IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No : CCT 27/03

In the matter between:

BATO STAR FISHING (PTY) LIMITED	Applicant
and	
THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM	First Respondent
THE CHIEF DIRECTOR: MARINE & COASTAL MANAGEMENT, DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM	Second Respondent
RESPONDENTS AS PER THE ATTACHED ANNEXURE "A" TO THE NOTICE OF MOTION	Third to Eighteenth Respondents

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OPPOSING AFFIDAVIT

I, the undersigned,

TIMOTHY WINFRIED REDDELL

do hereby make oath and say that:

1. I am the director: operations of Irvin & Johnson Ltd ("*I&J*"). I am also the Chairperson of the South African Deep-Sea Trawling Industry Association ("*SADSTIA*").

2. The facts to which I depose are, unless otherwise stated or the context indicates to the contrary, within my knowledge and belief, and are true and correct. Where I deal with matters of a legal nature I do so on the advice of the Industry Respondents' legal representatives.

3. I am duly authorised to oppose this application, and to depose to this affidavit, on behalf of the Third to Eighteenth Respondents ("*the Industry Respondents*"), all of whom are rights holders in the hake deep sea trawl sector for 2002 to 2005. A full list of the Industry Respondents is annexed hereto marked "**TR1**". I should emphasize that the Industry Respondents comprise some sixteen of the 2002 rights holders in the hake deep sea sector and are made up of a wide variety of quota holders. Included among them are four of the five companies that were operating in the fishery when individual company quotas were first set in 1979, as well as rights holders who entered in 1980, 1984, 1996, 1999 and 2000 (including some who are wholly owned by historically disadvantaged persons).

4. The Industry Respondents oppose the application for special leave to appeal. They do so on the grounds that the Applicant does not have reasonable prospects of success on appeal and that it is not in the interests of justice to grant leave to appeal. As to the lack of merit of the review application of the Applicant (also referred to, where appropriate, as "*Bato Star*"), I refer to paragraph [74] of the Supreme Court of Appeal ("*the SCA*") judgment that Bato Star seeks leave to appeal against ("*the SCA judgment*"). At that paragraph, Schutz JA, for a unanimous Court, stated:

> "*[74] In the result I am of the view that there is <u>not any merit in any of the respondents' review grounds</u>. The court a quo should not have upheld the review. These huge reviews, running to some 45 volumes, were based upon a preconception that was not sustained by evidence and <u>lacked all substance</u>. The essential message of this judgment is that it is not the function of a court to sit in appeal on decisions to grant fishing allocations, or to constitute itself as an authority as to how to make such allocations. That, however much it is denied, is what the respondents are asking us to do.*" [emphasis added]

5. The Industry Respondents have, together with the First and Second Respondents ("*the Government Respondents*"), at all stages opposed the applications to review the allocation of medium-term hake deep sea trawl rights brought by Bato Star and Phambili Fisheries (Pty) Ltd ("*Phambili*"). The Cape High Court upheld the review applications. That judgment was, however, reversed on appeal to the SCA. What was notable on appeal, I am informed, was the total lack of reliance on the Cape High Court's judgment by the successful parties before the Court of first instance.

6. I should emphasize at the outset that Bato Star's application (which ran to 17 volumes on appeal) was virtually from its inception intertwined with that of Phambili's (which runs to 27 volumes). The matters were argued together before the Cape High Court with counsel for the Industry Respondents filing one set of Heads of Argument dealing with both applications. The two cases were also heard together on appeal in the SCA, with both the Industry Respondents and the Government Respondents' counsel filing one set of Heads for both matters. One judgment was given in respect of both applications in both the Cape High Court and the SCA. Moreover, the answering affidavits were drafted in the Bato Star application after it had become apparent that it would be heard together with the Phambili review. I refer in this regard to what was stated in paragraph 4 of the answering affidavit of the Industry Respondents in the Bato Star review:

> "*4. This matter is being heard together with Phambili Fisheries (Pty) Ltd v The Minister of Environmental Affairs and Tourism and 52 Others (Case No: 1171/02) (henceforth the "Phambili matter"). These applications are of a similar nature but have not been consolidated. The principal grounds of attack of the respective applicants and the nature of the opposition thereto overlap to a great extent. I therefore repeat much of the content of my affidavit in the Phambili matter. To avoid unnecessarily burdening these papers I will from time to time refer to affidavits and annexures filed in the Phambili matter and will refer to them as "the Phambili Record". To the extent that I refer to the Phambili Record, I ask that it be read as if specifically incorporated herein.*"

The papers in the Bato Star application thus cannot be read in isolation of those in the Phambili matter.

7. A factor which should consequently weigh heavily with this Court is that Phambili has not joined Bato Star in its endeavour to have the SCA judgment overturned. This is significant for two reasons:

   7.1 First, we submit that it will seldom, if ever, be in the interests of justice for one applicant to be allowed to appeal to the Constitutional Court from the SCA when another applicant in the same case, or an applicant in another application which has to all intents and purposes been consolidated, has accepted the judgment delivered by the SCA.

