

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others

CCT 27/03

Decided: 10 March 2004

Media Summary

The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

This application for special leave to appeal against a judgment of the Supreme Court of Appeal (SCA) concerns the allocation of fishing quotas in the deep-sea hake trawl sector of the fishing industry. The applicant, Bato Star Fishing (Pty) Ltd, is dissatisfied with the allocation it received in the 2001 allocation process for the 2002 – 2005 fishing seasons. It applied for a quota of 12 000 tonnes in the deep-sea hake trawl sector, but it was allocated only 873 tonnes. It therefore sought to review that allocation decision. It succeeded in the Cape High Court, whose decision was overturned by the SCA and the applicant then approached the Constitutional Court.

Deep-sea trawling for hake was pioneered in South Africa by a handful of companies who remain dominant in the sector. Like most of the South African economy, these pioneer companies historically were established, owned and managed by white people. Accordingly section 2(j) of the Marine Living Resources Act, 18 of 1998 (the Act) identifies as one of the Act's ten objectives the need "to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry." Similarly, section 18(5) of the Act provides that when allocation decisions are made particular regard must be paid to "the need to permit new entrants, particularly those from historically disadvantaged sectors of society". The applicant relies on these provisions and points to the fact that the main purpose behind its establishment was to create a medium-sized black empowerment company.

The applicant unsuccessfully relied on three grounds in its application to this Court:

- (a) that the SCA misconstrued the nature of the objectives in s 2 of the Act – this argument raised two separate issues: first, the proper construction of subsections 2(j) and 18(5) of the Act; secondly the question whether the allocation decision was reasonable;
- (b) that the SCA incorrectly concluded that the Chief Director's decision should be set aside on the ground that he failed to apply his mind to the quantum of hake applied for by the applicant and its ability to catch such quantum; and
- (c) that the SCA erred in finding that the alleged "undisclosed policy change" by the Department did not infringe the applicant's right to procedural fairness. The applicant did not however mention the Promotion of Administration of Justice Act, 3 of 2000(PAJA) in its application for special leave to appeal to this Court.

O'Regan J, in whose judgment all the judges concurred, found that because the courts' powers to review administrative action no longer flow directly from the common law, but from PAJA and the Constitution itself, the provisions of PAJA should be directly relied upon by applicants seeking the review of administrative action.

On the first ground of appeal the applicant raised two arguments: that the Chief Director had paid insufficient attention to the requirements of 2(j) as repeated in s 18(5) of the Act; and also that the allocation decision was an unreasonable decision within the terms of s 6 (2)(h) of PAJA. O'Regan J held that to meet the obligations imposed by section 2 and section 18(5)

there must be a recognition that these needs had to be fulfilled and that steps must be taken to ensure their fulfilment. If no step towards their fulfilment in any particular round of allocation, the decision will not be in accordance with the requirements of the Act unless the decision-maker can show that the absence of such a step is reasonable. On the facts of this case, she held that the decision-maker had taken some practical steps to ensure fulfilment of the statutory objectives.

With regard to reasonableness she held that what constitutes reasonableness will depend on the circumstances of each case, but that a decision will be unreasonable if it is one that a reasonable decision-maker could not reach. A range of factors will be relevant in answering this question in each case. The judge warned that courts should not take over the functions of administrative agencies. A court must ensure that it recognises the proper role of the executive in the Constitution, and must not attribute to itself superior wisdom in relation to matters entrusted to other branches of government. Instead, the task of the courts is to ensure that administrative decisions fall within the bounds of reasonableness required by the Constitution.

The second ground of appeal was based on the alleged failure of the Chief Director to apply his mind to the quantum of hike applied for by the applicant. O'Regan J found that each application was carefully considered individually and rated according to a range of relevant criteria. This ground of appeal was therefore dismissed.

Finally, O'Regan J also rejected the third ground of appeal which alleged that there had been an undisclosed policy change by the Department that infringed the applicant's right to procedural fairness. She held that the policy guidelines published with the call for applications made clear that a number of factors were to be considered in making the allocations. Moreover, the applicant was mistaken in relying on unpublished guidelines, draft guidelines and policy documents subsequently overtaken by legislation or regulations as they were not relevant to determining whether there had been a change in policy.

Ngcobo J filed a separate judgment in which all the members of the Court concurred. He began by sketching the constitutional context within which the Act must be understood and construed. He found that the achievement of equality is one of the fundamental goals that the Constitution sets and this commits us to the transformation of society, from being grossly unequal, to one in which there is equality between men and women and people of all races. Ngcobo J also found that decades of systematic racial discrimination cannot be eliminated without positive action being taken. He warned that the effects of discrimination may continue indefinitely unless there is a commitment to end it. He acknowledged that there are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. Measures that bring about transformation will inevitably affect some members of the society adversely, but these other considerations may have to yield in favour of achieving the constitutional goal of equality. The process of transformation, he held, must nevertheless be carried out in accordance with the Constitution.

Ngcobo J emphasized that the transformation of the fishing industry is a foundational principle of the Act. He points out that the fishing industry has been, and continues to be, dominated by a few so-called pioneer companies, controlled and owned predominantly by members of the community that were privileged under apartheid. There is therefore a need to ensure that access to the industry is opened to those newly-created companies mostly controlled and owned by communities that were previously excluded. This concern for previously disadvantaged communities is highlighted in various provisions of the Act and is entirely congruent with the Constitution, particularly section 9(2) which authorises special measures to achieve equality.

He held that the Act requires the Minister to pay special attention to transformation of the fishing industry when granting fishing rights. He is required to address the need for transformation in a meaningful way when making decisions and must be able to demonstrate that this has been done. In the present case this would require a two-stage approach. The first stage of setting a total allowable catch requires various considerations to be taken into account. The second stage of granting quotas should give prominence to transformation of the industry.

He emphasised, however, that the goal of transformation does not entitle a court to tell functionaries how to implement transformation where this could take place in various ways.

As a result the application for leave to appeal was granted and the appeal was dismissed with costs.