishery. As far as transformation is concerned the policy records that to achieve this small-scale fishers must regain their access to traditional fishing areas.[43]

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[38] Para 1.2.2.

[39] *Id*.

[40] Para 1.5(b).

[41] Para 1.5(e).

[42] Para 2.1(a).

[43] Para 4.1.2.

[38] The SSF Policy envisages an entirely different way of allocating and managing fishing rights and proposes moving away from the previous individualised permit-based system to a collective rights-based system. To this end it envisages the formation and registration of community-based legal entities in particular areas, which will serve as rights-holders for small-scale fishing rights. These entities will provide a list of persons who will be allowed to exercise communities' collective fishing rights, and who will be registered as members of the entity. There will be procedures for the verification of such membership, and the entity will also draw up a list of fishers who will go to sea in order to exercise the allocations awarded, which may have to be shared on a rotational basis in order to ensure compliance with the TAC and TAE. Regulation of the sector will be largely based on self-regulation.

The imposition of the restrictive condition in respect of Zone B

[39] The application was initially aimed at reviewing and setting aside the restrictive condition in the permits and interim relief exemptions which was imposed in 2013 and 2014, but was later amended to include the subsequent repeated imposition of the condition in the 2015 and 2016 permits and interim relief exemptions.

[40] Despite this, the only functionary who was responsible for taking a decision to impose such condition and who sought to explain it by way of an affidavit was Thembalethu Tanci, the Deputy Director: Line and Net Fisheries Management (Department of Agriculture, Forestry and Fisheries). Tanci was responsible for imposing the condition in the 2013-2014 permit allocations. He said that

the restrictive condition had been imposed in all permits that were issued since the long-term rights allocations in 2006, and in his imposing of the condition he had been guided by two considerations. In the first place the lagoon was a critically important site for the protection of "*threatened"* (sic) bird species, particularly the Palearctic migrant waders. Secondly, the zonation of the lagoon was designed to protect shallow sandbanks where "*threatened"* birds and seagrass beds were to be found, and the deep-water channels where fish spawned.

[41] Tanci said his reasons for imposing the condition were to:

(i) manage the harder stock resource to ensure its optimum sustainable utilisation;

(ii) facilitate the recovery of certain fish species including the harders so as to maintain optimum levels of production and *"maintain a viable income for those involved"*;

(ii) not allow additional effort within the restricted zone as this would compromise the integrity of the marine protected area and *"defeat the purpose"* of the TAE;

(iv) give effect to the recommendations of the Scientific Working Group (*"SWG"*) for the Management of Sustainable Beach-seine and Gill-net (small net/drift net) Fisheries for the period 2012-2013 which were

contained in a report by one Rob Tarr, the Chairperson of the Line-Fish Scientific Working Group, and which was dated August 2012; and

(v) take account of the fact that net-fishing resulted in a substantial by-catch which threatens the sustainability of fish species such as the white stumpnose; and he noted that certain fish species, notably the harder, have been protected as the result of the zonation which is in place and if fishers are allowed to exploit Zone B the fishery would be *"diminished"* and *"placed under threat"* (sic).

[42] Apart from the 2012-2013 SWG report, Tanci also annexed copies of the 2013-2014 and 2014-2015 SWG reports to his affidavit. He said that the deponent to the main answering affidavit, Dr Stephen Lamberth, was the Department's principal advisor as regards the scientific aspects of the fishery. It may be useful at this juncture to point out that the affidavit which was filed on behalf of third and fourth respondents by Thanduxolo Mkefe the Director: Coastal and Biodiversity Conservation (Department of Environmental Affairs) bears a striking resemblance insofar as its contents are concerned, to the affidavit of Tanci and the affidavit of Lamberth, and in material respects particularly insofar as the reasons for the imposition of the condition and the principal motivating considerations which led thereto are concerned, the 3 affidavits are almost word-for-word identical. This is most curious if one bears in mind that Lamberth was supposedly not one of the decision-makers who imposed the condition in any permit or exemption, and was only a scientific advisor in respect thereof. And although it is not apparent from his affidavit

that Mkefe was personally involved in any of the decisions pertaining to the issue of the permits and interim relief exemptions of any of the applicants, he too sought to indicate, in a parroting of the other deponents mentioned, that the Langebaan lagoon was a critically important site for the protection of "*threatened*" bird species, particularly the Palearctic waders, and he too said that the demarcation of the different zones in the lagoon was designed to protect the shallow sandbanks where such birds and seagrass beds were to be found, and it also served to protect the deep-water channels. Mkefe also referred to research undertaken by Lamberth in regard to lower catch rates, smaller average size of harders caught, and historical and *"anecdotal"* evidence (which was not specified or set out in any detail), but which was based on Lamberth's research, which suggested that the harder stock was regionally over-exploited in the Langebaan lagoon. He also made reference (in almost identical language) to the issue of by-catch and made a similar suggestion that if fishers were allowed to fish in Zone B, certain fish species would be *"diminished and placed under threat"*.

[43] Be that as it may, it will be apparent from an analysis of Tanci's reliance on the contents of the SWG report for 2012-2013, that the report was largely predicated on a number of studies which were co-authored by Lamberth and Hutchings before 2001.

[44] In fact, when one considers the affidavits of Tanci, Mkefe and Lamberth, and all the SWG reports, it becomes apparent that all of them are underpinned principally by 4 marine studies which were co-authored by Lamberth, and in

respect of which research was done in False Bay and along the West Coast between 1998 and 2000. In addition, what also jumps out at one is that the SWG reports for 2013-2014 and 2014-2015, are also almost word-for-word a copy and paste of the 2012-2013 SWG report of Tarr, and arrived at exactly the same recommendations, year after year.

[45] Lamberth explained in his affidavit that the Scientific Working Groups are comprised of Departmental scientists and external experts from other marine science institutions who are responsible for interpreting stock analyses which are carried out on various fish species, and their interpretation ultimately informs the determination of the TAC and TAE which is set annually by the Minister in terms of the MLRA.