   7.2 Secondly, Phambili's stance, which reflects an appreciation that it has no prospects of success on appeal, must have a bearing on whether Bato Star could legitimately be thought to have any prospects of success on appeal.

8. Phambili, perhaps even more so than Bato Star, has vigorously challenged the medium-term rights allocation process every step of the way up until now. Prior to launching the review applications, Phambili sought, as a matter of urgency, an interim interdict to restrain all the participants in the hake deep sea trawl sector from catching fish pending the determination of the review. This application was unsuccessful. After judgment was handed down by the Cape High Court in November 2002, Phambili brought an application in terms of Rule 49(11) of the High Court Rules, for leave to put the order into effect pending the appeal. The application was subsequently withdrawn prior to being heard. It is clear that Phambili has taken the view that there are no prospects of success on appeal to the above Honourable Court. Phambili would most certainly have applied for special leave to appeal had it believed that there were prospects of success on appeal. This is a clear sign, if any be needed, that Bato Star's prospects on appeal are at best extremely slim.

9. It is notable that Bato Star have considerably truncated their attack on the hake deep sea trawl rights allocations in their application to this Court – something I elaborate upon further below. Bato Star have also refrained from providing much background

information, except largely irrelevant information as to its shareholding and the programmes supported by its ultimate shareholder. It is therefore difficult to gain an appreciation of the nature of Bato Star's review application from the affidavit filed by Bato Star in support of its application for special leave to appeal. It may therefore assist this court if I commence by briefly:

9.1 providing some introductory remarks about the review applications;

9.2 providing some further information about Bato Star and its involvement in the hake deep sea trawl sector to date;

9.3 setting out some information about the nature of the hake deep sea trawl industry; and

9.4 referring to various review grounds raised by Phambili and Bato Star before the Cape High Court and/or the SCA.

The material I include under those headings are in the main culled from the Industry Respondents' Heads of Argument before the SCA. I respectfully say that it is appropriate to take over this material because those SCA Heads involved a thorough and pain-staking distillation of the evidence contained in the voluminous records. They therefore provide a handy reference source in these circumstances.

10. After those introductory sections, I shall –

10.1 firstly, deal with Bato Star's contention that it is in the interests of justice for special leave to be granted;

10.2 secondly, examine Bato Star's three grounds of appeal (summarised in paragraph 19 of Mr Bailey's founding affidavit).

I have not dealt *seriatim* with the Applicant's founding affidavit and am advised that, for purposes of this application, it is not necessary to do so. The fact that the Industry Respondents do not do so should not be regarded as an acceptance by them of the correctness of the allegations. I have, where appropriate, responded to

some paragraphs in Mr Bailey's affidavit in the section hereof dealing with the Applicant's main grounds of appeal.

11. I am advised that a threshold requirement in applications for special leave to appeal to the Constitutional Court is whether the issue to be decided is a constitutional matter or is connected with decisions on constitutional matters. The Industry Respondents do not contend that the grounds upon which the Applicant wishes to appeal against might not raise constitutional matters. To the extent that the grounds of appeal pertain to an alleged infringement of section 33 of the Constitution, Act 108 of 1996 ("*the Constitution*"), a constitutional matter may arise for determination. The Industry Respondents do, however, contend that any constitutional matter which may be raised by Bato Star's review is not one which is, in the interests of justice, deserving of consideration by this Court. The Applicant also suggests that a constitutional issue arises in respect of section 9(2) of the Constitution. The Applicant does not, though, claim that there was a direct violation of section 9(2), but rather relies on the aforesaid section in support of its interpretation of section 2(j) of the Marine Living Resources Act, 18 of 1998 ("*the MLRA*"). However, even were section 9(2) to be relevant, that would not, we submit, elevate the question of interpretation of section 2 of the MLRA to a constitutional issue.

Some Introductory Remarks

12. The reviews by Phambili and Bato Star were unusual in that not only were both Phambili and Bato Star successful in their hake deep sea trawl applications for 2002, but they did not even suffer a reduction of their 2001 allocations. Indeed, both Phambili and Bato Star were awarded increased quotas for 2002 - with Phambili's hake deep sea quota rising from 1069 to 1083 tonnes and Bato Star's quota being increased from 803 tonnes to 856 tonnes. By contrast, some of the fourth to fifty-third respondents in CPD Case No. 1171/02 ("*the Phambili application*"), and some of the third to fifty-third respondents in CPD Case No. 1417/02 ("*the Bato Star application*") - including some of the Industry Respondents - were awarded reduced quotas. Moreover, included among the fifty-fourth to eighty-ninth respondents in the Phambili application were 2001 rights holders who were awarded no hake deep sea quota at all for the 2002 to 2005 seasons.