[46] The 2012-2013 SWG report[44] refers to two 3-year studies which assessed the False Bay beach-seine fishery and the gill-net and beach-seine fisheries in the South Western Cape, which were carried out between 1998 and 2000 by Lamberth and Hutchings, shortly before the call for application for rights in these fisheries in 2001. Until then, approximately 450 licensed permit-holders used about 1 350 nets and there were an unknown number of other fishermen who were using approximately 400 illegal nets. The majority of these fishermen were occasional fishers who fished for short periods of the year, particularly over the summer and autumn months, and who were either semi-retired or otherwise employed, and many participated in the netfishery simply to supplement incomes and food supplies, as it was not the mainstay from

[44] Which was released in August 2012.

which they derived a living. However, many of these fishermen were described as being *"desperately poor"*. The authors of these studies were of the view that, overall, there was excess effort in the fishery.

[47] As far as data is concerned the studies concluded that on average, the gill-net fishery accounted for some 3 250 tons of harders annually and 650 tons of St Joseph shark (these are the only two species which net-fishers are legally allowed to catch) and a by-catch of approximately 130 tons per annum, which comprised some 27 fish species. According to these studies thus, the by-catch comprised less than 5% of the average annual harder catch. Based on size – frequency distributions the authors of the studies suggested that the harder stock was over-exploited, and that there was a strong negative correlation between the effort (ie number of nets) and the size of fish which were caught.

[48] It appears that in 2000 the Minister approved a 40% reduction in the TAE in the harder netfishery in the light of the information set out in these studies, with a view to facilitating a rehabilitation of the stock and the removal of occasional or *"part-time"* fishers from the fishery. In this regard the TAE was projected on the number of fishers who, according to the authors of the studies, could maintain a viable income.

[49] According to the 2012-2013 SWG report, future resource assessment for the beach-seine and gill-net fisheries was to be based on a 2-year detailed catch, effort and socio-economic survey which was to be carried out as part of a National Linefish survey every 5 years. However, Tarr said that *"continuous"*

annual budget cuts had prevented this survey from ever being carried out and the fishery had thus been assessed since 2000 on an *"ongoing"* basis simply by sample monitoring of changes in size-frequency distributions, catch-per-unit-effort, and total-catch and species reports. Most of the information in this regard was being obtained from 'fishery-independent surveys' (details of which were not specified in the report) and from observer reports in St Helena Bay, on the West Coast. However, the information at hand was clearly unsatisfactory because in their summary of recommendations the authors of the 2010-2013 SWG report concluded that the TAE for 2011 should be kept the same as it was for 2010 in all netfishing areas, because of the *"limited information available"*. The authors in fact pointed out that maintenance of the effort status quo was not due to the fishery operating at sustainable levels, but due to the fact that *"insufficient new data"* was available for *"any real up-to-date assessment"* of the fishery to be made.

[50] As far as the Langebaan lagoon was concerned, the authors of the 2012-2013 SWG report pointed out that the TAE for this area needed special consideration as it constituted both a National Park and a MPA which consisted of open, restricted and sanctuary zones. They were of the view that any concession which would allow additional gill-net effort within any of these zones would compromise the integrity of the MPA and the purpose of the TAE. They pointed out that as at 2000 the TAE for the lagoon had been set at 5 rights-holders, with each rights-holder being granted a right to use two nets ie there was a TAE of 10 for the lagoon. However, after negotiations with fishermen a compromise had been reached by which the number of

rights-holders was increased to 10 without any increase in overall fishing effort. This was done by reducing the total allowable effort in the adjacent overlapping area of Saldanha Bay and dividing operators up into existing fishing zones in Langebaan, and restricting fishers to the use of 1 instead of 2 nets. The result of this was that 5 rights-holders (from Stofbergsfontein and Churchaven), were allowed to fish in Zones A and B (although they were restricted to the use of 1 gill net each in Zone B), whereas 5 rights-holders (from Langebaan itself) were restricted to fishing only in Zone A up to the iron-ore jetty in Saldanha Bay, also only with the use of a single net each. The report was of the view that the awarding of an additional 3 interim relief exemptions in terms of the Order of the Equality Court, had, in exceeding the TAE, compromised the integrity of the MPA, as had subsequent concessions allowing gill-net fishers access to the restricted area over holiday seasons.

[51] In the concluding paragraph of their report the authors stated that, given that the National Linefish Survey was not to proceed in the near future, it was essential that *"lapsed observer coverage (contracts)"* be re-started and *"fisher-independent sampling intensified"*.

[52] It is thus evident from the 2012-2013 SWG report that the science underpinning it was based on the four Hutchings and Lamberth studies which had been conducted more than 10 years earlier, and its recommendations were simply a precautionary repeat of the previous years' TAE, which was the same TAE initially set in 2001, principally because of the absence of up-to-date information.

[53] As I have pointed out when one considers the 2013-2014 and 2014-2015 SWG reports, it becomes immediately apparent that they constitute an almost word-for-word re-statement of the 2012-2013 report, from the background and the summary to the recommendations at the end thereof. And both these reports also came to the same recommendation that, because of the limited information available, the TAE for the following year should be set as per the year before. The only difference I was able to discern in the 2013-2014 report was that the authors recommended that the additional rights which had been granted by way of interim relief in 2010 should be withdrawn. And both these reports again lamented the lack of any up-to-date information, and the 2014-2015 report recommended that a comprehensive fishery catch and socio-economic survey should be initiated and completed before the allocation of beach-seine and gill-net rights in 2015. In endorsing the 2014-2015 report, the Chief Director: Fisheries Research and Development noted that it was *"another example where lack of funding is compromising good information on an important small-scale fishery and lack of proper enforcement is threatening legitimate livelihoods"* (sic).

[54] The 2015-2016 SWG report is not included in the record, but there is no indication from any of the answering affidavits which were filed on behalf of any of the respondents that the contents thereof are in any material way different from the contents of the preceding reports, and there can be no doubt that they were not, as the fact that the TAE for 2015-2016 appears to have been maintained at the same level as that for the preceding year,

suggests that the recommendations which were made for 2015-2016 were essentially the same as those made in the preceding years.

An evaluation: reasonableness, rationality and unfair discrimination

[55] The grounds of review must be evaluated in the context of the relevant legislation in terms of which the condition to prohibit the applicants from fishing in Zone B was imposed in their permits and interim relief exemptions. That legislation is the MLRA. In declaring the Langebaan lagoon to be a MPA the Minister acted pursuant to the provisions of the now repealed s 43 of the MLRA. These provisions allowed for the Minister to declare an area to be a MPA *inter alia* to facilitate fishery management *"by protecting spawning stock, allowing stock recovery (and) enhancing stock abundance in adjacent areas"*[45] or to diminish *"any conflict that may arise from competing uses"* in such area.[46] Once the lagoon was proclaimed a MPA, no persons were allowed to fish or attempt to fish therein without the permission of the Minister.[47] The now repealed s 43 has largely been subsumed within the later provisions of NEMPAA.[48]

[56] The MLRA provides that no person shall undertake commercial fishing unless a right to undertake or engage in such activity has been granted to them by

[45] S 43(1)(b).

[46] S 43(1)(c).

[47] S 43(2)(a).

[48] Note 1.

the Minister.[49] In granting any such right, the Minister is enjoined not only to give effect to the objectives contemplated in s 2 of the Act, but is also required to have *"particular regard"* to the need to permit new entrants to the fishery, particularly those from historically disadvantaged sectors of society.[50] As was pointed out previously, approximately half of the applicants hold rights in terms of permits granted by the Minister under these provisions and the remainder of the applicants enjoy rights in terms of exemptions which were issued in the form of interim relief in 2010 pursuant to the *Kenneth George* Order in the Equality Court. These exemptions were issued by the Minister in terms of s 81 of the Act which provides that the Minister may exempt any persons from a provision of the Act if, in his or her opinion, there are sound reasons for doing so.[51] The Act also provides that the Minister may extend the period of validity of any right which has been conferred, in whole or in part, but in doing so, must have regard to any change in the TAC and/or the TAE.[52]

[57] The reference to the TAC and TAE in the context of the awarding of rights is to be read with reference to the provisions of s 14 of the Act. These provide that the Minister shall determine the Total Allowable Catch (TAC) and the Total Applied Effort (TAE) or a combination thereof,[53] and shall determine the portions of the TAC and/or TAE, or a combination thereof, which is to be

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[49] S 18(1).

[50] S 18(5).

[51] S 81(1).

[52] S 18(6A)(b).

[53] S 14(1).

allocated in any year to recreational, local commercial and foreign fishing, respectively. In 2014, these provisions were amended to include so-called *"small-scale"* fishers[54] and a new provision was introduced in the Act[55] to deal specifically with small-scale fishing. To this end, the Act now provides that in order to achieve the constitutional objectives contemplated in ss 9(2) and 39(3) of the Constitution ie in order to advance equality the Minister is required, subject to any law relating to MPAs, to establish specific areas or zones where small-scale fishers may fish,[56] and may, within a prescribed period, recognise a community to be a small-scale fishing community,[57] and in doing so, must prescribe the process and procedures that will apply in regard to the allocation and recognition of rights of access by small-scale fisher communities to such areas or zones, and the procedures which shall apply in the allocation of fishing rights to such communities.[58]

[58] S 2 of the Act provides that in exercising any power under the Act, the Minister shall have regard to a number of objectives and principles which include not only the need to protect the eco-system and any species which is not targeted for exploitation[59] and the need to apply *"precautionary approaches"* in respect of the management of marine living resources[60] and

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[54] S 14(2).

[55] S 19.

[56] S 19(1)(a).

[57] S 19(1)(b).

[58] S 19(1)(d)(i) and (ii).

[59] S 2(e).

[60] S 2(c).

the need to conserve such resources for present and future generations,[61] but also the need to achieve the *"optimum utilisation"* and ecologically sustainable development of such resources,[62] and the re-structuring of the fishing industry in order to address historical imbalances,[63] and to promote *"equitable access to and involvement in"* all aspects of the fishing industry (with particular reference to the need to rectify past prejudice against women, youth and disabled persons) and to achieve equity within all branches of the industry.[64]

[59] With that by way of background, it is time to turn to the grounds of review raised by the applicants.

[60] Firstly, with regard to reasonableness, it is appropriate to refer to the seminal decision in *Bato Star*[65] which dealt extensively not only with reasonableness as a ground of administrative review, but also gave direction as to how the provisions of the Act which deal with the objectives and principles set out therein,[66] and the need to have *"particular regard"* to the transformation of the industry, are to be dealt with by courts of law. In *Bato Star* the applicants sought to review certain medium-term fishing allocations they had been awarded for hake fishing in the deep-sea trawling sector. With regard to review on the grounds of unreasonableness, the Constitutional Court held that what will constitute a reasonable decision will depend on a number of

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[61] S 2(b).

[62] S 2(a).

[63] S 2(j).

[64] S 2(k) rtw (j).

[65] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Ors* 2004 (4) SA 490 (CC).

[66] S 2.

circumstances, including the nature of the decision, the identity and expertise of the decision-maker, the factors relevant to the decision, the reasons given therefor, the nature of the competing interests involved and the impact of the decisions on the *"lives and well-being of those affected"*. In considering whether a decision meets the requirements of reasonableness, the court is required to take care not to *"usurp"* the functions of administrative agencies.[67] And inasmuch as a decision may require a balance to be struck between a range of competing interests or considerations, and is to be taken by a person or entity with specific scientific expertise in that area, it must be shown the necessary deference by a court[68] and the court *"should be careful not to attribute to itself superior wisdom"* in relation to matters entrusted to other branches of Government.[69] It is not for the court to second-guess the administrative entity that must take the necessary decision. In the circumstances, the Constitutional Court held that a decision by an administrative entity will only be reviewable on the grounds of unreasonableness if it could be shown that it was not one that another reasonable decision-maker could have arrived at. This is a stringent test, requiring a fairly high hurdle to be surmounted.

[61] In *Bato Star*, the Court further pointed out that the task of allocating fishing quotas is a difficult one *"intimately connected with complex policy decisions"* which require on-going supervision and management by departmental

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[67] Para [45], 513B-D.

[68] Para [48], 514H-515A.

[69] *Id* at 514G.

decision-makers who are experts in the field.[70] In evaluating the facts before it the Court was of the view that although the Chief Director's allocation may not have been the *"best decision"* in the circumstances, it could not be said that it did not attempt to strike a reasonable equilibrium between the principles and objectives set out in the Act, in the context of the relevant circumstances pertaining to the deep-sea hake trawling sector. In the result, the Court was of the view that the decision could not be reviewed on the grounds that it was unreasonable ie on the basis that it was not a decision which could have been arrived at by any other reasonable decision-maker.