13. Both Phambili and Bato Star contended, however, that it was not enough for them to have received relatively small (yet lucrative) increases in their existing hake deep sea quotas.[1] In their opinion, the composition of their shareholders and management and their participation in the industry were purportedly so exemplary that - notwithstanding the fact that the hake deep sea total allowable catch ("*the hake deep sea TAC*") remained constant from 2001 to 2002 - their allocations should have increased manifold. Phambili alleged that it should have received a 2002 hake deep sea quota of 5000 tonnes (an increase of over 450%). It also asked for this amount to be allocated to it on appeal by the first appellant ("*the Minister*"), in terms of section 80 of the MLRA.[2] Bato Star appeared to be indicating in its founding papers that it was entitled to 12 000 tonnes in 2002 (an increase of almost 1500%), but at other places it appeared to be insisting on a minimum of approximately 2700 tonnes for that season (an increase of just over 330%). On appeal Bato Star sought a minimum allocation of 2500 tonnes.[3] In both cases, the failure of the second appellant ("*the Chief Director*") to award such phenomenal increases - in a situation where he was faced with a finite resource that had not increased since the previous year and in circumstances where both Phambili and Bato Star obtained relatively low scores in the comparative balancing exercise undertaken by the Chief Director - was said to constitute a reviewable irregularity.

<u>Bato Star</u>

14. Bato Star was apparently formed in 1996, as the holding company to three companies with abalone quotas.[4] 70% of its issued shares are owned by a company called SA Amalgamated Union Fishing (Pty) Limited ("*SAAUF*");[5] the remaining 30% of its shareholding is divided between the WA and HD Lewis Childrens' Trust ("*the Lewis Trust*") (26%) and a director, Mr P Rogers (4%).[6]

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1 Based on the figures provided by Mr Gordon (Phambili Record: Vol 21: 1339 para [15]) 1 ton represents some R13 000,00 turnover and a profit of R5 000,00 (assuming a value added process).

2 Phambili Record: Vol 20: 1212 para [15].

3 Bato Star Record: Vol 4: 276 para [4.2] (line 33).

4 Bato Star Record: Vol 1: 27 paras [31-2].

5 Bato Star Record: Vol 1: 27 para [32], Vol 3: 238.

6 Bato Star Record: Vol 3: 238, Vol 7: 609-610 paras [66.1]-[66.2]. (Bato Star incorrectly states, at paragraph [32] of its founding affidavit (Bato Star Record: Vol 1: 27) and at para 11 of its founding affidavit in its application for special leave to appeal to this Honourable Court, that 30% of its shareholding is owned by management.)

14.1 Neither WA Lewis nor P Rogers is an HDP. Nor is the management of Bato Star dominated by HDPs. Only 1 of the 4 top and senior managers at Bato Star is an HDP, while only 2 out of the 9 employees listed in the Applicant's 2002 hake deep sea application as earning over R5 000.00 per month are HDPs.[7]

14.2 Bato Star by its own admission does not have any employees other than directors.[8]

15. Bato Star's claim to impeccable empowerment credentials therefore does not result from its management, or from its immediate shareholding. Instead, it appears to lie in its ultimate shareholding. 80% of the shares in SAAUF are held by SACTWU Investment Group (Pty) Ltd ("*SIG*") (a trade union investment company), which in turn is wholly-owned by the SACTWU Education Trust ("*the SACTWU Trust*"). The beneficiaries of the SACTWU Trust are the more than 100 000 SACTWU members employed in the clothing and textile industries in South Africa.[9] But it is not apparent from the papers - and what Bato Star has studiously declined to say, despite being invited to do so - is what proportion of the profits generated by Bato Star thus far have found their way from SAAUF through SIG to the SACTWU Trust (which has an effective 56% shareholding in Bato Star).[10] On the other hand, the Lewis Trust and Mr Rogers (and/or Mr Lewis) received a dividend of R1.05 million in respect of the period 1 August 1999 to 31 December 2000,[11] and seemingly R4 million in dividends and loan repayments since 1997.[12]

16. Bato Star entered the hake deep sea sector as a new entrant in the middle of 1999 (some 9 months <u>after</u> the MLRA came into force), when it was allocated a quota of 750 tonnes.[13] This tonnage was part of the 10 000 tonnes made available by eight of the larger rights holders as part of an agreement with the Minister concluded on 25 May 1999, known as the hake industry agreement. The donor companies

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7 Bato Star Record: Vol 3: 239-240, Vol 7: 610 para [66.2].
8 Bato Star Record: Vol 3: 240 paras [4.7] and [4.8].
9 Bato Star Record: Vol 1: 27-28 paras [32]-[35].
10 Bato Star Record: Vol 7: 611 paras [67]-[68.1], Vol 10: 820 paras [190]-[191].
11 Bato Star Record: Vol 7: 611 para [67], Vol 6: 471-491 annex HK4, Vol 8: 662 annex LP9.
12 Bato Star Record: Vol 9: 716 para [25.1], Vol 10: 820 para [190]. As regards loan repayments to the Lewis Trust and Mr Lewis for the 18 month period ending 31 December 2000, see Bato Star Record: Vol 7: 612 para [68.2].

included Irvin & Johnson Limited ("*I&J*") (which contributed 4517.9 tonnes), Sea Harvest Corporation Ltd ("*Sea Harvest*") (which contributed 3383.3 tonnes), and Atlantic Trawling (Pty) Ltd ("*Atlantic Trawling*") (which contributed 1023 tonnes). This tonnage was apportioned by the Minister as follows: 4000 tonnes to the hake longline sector (which nearly doubled as a result); 3000 tonnes to the other 1998 rights holders in the hake deep sea sector; and 3000 tonnes to new entrants.[14] Bato Star (along with the three other new entrants - one of which only received its allocation in 2000) therefore owes its entry in the sector to the sacrifice made, after the coming into force of the MLRA, by the larger rights holders. As the hake industry agreement records, this sacrifice was made as a contribution to the restructuring of the hake industry.

17. Bato Star's quota remained constant (at <u>750</u> tonnes) in 2000, increased to <u>803</u> tonnes in 2001, and increased a further 53 tonnes to <u>856</u> tonnes in 2002. Bato Star is at present the 18th biggest rights holder (out of 51) in the hake deep sea sector. Of the rights holders who have entered the sector from 1994 onwards, only 4 currently have larger quotas.[15]

18. Bato Star has made considerable profits since 1997. It has paid out over R13 million in dividends and loan repayments since 1997. Simply for the period August 1999 to December 2000, Bato Star's net profit was approximately R3.3 million, while the net profit of the "Bato Star group" - i.e., Bato Star (which has a hake deep sea and west coast rock lobster quota) and its subsidiaries (which have abalone quotas) - was just over R4.5 million.[16]

19. Notwithstanding these profits, Bato Star is not yet able to point to any concrete investments in the hake deep sea sector. All it can show for its efforts is the conditional purchase of a vessel, the mfv "Lobelia", in respect of which it paid (and forfeited) a deposit of R200 000.00. It has made no other investment in any vessel, nor in any processing or distribution facilities; nor has it thus far provided any

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13 Bato Star Record: Vol 7: 590-591 para [37.9.2], Vol 7: 650-651 annex LP2.
14 Bato Star Record: Vol 7: 589-591 paras [37.9.1]-[37.9.3], Vol 8: 652-654 annex LP3.
15 Bato Star Record: Vol 5: 469, Vol 7: 651.
16 Bato Star Record: Vol 7: 631 para [99.3].

employment in the hake deep sea sector.[17] It is notable, too, that the conditional agreement of sale with I&J in respect of the Lobelia was only concluded on 11 September 2001,[18] the day before Bato Star's 2002 rights application was submitted, and just before the expiry of the period for submitting applications (27 August 2001 to 13 September 2001).[19] The sale of the "Lobelia" (a 60.9 metre long vessel) to Bato Star for R7.75 million was conditional upon Bato Star being awarded a 2000 ton allocation for 2002;[20] a factor that Bato Star did not expressly mention in its 2002 hake deep sea application.[21]

20. On its own version, Bato Star appears each year to have sold the catching and processing rights in respect of its quota to other rights holders in the hake deep sea sector. For example, for the 2001 season, it entered a catching and co-operation agreement with Sistro Fishing Co (Pty) Ltd in respect of 403 tonnes of the quota, while another hake deep sea rights holder, Food Corp (Pty) Ltd ("*Foodcorp*"), effectively purchased the remaining 400 tonnes.[22] Bato Star is therefore *par excellence* a paper quota holder.

The Nature of the Hake Deep Sea Trawl Industry

21. I have highlighted in the previous section of this affidavit the extent of the participation of Bato Star in the hake deep sea trawl fishery. An appreciation of this sector generally and how it has evolved over time is essential to an understanding of the process of allocating fishing rights. The nature and development of the industry appeared from the affidavits filed in the review applications, including the historical background set out in annexure "LP1" to the affidavit of Mr Penzhorn in the Phambili application, paragraphs 4 to 28 of the affidavit of Mr Kleinschmidt in the Phambili

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[17] Bato Star Record: Vol 7: 613 para [69.2.2]. As Bato Star points out, it did conclude a contract for the purchase of the "Eugene Marine" (a 73 metre vessel) with Marine Products (Foodcorp Holdings), but Bato Star's application to the Fishing Effort Advisory Committee ("*FEAC*") to re-deploy the vessel in the hake trawl sector was rejected in November 2000. The reasons for FEAC's rejection of the application were, first, that the vessel would only be able to operate for 3 months of the year if it were to be employed to catch Bato Star's quota alone, and secondly that a condition of an earlier application lodged by Foodcorp was that the Lobelia be totally withdrawn and scrapped from the industry. (Bato Star Record: Vol 3: 261 and 265, Vol 10: 823 para [193.5]).

[18] Bato Star Record: Vol 6: 508.

[19] Bato Star Record: Vol 3: 195.

[20] Bato Star Record: Vol 6: 502-503.

[21] See, for example, Bato Star Record: Vol 3: 241, 244 and 262.

[22] Bato Star Record: Vol 7: 614 para [69.2.4], Vol 8: 663-673 annex LP10 and LP11.

application, the draft ESS fishery profiles for the hake deep sea and inshore fisheries prepared by Rhodes University ("*the ESS study*") and the instructions provided to the Advisory Committee. It is also summarized succinctly at paragraphs [14] to [18] of the SCA judgment.