[62] In their submissions in this matter, the applicants seek to prove that the science behind the respondents' decision ie the various studies to which I have referred to, which underpin the annual reports of the SWG groups between 2012 and 2015, was wrong and that in the circumstances, the restrictive conditions which were imposed were unreasonable. Although there is some merit in certain of these submissions (for example, the arguments made by Lamberth in regard to by-catch as constituting a substantial portion of the gill-net catch when in fact, on his own studies, it was less than 5% and closer to 1-3%), it cannot, in my view, be said that the reliance by the respondents on such studies was unreasonable to the point where no other reasonable decision-maker would have relied on such studies or would have arrived at the same decision as they did, based on such studies.

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[70] At para [50], 515F.

[63] I am unable to find on the material which is before me that the imposition of the restrictive condition in the permits and interim relief exemptions, was wrong, as a matter of science, as there are conflicting opinions by the various scientists and I cannot find that on this basis it was unreasonable ie not a condition which another reasonable decision-maker could and would have imposed in the circumstances.

[64] However, as far as the rationality review is concerned, the matter is somewhat more complex.

Rationality

[65] In *Pharmaceutical Manufacturers*[71] the Constitutional Court held that it is a requirement of the rule of law that the exercise of public power by State functionaries should not be arbitrary. In the result, decisions made by such functionaries must be rationally related to the purpose for which such power was given, otherwise they will, in effect, be arbitrary and irrational. In order to pass constitutional muster the exercise of any public power by State functionaries must comply with this *"minimum threshold"* rationality requirement.[72] Whether a decision is rationally related to the purpose for which a power was given, calls for an objective enquiry. If the decision which is subject to scrutiny meets the objective requirements of rationality, a court cannot interfere with it simply because it disagrees with it or considers that the

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[71] *Pharmaceutical Manufacturers Association of SA and Ano: In re Ex Parte President of the Republic of South Africa and Ors* 2000 (2) SA 674 (CC) at para [85].

[72] *Id* paras [85] and [90].

power was exercised inappropriately.[73] The application of an objective test ensures that decisions which are objectively irrational do not *"pass muster"* simply because the person who took such decisions *"mistakenly and in good faith"* believed them to be rational.[74]

[66] In determining whether a decision is objectively rational, the court is not to consider whether an alternative or better means could have been employed to achieve the desired end, nor can the Court interfere merely because it considers the decision to be wrong or considers that a different outcome would have been better or preferable.[75] Thus, assessing rationality is not to be equated with testing for the *"reasonableness, fairness or appropriateness"* of a decision.[76] A rationality enquiry is thus a *"less stringent test"* than reasonableness.[77] In assessing whether the decision in question was taken rationally, the court must be careful not to descend down the *"slippery path"* that leads it inadvertently into assessing whether the decision was one which the court considers to be reasonable. As has been explained: *"Rationality entails that the decision is founded upon reason – in contradiction to one that is arbitrary – which is different to whether it was reasonably made"*.[78] All that

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[73] *Id*.

[74] *Id* para [86].

[75] *Minister of Education, Western Cape and Ano v Beauvallon Secondary School and Ors* 2015 (2) SA 154 (SCA) para [38] at 169A, referring to *Albutt v Centre for the Study of violence & Reconciliation & Ors* 2010 (3) SA 293 (CC) at para [51].

[76] *Id* at 169D.

[77] *Ronald Bobroff and Partners Inc v De la Guerre* 2014 (3) SA 134 (CC) at para [7].

[78] Per Nugent JA in *Minister of Home Affairs & Ors v Scalabrini Centre & Ors* 2013 (6) SA 421 (SCA) para [65] at 439H-I, cited with approval in *National Treasury and Ano v Kubukeli* 2016 (2) SA 507

is thus required is a rational connection between the power which was exercised and the decision which was made.[79]

[67] In *Calibre Clinical Consultants*,[80] the Supreme Court of Appeal held that:

> *"In the ordinary meaning of the term a decision is "rationally" connected (to the purpose for which it was taken) if it is connected by reason as opposed to being arbitrary or capricious"*.

[68] To satisfy this rational connection requirement, there must be a *"rationally objective basis justifying"* the conduct or decision in question.[81]

[69] In *DA v President of the Republic of South Africa*,[82] the Constitutional Court expanded on the nature of the enquiry which the court must conduct in a rationality review. It held that such an exercise is concerned with an evaluation of the relationship between the means and the ends ie the relationship, connection or link between the means employed to achieve a particular purpose on the one hand, and the purpose or end itself.[83] In evaluating the means selected, the court must therefore inevitably evaluate the process by which the decision in question was arrived at and must consider whether it was a rational process, and it is not confined to

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(SCA) at para [18].

[79] *Id.*

[80] *Calibre Clinical Consultants (Pty) Ltd and Ano v National Bargaining Council for the Road Freight Industry and Ano* 2010 (5) SA 457 (SCA) at para [58].

[81] *Merafong Demarcation Forum and Ors v President of the Republic of South Africa and Ors* 2008 (5) SA 171 (CC) at para [63]; *Calibre Clinical* n 81 at para [58].

[82] 2013 (1) SA 248 (CC) at para [32].

[83] *Id* at 269D-E.

considering whether only the end ie the decision itself is rational.[84] In the circumstances, in evaluating and considering the means used for achieving the purpose for which the power was conferred, the court must assess all the steps that were taken as part of the process in order to achieve the relevant purpose:

> *"The means for achieving the purpose for which the power was conferred must include everything that he had done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision constitutes means towards the attainment of the purpose for which the power was conferred"*.[85]

[70] As part of the exercise therefore, the court must inevitably consider whether the steps in the process which was undertaken, were rationally related to the end sought to be achieved and if not, whether the absence of a connection between a particular step (which was part of the means employed) was so unrelated to the end as to taint the whole process with irrationality.[86]

[71] The Court held further that if there was a failure to have regard for relevant material in arriving at a decision, such a failure would constitute part of the means utilised to achieve the purpose for which the power was conferred and if such failure had an impact on the rationality of the entire process, then the final decision *"may be rendered irrational and invalid by the irrationality of the*

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[84] *Id* para [34] relying on *Albutt* n75, para [30].