22. The South African fishing industry comprises 22 commercial fishing sectors ranging from shore based to deep sea fishing activities. Demersal trawling off the South and East Cape coast commenced in the 1890's and it has developed into the most mature of all South African fisheries. The hake fishery is the largest and most valuable of the South African fisheries and it is recognised as one of the best managed fisheries in the world. It is the largest South African exporter of perishable frozen products with exports mainly to the USA, Europe and Australia. I&J has been established in the industry since about 1912. Atlantic Trawling commenced operations in 1961 and in 1964 Sea Harvest emerged as a new force. Prior to 1978 the hake fishery was completely unrestricted. A hake deep sea TAC was determined for the first time in 1978 but unallocated. In 1979 the introduction of individual quotas was effected in the deep sea sector. By 1985 the deep sea trawl sector had as its five pioneer participants: I&J, Sea Harvest (with Atlantic Trawling a subsidiary), Viking, Foodcorp and Fernpar.

23. The number of participants in the hake deep sea trawl sector grew to 22 in 1992. The period since 1992 has seen further significant changes in the industry with the further introduction of new entrants. As at 2002 there were 51 participants in that sector. The three original companies (I&J, Sea Harvest and Atlantic Trawling) have between 1978 and 2000 seen their quota holdings erode by 42% to accommodate new entrants and new fisheries (longline and handline). Over the last decade the pioneer companies lost about a third of their share of the TAC to new entrants, specifically those from the historically deprived communities of the country. The position as of early 2002 was that:

23.1 23,86% of the hake deep sea trawl quantum for 2002 had been allocated to rights holders that are 50% or more owned by historically disadvantaged persons;

23.2 17,96% of the hake deep sea trawl quantum for 2002 had been allocated to rights holders that are 50% or more managed by historically disadvantaged persons;

23.3 53,14% of the hake deep sea trawl quantum for 2002 had been allocated to rights holders that have provided substantial transformation plans which are in place;

23.4 Of the 51 hake deep sea trawl rights granted, 38 (approximately 73%) were to applicants who are majority-owned by historically disadvantaged persons and 55% were to applicants whose management comprises a majority of historically disadvantaged persons.

All of the above percentages constitute a "*notable portion*" of the hake deep sea trawl TAC.

24. The degree of transformation in the inshore trawl sector and the longline and handline sectors is greater. For example, more than 80% of the fishing rights in the hake longline sector for 2002 were allocated to companies that are majority owned by historically disadvantaged persons.

25. The industry is highly capital intensive. There is currently a fixed capital asset investment in the region of R5,4 billion (at replacement value). Annual investment of over R200 million is made to ensure the maintenance of high standards and efficiency. Annual catches from a trawler fleet of 61 offshore and 21 inshore vessels are landed. These catches generate annual sales of over R1 450 million and an export revenue of R750 million for I&J alone.

26. The industry is also labour intensive and employs 8838 people (excluding those employed in distribution), with a further 1300 employed by intermediary hake and by catch processors. Employment is characterised by permanent full-time employment, a fixed wage plus commission and the negotiation of terms and conditions of employment with recognised trade unions.

27. The hake deep sea trawl industry can in summary be described as a stable industry "*characterised by high-levels of capital investments, stable (and relatively high) levels of employment regulated by sophisticated and mature collective bargaining structures; a long and historically proud record of the long-term sustainable utilisation of the resource; a vibrant and competitive local market, and a good reputation as a reliable supplier on the international market*". This is largely as a consequence of the effort and commitment over the years by the original participants in the industry. The newer entrants, such as Phambili and Bato Star, of course derive huge benefit from now participating in a mature and established industry which has been built up by those who preceded them.

Phambili's and Bato Star's Review Grounds

28. Phambili and Bato Star mentioned a slew of review grounds in their founding and amplifying affidavits, and augmented these in reply.[23] Not all the legal contentions anticipated by the affidavits were adopted in Phambili's and Bato Star's subsequent written or oral argument. For example, there was no mention of Bato Star's alleged "*legitimate expectation*" - engendered by draft discussion documents, newspaper reports and the like. Nor was there any reference to the alleged breach of section 9 of the 1996 Constitution of the Republic of South Africa[24] (although that argument was nevertheless considered and dismissed by the court *a quo* at paragraph [147] of its judgment).

29. The following review grounds were relied on by Phambili and Bato Star in oral and/or written argument before the Cape High Court:

29.1 that the Chief Director acted *ultra vires* when allocating the TAC;

29.2 that the Minister's failure to make regulations was a reviewable irregularity;

29.3 that the Chief Director failed to pay due heed to, and acted in conflict with, section 2(j) of the MLRA;

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23 See: Bato Star Record: Vol 7: 577-578 paras [20]-[21]; Bato Star Record: Vol 1: 71-72 para [109], Vol 7: 578 para [21.7], Vol 7: 604-605 para [51]-[52].

24 See: Bato Star Record: Vol 4: 327 para [34], Vol 7: 640 para [114.3].

29.4 that the Chief Director acted arbitrarily and without reason and that his decision was not rationally connected to the purpose for which it was taken;

29.5 that the Chief Director failed properly to apply his mind and acted grossly unreasonably;

29.6 that Phambili was scored incorrectly and thus allocated too little of the equity pool;

29.7 that Phambili had a legitimate expectation to a larger increased allocation;

29.8 that Bato Star's application and the tonnage applied for was not considered on the merits; and

29.9 that the Chief Director failed to consider the concept of minimum viable quotas ("*MVQs*") when evaluating Bato Star's application.

The grounds referred to in paragraphs 29.1, 29.2 and 29.6 were not persisted with on appeal.

30. The three grounds upon which Bato Star now relies are: (1) a mutated form of the argument referred to in sub-paragraph 29.3 above; (2) the argument referred to in sub-paragraph 29.8 above; and (3) a transmogrification of the old legitimate expectation argument referred to in sub-paragraph 29.7 above (that, as mentioned, was not pressed in argument before the Cape High Court but resuscitated before the SCA largely in the version in which it is now presented).

<u>Interests of Justice</u>

Constitutional Issue

31. The Applicant has contended that it is in the interests of justice for special leave to be granted because, *inter alia*, the case concerns a *"constitutional issue"* (p.49: paras [148]-[149]). The Industry Respondents take issue with the basis upon which the Applicant seeks to explain that a "*constitutional issue*" would be raised on appeal.

32. The Applicant's contention is that the objectives contained in the MLRA are a hallmark of much of the legislation passed after 1994 to give effect to constitutional rights and, accordingly, that a judgment which interprets section 2 of the MLRA will create an important precedent, not only with regard to the MLRA, but also with regard to all such other enactments.

33. The, with respect, startling averment is made that, if the SCA judgment stands, it might well slow or retard the implementation of constitutional rights in a wide range of legislative enactments (para [149]). The Applicant does not identify any specific constitutional rights in this regard. Reference is, however, made to four legislative enactments which it argues would fall to be interpreted in the same manner as section 2 of the MLRA. It is clear from a perusal of the aforesaid legislation that the interpretation of section 2 of the MLRA will have absolutely no bearing on an interpretation of the sections highlighted by Applicant in footnote 47:

33.1 Firstly, the principles and objectives in these Acts differ markedly from each other, as can be expected given that the Acts relate to vastly different subject matter, ranging from housing to education and the environment;

33.2 Secondly, to the extent that the Applicant may be referring to objectives and principles dealing with the need for transformation or redressing historical imbalances, the precise wording and language of the different provisions, and consequently the nature of the obligations contained in the legislation, vary. For example, section 2(j) of the MLRA refers to "*the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry*" whereas the National Education Policy Act, 27 of 1996 includes provisions such as "*achieving equitable education opportunities and the redress of past inequality in education provision*" (section 4(c));

33.3 Perhaps more importantly, the application of various principles and objectives differs from statute to statute. They have to be interpreted and applied in the context of the particular statutory provisions. The exact balance and weighting to be accorded to the principles and objectives when read together and applied, also differ. The critical phrase in the MLRA

which the Applicant overlooks is that "*the Minister and any organ of state shall in exercising any power under the Act, have regard to the following objectives and principles…*" [emphasis added] which are outlined thereunder. In contrast, for example, the National Housing Act, 107 of 1997 ("the Housing Act"), provides that "*National, provincial and local spheres of government must give priority to the needs of the poor in housing development*" (section 2(1)(a)). Other sub-sections of the Housing Act require the organs of state to *"promote"* certain principles, for example, measures to prohibit unfair discrimination on the grounds of gender and other forms of unfair discrimination (section 2(1)(e));

33.4 None of the legislation referred to by the Applicant includes the phrase *"shall have regard to"* in respect of the listed objectives and principles. Each legislative enactment must be interpreted on its own terms. The interpretation of section 2(j) of the MLRA does not have any bearing on the interpretation of these sections.

Implications of the Dispute

34. The Applicant contends that the implications of the dispute extend far beyond the interests of the immediate parties and that the outcome of the review will in all likelihood shape the fishing industry for decades to come (p.49: para [150]). The Applicant is, however, not litigating in the public interest and has not professed to be doing so. It brought the review proceedings solely in its own interest and in an endeavour to achieve an increased allocation for itself.

35. In fact, out of a total of 51 rights holders in the hake deep sea trawl sector, it is only Bato Star that believes it is in the interests of justice to persist with challenging the 2002 rights allocation. Of the 50 other rights holders in this sector –

35.1 16 (the Industry Respondents) have consistently opposed the review and related applications;

35.2 another 11 smaller rights holders supported the opposition to the applications (judgment para [3]);

35.3 1 (Phambili) has accepted the decision of the SCA;

35.4 22 have at no stage indicated their attitude with regard to the applications but have certainly not made common cause with the Applicant.

36. The Industry Respondents respectfully submit that it is in the interests of justice and the fishing industry as a whole that finality be reached on the allocation of medium-term rights. One and a half years of the four-year medium-term fishing rights have elapsed and these rights expire at the end of 2005. Participants in the industry have made capital and other investments and have structured their affairs on the basis of the rights allocated to them. Should special leave to appeal be granted, and the Applicant succeed on appeal, the Government Respondents would have to embark on a re-allocation process, with potentially disastrous consequences for the industry. In the opposing papers filed by the Government Respondents to the application brought by Phambili in terms of Rule 49(11) to put the judgment of the Cape High Court into effect pending the appeal to the SCA, the Government Respondents indicated that it would take some 6 (six) months to effect a re-allocation.