[85] At para [36].

[86] Para [37].

process as a whole".[87] The analysis thus involves a three-stage enquiry, in which the following questions are posed:

(i) Were the facts which were ignored relevant?

(ii) Was the failure to consider the material concerned rationally related to the purpose for which the power was conferred?

(iii) If not, was the ignoring of the relevant information or material of a kind which *"coloured"* the entire process with irrationality and thereby rendered the final decision irrational?[88]

[72] The only functionary who sought to explain why the restrictive conditions excluding applicants from fishing in Zone B were imposed was Tanci, the then Deputy-Director: Line and Natural Fisheries Management of the Department of Agriculture, Forestry and Fishing. As I have pointed out above, in imposing the condition, he had regard to a single document ie the SWG report of Tarr for 2012-2013. If one reads between the lines in the voluminous affidavits filed on behalf of the respondents, it is apparent that the other functionaries who imposed the self-same condition from 2006 onwards, as well as after Tanci ie between 2014 and 2016, also relied principally on the recommendations of the SWG reports in doing so, as these formed the underlying basis for the TAC and TAE which was set each year. As was pointed out above, the 2012-2013 report relied in turn on the findings and

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[87] At para [39].

[88] *Id*.

recommendations of 4 marine studies conducted by Hutchings and Lamberth between 1998 and 2001, and it openly lamented the lack of up-to-date information. The subsequent SWG reports for 2013-2014 and 2014-2015, largely constituted a copy and paste of the contents of the 2012-2013 report and all again pointed to the lack of available up-to-date information. The selfsame studies informed the setting of the TAC and TAE by the Minister in terms of s 14 of the MLRA in 2001, and notwithstanding the provisions of s 18(6) of the Act which provide that the Minister may extend the validity of any rights or permits issued provided he has regard for any changes in the annual TAC or TAE, it is apparent that the limitations on the number of rights-holders for the Langebaan lagoon as set in 2001 by the Minister, were simply applied, as they were, from 2001 onwards, every year that the permits and exepmtions were extended without any attempt to obtain and to have regard for up-to-date information, and without any up-to-date re-assessment of the fish stocks and the biological and conservation considerations pertaining to any impact or target species, or the fishery by-catch.

[73] Tanci, Mkefe and Lamberth pointed out that the exclusion of human activities from Zones B and C, was motivated principally by the need to protect birds (ie migrant waders) during the feeding season and the sandbanks where such birds and seagrass beds were to be found, rather than the fish in the lagoon. Lamberth said that it was only "*later*" research which found, co-incidentally, that the zonal demarcation also resulted in the protection of deep-water species such as white stumpnose which spawned in Zone B and, in his view, the current zonal demarcations thus accorded with the objectives of a MPA.

As the applicants rightly point out, by referring to this *ex post facto* justification the respondents seek to elevate a happy coincidence to being one of the reasons why they imposed the restrictive condition, when it never was.

[74] The applicants rightly point out that in their own 4 studies Hutchings and Lamberth identified similar limitations in regard to the scientific data which was available to them at the time. So, in the study entitled *"By-Catch and Gill Net and Beach-Seine Fisheries in the Western Cape"*,[89] the authors pointed out that although reductions in the numbers and mean size of species targeted by the gill-net fishery were often as a result of intrusive fishing pressure, the evidence before them was not conclusive because the *"size-specific spatial restrictions"* they observed could simply be related to *"natural distribution patterns"*. They pointed out that the occurrence of particularly large harders in the Langebaan lagoon was not a recent phenomenon and even 200 years ago when Dutch colonists caught these fish in the lagoon, they were larger than those caught elsewhere along the West Coast, such as in Table Bay. Thus the increased size could be related to the increased availability of food and the relatively higher water temperature in the lagoon which allowed for faster growth of the species. And it must be noted that already in this report, Lamberth pointed out that netfishers could rightly claim an historical traditional right to fish commercially with nets on the lagoon and a 'co-management' initiative to reduce by-catch was *"clearly going to be better than confrontation"*.

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[89] Published in the Journal of Marine Science (2002).

[75] In a related study entitled *"Catch and Effort Estimates for Gill Net and Beach-Seine Fisheries in the Western Cape"*,[90] Lamberth stated that a *"once-off survey"* of the kind he had engaged in could only provide data on the fishery *"at one point in time",* as catch composition could vary from year to year, and catch-and-effort estimates arrived at during the study could thus only describe the fishery as it had been during the study period ie 1998-1999.

[76] In the third study, *"Socio-Economic Characteristics of Gill Net and Beach-Seine Fishers in the Western Cape"*[91] Lamberth advised that in order to reduce effort in the fishery equitably, current and potential new permit holders should be assessed on an *"individual merit"* basis and in this regard, a number of factors should be taken into account including proof of past involvement in the fishery, an economic need to fish regularly and the financial means to afford the capital outlay. In this study he ultimately based his conclusion that the harder stock in the lagoon was *"regionally over-exploited",* on lower catch rates, smaller average size (which, on his own understanding, could well be ascribed to environmental and other factors) and unspecified 'historical and anecdotal' evidence.

[77] It is, of course, obvious that if one closes off an area which is home to certain fish or animal species, thereby preventing such fish or animals from being caught or hunted, their numbers will increase, and as they will inevitably live longer because they will not be caught or hunted, their size-frequency

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[90] Journal of Marine Science (2002).

[91] Also published in the Journal of Marine Science in 2002.

distribution, to use the jargon in the studies, will increase. It does not need an expert to point this out, as it is a matter of common sense. Put simply, if a complete ban on fishing was imposed on the entire Langebaan lagoon, there can be little doubt that this would result in an improvement in fish numbers and sizes. But in exercising the powers they have in this regard in terms of the MLRA, the Minister and other departmental functionaries who must determine whether or not to grant rights to fish in terms of permits or exemptions, are not required to have sole regard for the imperatives of ecological conservation at the expense of all the other considerations listed in the Act. Whilst it is so that the preamble to the Act declares that its purpose is to provide for the conservation of the marine eco-system, it also provides, at the same time, for the *"long-term sustainable utilisation"* of marine living resources as well as the *"orderly access to exploitation, utilisation and protection"* of such resources and to these ends, to allow for the exercise of control over such resources *"in a fair and equitable manner to the benefit of all the citizens of South Africa",*[92] and one of the important objectives which is emphasised both in s 2 as well as s 18(5) of the Act, is the need to transform the industry by re-structuring it in order to address historical imbalances and to achieve equity within all branches of the fishing industry. In *Bato Star*,[93] both O'Regan J and Ngcobo J (as he then was) emphasised how important transformation was in the proper implementation of the Act by the relevant functionaries. The importance of transformation was also highlighted in each of the various fishing policies referred to above, including the 2005 Net-fishing

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[92] These purposes and objectives are expressly set out in s 2(a)-(m).

[93] Note 65.

Policy, as well as the SSF Policy which was published in 2012. The latter provided, as one of its principal objectives, for the promotion of *"equitable access to and benefits from marine living resources taking the historical background of the fishers into account"*.[94] Similarly, all of these policies emphasised the need to ensure long-term sustainable use and management of the fisheries and resources, and (active) development of the fisheries. The SSF Policy emphasised that one of its purposes was to maximise the benefit of marine living resources for small-scale fishing communities in such a way as to ensure that they were the *"main beneficiaries"* of such resources.[95] The vision outlined in the SSF Policy is of a sustainable, equitable, small-scale fishing sector in which the *"wellbeing and livelihood of fishing and coastal communities is secured and the health of the marine eco-system is maintained"*.[96] It also recognises that in order to achieve effective transformation, small-scale fishers need to regain their lost access to their traditional areas.[97]

[78] The data on which Tanci and others sought to rely as a basis for imposing the restrictive condition, may have been good as at 2001 when the Minister set the new TAE and TAC, but this does not mean that it held good for 12-15 years thereafter. And it must not be forgotten that the very same data was initially used to *allow* the applicants to fish in the restricted zone, for a number of years at least, from 2001 until 2006, after which the self-same data and

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[94] Para 3.2(b).

[95] Para 3.2(f).

[96] Para 26.

[97] Para 4.1.2.

information was used to justify their *exclusion*. Between 2010 and 2013 Dopolo, a marine scientist engaged in research specific to the lagoon itself, built up his own dataset in relation to fish stocks, but by their own admission it was never taken into account by any of the relevant Departmental functionaries, at any time when considering whether to extend the validity of the applicants' permits and interim relief exemptions and to keep imposing the restrictive condition therein. Dr Jackson pointed out, on her analysis of all the data, that there were large discrepancies between the results in the dataset of Dopolo and the datasets on which the Department sought to rely upon religiously between 2006 and 2012, based on the 1998-2000 Hutchings and Lamberth studies. Some of the differences include that according to Dopolo's data, the incidental by-catch from gill-net fishing is even lower than that estimated generally by Lamberth, and the top by-catch species in the lagoon (by mass) is elf, and not white stumpnose. In addition, Dopolo and other studies[98] showed that some 80 000 kgs of white stumpnose are caught annually by recreational anglers in Zone A and Saldanha Bay, a vastly larger quantity of fish than what could possibly be caught by fishermen fishing illegally in Zone B. It is also apparent from their own papers that whereas the respondents claim to have been largely driven by ecological and conservation imperatives when imposing the restrictive condition, they do not appear to have had any regard for the provisions of the SSF Policy or the imperative for transformation emphasised in all of the various policies which were applicable, as well as in the MLRA. In setting out his reasons for imposing

[98] Such as the various annual Saldanha State of the Bay Reports, published between 2012-2015.

the restrictive conditions, Tanci simply listed a number of conservation factors such as the need to manage the harder resources to ensure their recovery and their optimal sustainable utilisation, and to uphold the integrity of the MPA and the purposes of the TAE first set in 2001, and to protect the Palearctic waders and the seagrass and avoid the exploitation of juvenile white stumpnose by-catch, from spawning biomass caught in the deep channels. He does not say in his answering affidavit that either he or the Department gave consideration to the need to transform the rights-holders and to give preference to those traditional and artisanal fishermen who had an historical claim to the area, as required by the MLRA, and the various policies which were applicable. Even the SSF Policy emphasises that the Department is required to prioritise fishery research and data collection and states that all conservation and management decisions should be based on scientific evidence after *"comprehensive regular assessments".* [99]

[79] To my mind, the respondents' rationalisation for the imposition of the condition restricting the applicants from fishing in Zone B, which is based on conservation and ecological imperatives, falls down when one tries to reconcile it with the fact that notwithstanding such imperatives, the respondents had no difficulty allowing a number of rights-holders (initially 5, now 3) who reside in Churchaven and Stofbergsfontein, to exercise commercial net-fishing rights in Zone B ever since the 1990's. Lamberth's explanation for this state of affairs, is startling, to say the least. He says these rights-holders have been allowed to fish in Zone B (for a number of years)

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[99] Para 5.3.1.

because they have addresses adjacent to the water, and adverse environmental impact is mitigated if fishers do not have to travel through the waters in boats under power to access their fish. So in essence he is saying that by allowing the Churchaven and Stofbergsfontein rights-holders to fish, they are protecting the lagoon. In addition, he claims (with a straight face?) that the requirement of proximity has a 'positive effect' on excluded fishers because they in turn do not have to incur petrol and other operational costs in order to be able to access their fishing grounds. This attempt to construe the applicants' exclusion from the area at the expense of other fishermen as an exercise of benevolent protection of the applicants and the environment is not only facile, but disingenuous. It also makes a mockery of the respondents' purported reliance on conservation and ecological imperatives as the principal reason for why the applicants have been excluded from fishing in Zone B. If the exclusion was really about these conservation and ecological imperatives, one would have assumed that no-one would be allowed to fish in Zone B at all.