37. Bato Star states that it is ultimately concerned with the shape of the fishing industry over the next few decades (p.49, para [150]). The Government Respondents will undoubtedly publish criteria and guidelines for allocation of long-term fishing rights. If Bato Star feels that the long-term rights allocation criteria and process do not give effect to section 2(j) of the MLRA, it can take the appropriate steps at that stage.

Constitutional Democracy

38. The Applicant argues, in an endeavour to establish that it is in the interests of justice for leave to appeal to be granted, that the review has important implications for the relationship between the judiciary and the executive, as the SCA judgment reflects an unduly deferential approach to administrative review proceedings. It is submitted that the approach of the SCA was clearly correct. I refer to the reasoning of the SCA in this regard (pp.81-83: judgment para [50]), which need not be repeated in this affidavit.

39. Judicial deference is entirely appropriate where, as in the present instance, administrative decisions are polycentric - that is where they involve a large number of possible configurations of interests and interactions between them. The 2002 hake deep sea rights allocation process related to a finite resource (the amount of deep sea hake that was able to be caught by the trawl method in terms of the TAC set by the Minister in terms of section 14 of the MLRA) and involved a web of interlocking considerations; a greater emphasis on one would have had to involve less importance being attached to another. A policy laden approach of that nature is essentially an exercise to be performed by the executive, rather than the judiciary, all the more so when there are a range of issues (ranging from marine biology, ecology, economics and the like) that require expert knowledge. Having regard to the doctrine of separation of powers, as well as the technical and policy laden nature of the issues, the SCA exercised the appropriate judicial deference in deciding the appeal. To have adopted a different approach would have impermissibly extended the role of the judiciary and intruded on the executive's role in our constitutional democracy.

40. In following the approach that it did, the SCA applied the jurisprudence developed by the Constitutional Court in a number of decisions. These include Pharmaceutical Manufacturers of South Africa: *In re ex parte* President of the Republic of South Africa 2000 (2) SA 674 (CC) at 709D-H (judgment para [51]); Bel Porto School Governing Body v Premier Western Cape 2002 (3) SA 625 (CC) at 292 (judgment paras [46] and [51]; and Du Plessis v De Klerk 1996 (3) SA 850 (CC) at 931I-932J (judgment para [48]). The Applicant has not argued, nor could it, that the approach reflected by these decisions is wrong. There is accordingly no reasonable prospect that the Applicant will succeed on this basis.

Prospects of Success

41. The Applicant has contended, without amplifying its statement, that it has *"a reasonable prospect"* of success (para [152]). This contention is based solely on its argument in regard to the interpretation of section 2(j) of the MLRA. For reasons that will be dealt with in the next section hereof, the Industry Respondents contend that the Applicant has no prospect of success whatsoever on this ground, or indeed on any other ground.

<u>Grounds of Appeal</u>

42. The Applicant relies on three grounds of appeal (para [19]), namely:

    42.1 the SCA misconstrued the nature of the objectives and principles in section 2 of the MLRA;

    42.2 the SCA incorrectly concluded that the Chief Director's decision should not be set aside on the grounds that he did not apply his mind to the quantum of hake applied for by the Applicant and the Applicant's ability to catch such quantum; and

    42.3 the SCA erred in finding that the Department's undisclosed change in policy did not infringe the Applicant's right to procedurally fair administrative action.

43. As I have already indicated, these review grounds are all that is left of the phalanx of contentions advanced by the Applicant and Phambili in the affidavits filed in the Court *a quo*. Significantly, too, Bato Star appears to no longer place reliance on what the SCA (correctly, it is respectfully submitted) characterized as the "*essential theme*" of the various grounds: *viz.* that the "*central aim of the Chief Director should have been to bring about transformation in a drastic fashion, and in this he failed miserably. He should have taken much more from the big companies and he should have altogether denied rights to many other, smaller applicants. Consequently both Phambili and Bato Star should have received much larger allocations than they did. There is a tendency towards indifference as to what happens to other applicants, large and small. The tone of the attack is that the Respondents know far better than the Chief Director does how he should do his job, but little appreciation is manifested of the complexity of his task or of the competing interests involved."* (p.60: judgment para [13].)

44. I deal with each of the Applicant's grounds of appeal below.

Ground 1: Objectives and Principles of the MLRA

45. There is no prospect of the Applicant succeeding on appeal on this ground. I briefly outline the SCA's finding on the correct interpretation of section 2 of the MLRA and whether the section was in fact given effect to in the rights allocation process, and thereafter I deal with the Applicant's submissions.