[80] When one steps back and considers the matter dispassionately, then the following picture emerges, in summary. Firstly, the imposition of the restrictive condition in the annual extension of permits and interim relief exemptions during the period under review ie at least from 2012 to 2016, appears to have been simply the result of the mechanistic application of a policy position adopted in 2001 without an annual application of the mind, on an individual merit basis, in respect of each and every one of the applicants. It also appears to have been a decision which was arrived at without any

consideration for important information that should have been obtained and taken into account, such as up-to-date lagoon specific detailed catch, effort and socio-economic surveys as referred to by the authors of the SWG reports from 2012-2014, and the Dopolo studies which were available but which were never had regard for, and without due and proper regard for certain of the policies, including the SSF Policy, and the MLRA, which all required transformation of rights allocations in the fishery, and which were all similarly ignored. In allowing certain fishermen to exercise rights in the self-same lagoon in which it was alleged that others could not do so for conservation and ecological reasons, the imposition of the restrictive condition occurred arbitrarily and irrationally. And on the basis of *DA v President of the Republic of South Africa*, there were numerous deficiencies in the steps taken to arrive at the annual exclusion of the applicants ie in the process in terms of which the power in question was exercised and, to my mind, the requirements of a rational connection between the means and the end, were not met, in the years under review. The repeated mechanistic reliance on outdated datasets which predated the setting of the 2001 TAE and TAC, and the mechanistic repetition of the selfsame TAE and TAC for the lagoon, for every year thereafter, based on these outdated datasets, which were valid only at the time, does not demonstrate the necessary rational connection which is required between the means and the end. Put simply, in seeking to simply rely on outdated data which was only valid in 2001, to justify excluding the applicants from fishing in Zone B from 2013 onwards, the respondents adopted, in my view, defective means to exercise the powers they had in terms of the MLRA. On this ground alone, the imposition of the restrictive

conditions in the permits and exemptions that were issued in the period under review, falls to be set aside.

[81] But the applicants also claim that the impact of the decisions which were taken whereby they were excluded from fishing in Zone B, constitutes indirect discrimination on the grounds of race, and such decisions are thus reviewable on this ground as well, in terms of the provisions of s 6(2)(a) of the Promotion of Administrative Justice Act[100] read together with the equality clause in the Constitution[101] and the relevant provision[102] of the Promotion of Equality and the Prevention of Unfair Discrimination Act.[103]

[82] S 9(3) of the Constitution provides that the State may not unfairly discriminate, either directly or indirectly, against anyone on a number of grounds including race.

[83] In *Pretoria City Council v Walker*,[104] the Constitutional Court was concerned with a claim of unfair racial discrimination by a ratepayer of (then) Pretoria who lived in an historically white area where consumption-based tariffs for electricity and water were levied. He complained that the differentiation between residents of the formerly white areas of *"old"* Pretoria and residents of historically black areas such as Atteridgeville and Mamelodi constituted unfair discrimination on the grounds of race, as the residents of the latter

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[100] Act 3 of 2000.

[101] S 9.

[102] S 7.

[103] Act 4 of 2000.

[104] 1998 (2) SA 363 (CC).

areas were charged on the basis of a flat-rate and not on a consumption-based tariff. The evidence showed that the reason for this differentiation was because the formerly white areas had adequate facilities and infrastructure and were equipped with meters which could record the consumption of water and electricity, whereas the flat-rate which was adopted in the two *"townships"*[105] was a *"convenient practical expedient"* levied because of the non-existent or poor infrastructure, and the absence of meters. Langa DP (as he then was), held as follows:

> *"The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination, albeit indirect, on the grounds of race. It would be artificial to make a comparison between an area known to be overwhelmingly a "black area" and another known to be overwhelmingly a "white area", on the grounds of geography alone. The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory. In this case, its impact was clearly one which differentiated in substance between black residents and white residents. The fact that there may have been a few black residents in old Pretoria does not detract from this"*.[106]

[84] The approach which was adopted in *Walker*, was followed by the Constitutional Court in *Mvumvu*.[107] The issue before the court in that matter was whether or not a cap on the amount certain classes of passengers could claim from the Road Accident Fund in respect of damages arising from motor vehicle accidents, constituted unfair discrimination on the grounds of race. The evidence before the court was that the vast majority of poor people in the

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[105] As referred to in para [24].

[106] At para [32], 379D-F.

[107] *Mvumvu and Ors v Minister for Transport and Ano* 2011 (2) SA 473 (CC).

country were black and the principal mode of transport which was accessible to them was public transport in the form of taxis and buses. As a result, the claim was that the relevant provisions in the Act impacted disproportionately on black people as opposed to whites. The court upheld the claim. It found that even though the provisions did not expressly and directly place a limitation on claims by black people, at a practical level the majority of the victims affected were black and thus the provisions in question discriminated against black people indirectly and unfairly, in a manner that was disproportionate to other races.[108] So it is the impact of the provisions in question which determines whether the result constitutes unfair discrimination, and the intention of the creators thereof however benevolent it may be, is of no consequence.

[85] In seeking to justify the applicants' exclusion from Zone B at the expense of the 3 resident fishermen from Churchaven and Stofbergsfontein, the respondents seek to rely on the provisions of the 2005 Netfishing Policy, which provide that persons who do not live *"adjacent"* to the fishing zone in respect of which they have applied for fishing rights, should be excluded from obtaining such rights.[109] The policy further provides that even those who live adjacent to the fishing zone, must have lived there for at least 4 years before they are entitled to apply for fishing rights. These provisions must be contrasted with those that stipulate that the delegated authority should prefer applicants who rely on net-fishing for a significant proportion of their gross

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[108] Para [29].

[109] Para 8.1(h) which sets out the exclusionary criteria.

annual income. The requirement of residential adjacency appears, at face value, to be intended to protect the fishery from exploitation by persons who do not have any immediate connection with the area, and one can understand the objectives of such a policy, for example, in the context of deep-sea trawling where local fishermen need to be protected from the rapacious exploitation of marine resources by foreign fishing trawlers. However, in the context of this matter, the provisions in question serve, perversely, to exclude persons such as the applicants who are historically disadvantaged black fishermen whose ancestors used to live adjacent to the lagoon before they were forcibly removed from the area by the *apartheid* regime as part of its spatial planning. As it stands, therefore, the impact of these provisions in the Net-fishing policy, whilst having a laudable intention, serves to discriminate indirectly between white fishermen who now reside alongside Zone B at the expense of black, historically disadvantaged fishermen who used to live there. Although the distinction is sought to be made on a geographical basis, the effect thereof is to discriminate unfairly, on a racial basis, between white and black fishermen, and thus on this ground too the imposition of the restrictive condition is unfair and unconstitutional.

Ad the relief sought

[86] In paragraph 5 of the Amended Notice of Motion, applicants seek an order granting them an entitlement to fish in terms of a *"structural"* interdict whereby the respondents are to be directed to enter into negotiations with the applicants in regard to the allocation of permanent fishing rights in the said

zone, which process the court is requested to manage and ultimately approve. To my mind, this is not an order which, for a variety of reasons, the court can and should make. In the first place, were such an order to be granted it would effectively override the TAC and TAE which is set from time to time by the Minister, in respect of the lagoon. It is the Minister's function to determine and set these limits, and not the Court's. Secondly, all the experts who filed reports in this matter, including Dr Jackson (who was engaged by the applicants), agreed that the available data justifies the protection of parts of the lagoon as a vital refuge and breeding area for a variety of fish species, including harder, white stumpnose and elf, and even after reviewing Dopolo's data, Dr Jackson was still of the view that there was a real danger that uncontrolled fishing in Zone B with a spill-over into Zone C, would deplete the breeding harder population, and would wipe out the stock. Both Dr Jackson and Prof Attwood were in agreement that the current advantage given to recreational anglers in Zone A was unjustifiable in many respects and there needed to be an adjustment in this regard. As previously pointed out, these anglers are responsible for catching in the order of 80 000 kgs of white stumpnose (admittedly mostly adult), annually in Zone A, and this must surely constitute a greater mass depletion of the species than the minimal by-catch (between 1% and 5%) which illegal net-fishers and the Churchaven/Stofbergsfontein commercial rights' holders catch annually in the form of juvenile fish in Zone B. Prof Atwood, who is a prominent conservationist and marine scientist, has recommended that the Department of Agriculture, Forestry and Fishing and SANP, should consider reducing the extent and catch of recreational fishing in Zone A in order to minimise conflict

between the recreational fishers and the net-fishers. Atwood's suggestion is that recreational fishers should be allowed to fish in Zone A only on certain allocated days of the week or times of the day, at certain times of the year, whereas net-fishers should be allowed to fish in Zone A, more often, and also at night. Jackson also suggests that the current marine zoning should be reconfigured by adjusting the position of the demarcating 'lines' between Zone A and Zone B thereby reducing the area of Zone B and including more of it in Zone A, and she also recommended the preparation of a fisheries' management plan for the lagoon which would have due and proper regard for traditional subsistence fishermen and which would afford less prominence to the rights of recreational anglers. These are not waters into which a court should venture. In *Bato Star*, the Constitutional Court warned that *"the task of allocation of fishing quotas is a difficult one, intimately connected with complex policy decisions"* and *"requires ongoing supervision and management"* by departmental decision-makers who are experts in the field[110] and in the judgment of the SCA,[111] Schutz JA held that matters such as these require judicial deference ie *"a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; (and) to admit the expertise of those agencies in policy-laden or polycentric issues"*.[112] Any determination by the various Departments concerned as to how to accommodate the applicants as small-scale fishers, will, of necessity, require

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[110] Para [50] at 515E-F.

[111] Reported as *Minister of Environmental Affairs and Tourism and Ors v Phambili Fisheries (Pty) Ltd and Ano; Minister of Environmental Affairs and Tourism and Ors v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA).

[112] At para [47].

a complex equilibrium to be struck between a range of competing interests or considerations such as the ecological and conservation imperatives versus the requirments of sustainable utilisation and the imperatives of transformation, and will have to be arrived at by persons with specific and special expertise and experience in the field, and this process must be deferred to by the court lest it infringes on the separation of powers.[113]

[87] Finally, and most importantly, in the light of the fact that the Department of Agriculture, Forestry and Fishing and the Department of Environmental Affairs, have arrived at a common understanding that the entire lagoon is to become a no-take zone (this was to have happened already at the end of 2015), it would be totally inappropriate for this court to make an order granting the applicants some or other right to fish in Zone B. The best that the Court can do, with due respect and deference, is to urge those with the necessary expertise and skill in the Departments concerned, to engage with the applicants, who have apparently registered as a small-scale fishing community in terms of the SSF Policy, with a view to arriving at a fair and suitable accommodation in terms of which they are granted some rights to fish, of a sort, in such areas as the experts may deem to be suitable, and on such terms and conditions as may be deemed to be appropriate in the light of the various factors which need to be taken into account including the applicants' historical claim to traditional fishing rights, the imperatives of transformation and the need for ecological conservation whilst also allowing for sustainable utilisation and development of the resources concerned.

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[113] *Bato Star* n 65, para [48].

[88] Because the application was launched in 2013, the applicants originally sought an order setting aside the imposition of the restrictive conditions in 2013 as well as in the years subsequent thereto. Part of the motivation for this was because some of the applicants had been charged criminally for fishing in Zone B illegally in 2013. Given that these criminal charges have subsequently been withdrawn and that the permits were subsequently renewed, it would, in my view, be improper and entirely inappropriate for the court to make any order in respect of the years 2013 – 2015. The permits and exemptions for these years have long since expired and the relief sought in respect thereof is moot.

[89] In the result, I make the following order:

(i) The restrictive conditions which were imposed in the permits and interim relief exemptions which were granted to the applicants for 2016, restricting them from fishing in Zone B of the Langebaan lagoon and the decisions in terms of which such conditions were imposed, are declared to be arbitrary and irrational and to constitute unfair discrimination against the applicants on the grounds of race, and thus unconstitutional, and are reviewed and set aside;

(ii) First, second, third and fourth respondents shall be liable jointly and severally (the one paying the other to be absolved) for the applicants' costs of suit, which costs shall include the costs of two counsel.

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SHER AJ

Appearances:

For applicants: Mr J Brickhill (assisted by Mr M Bishop)

Instructed by: Legal Resources Centre, Johannesburg (Ms L Wicomb)

For first to fourth respondents: Ms K Pillay (assisted by Ms B Mthamzeli)

Instructed by: State Attorney, Cape Town (Mr L Manuel)

For fifth and sixth respondents: Ms C De Villiers

Instructed by: State Attorney, Cape Town (Mr L Manuel)