46. The key findings of the SCA are as follows:

Interpretation of sections 2 (j) and 18(5)

46.1 The MLRA introduces a mandatory requirement to have regard to redressing certain wrongs of the past. If the Chief Director were to fail to heed this injunction, he would fail in his duty and his decision would be open to attack. That does not mean that this sub-section overrides the rest of the MLRA, nor does the MLRA suggest as much (p.69: para [28]);

46.2 Section 2(j) and 18(5) contain the imperative word *"shall"*. The Minister and any organ of state is obliged, in exercising any power under the Act, to have regard to the relevant objectives and principles. The object is not that each of sub-sections (a) to (j) shall be given operative effect each time, but only that the functionary shall *"have regard to"* or *"have particular regard to"* the objectives and principles (p.69: para [29]);

46.3 The principles and objectives are there to guide and not to fetter functionaries (p.70: para [30]);

46.4 The functionaries must have regard to a wide range of objectives and principles. These objectives and principles will often be in tension and may even be irreconcilable with one another. Accordingly, it would be impractical if not impossible to give effect to every one of them on every occasion (p.71: para [31]);

46.5 Section 2 does not say that a functionary must have regard to each consideration in each case, nor what weight is to be accorded it, nor how the

various considerations are to be balanced against one another, nor when or how fast transformation is to take place, nor that the listed considerations are the only ones to be had regard to (p.71: para [31]);

46.6 As regards the applicability of section 18(5), neither Phambili nor Bato Star are new entrants (p.71: para [32]).

On the facts

46.7 The Chief Director in fact had regard to sections 2(j) and 18(5) of the MLRA (p.71: para [34]);

46.8 The record reveals a reiteration, in detail at times, of the need to take transformation into account. These reiterations are contained in the guidelines and policy directions leveled at functionaries forming part of the decision-making (p.71: para [34]);

46.9 The Court had the Chief Director's word that he did have regard to the need for transformation and it would be difficult to believe that he did not (p.72: para [35]);

46.10 The reasons given for the decisions on the various allotments in fact demonstrate that he did – the SCA judgment includes a full extract from the Chief Director's written reasons for the decision (p.72: para [35]):

46.10.1 Rights were not granted to new entrants because the handline and longline sectors were more appropriate as the deep sea sector was highly capital intensive and over subscribed;

46.10.2 The inclusion of new entrants into the sector could destabilize the industry, threaten investment in it and discourage future investment, which might lead to job losses.

46.11 The starting point for the rights allocation in the deep sea sector was the allocation in the previous season. Thereafter an express allowance for transformation was made (the 5% equity pool). The quotas of the holders of

larger allocations were reduced and the smaller rights holders were the beneficiaries of that reduction (p.74: para [37], p.75, para [38]).

Bato Star's submissions and the Industry Respondents' response

47. The Applicant submits that it is not its case that section 2(j) *"over-masters"* or *"swamps"* the other objectives of the MLRA, nor that the Applicant contends that section 2(j) and the other objectives must be given operative effect each time a functionary makes a decision (p.13: para [25]). (In recording this the Applicant acknowledges that it does not take issue with the SCA's approach in this regard.) But this is precisely what the Applicant's case was in the SCA and forms the central basis upon which it seeks leave to appeal.

48. Applicant's key arguments are that, firstly, the need for transformation is the primary (or only) purpose behind the MLRA (pp:16-19 paras [34]–[40]). It for example states:

48.1 the remedial purpose of the Act is apparent from section 18(5) (p.17: para [36]);

48.2 the constitutional imperative of advancing those disadvantaged by unfair discrimination is set apart and singled out from the other objectives of the MLRA (p.18: para [37]);

48.3 section 2(j) reflects a fundamental objective of the MLRA (p.19: para [41]).

Secondly, the Applicant argues that the obligation to transform is a legislative imperative, which was not *"implemented"* (p.13: paras [24], [26]). Furthermore, the Applicant contends that there are indications in the Act that section 2 is *"mandatory"* (paras [45]-[49]).

49. In respect of the first argument, it is clear from section 2 of the MLRA that there is no ranking or weighting between the objectives and principles listed. The Applicant states that in the allocation of rights the constitutional objective of advancing those disadvantaged by unfair discrimination (echoed in section 2(j)) is *"singled out and set apart from the other objectives of the Act."* (p.18: para [37]). This is said to be supported by section 18(5) of the MLRA. But the injunction contained in section

18(5) is directed at the admission of new entrants and underscores that, in section 2, the need for transformation is not singled out or elevated above the other objectives and principles.

50. The Applicant's case is not that section 2(j), and section 2 read as a whole, is in conflict with section 9 of the Constitution. Rather, it attempts to rely on section 9(2) to bolster the strength of section 2(j). The State has indeed promoted the achievement of equality by a legislative measure to protect or advance persons disadvantaged by unfair discrimination by the enactment of sections 2(j) and 18(5) of the MLRA. The legislature also provided that the measure must be balanced against the other principles and objectives contained in section 2 of the MLRA. The Constitution requires no more than that. There is no basis to find otherwise than the SCA did on this aspect.

51. In respect of the second argument (the alleged legislative imperative), the Applicant again totally overlooks the meaning of the phrase *"have regard to"* in section 2, which applies to all the objectives and principles listed in the subsections. It ignores this phrase entirely, in an attempt to elevate section 2(j) to a legislative provision which requires active steps to be taken by the Department to implement transformation each time fishing rights are allocated. Such an interpretation of section 2 is completely erroneous and is contrary both to the plain meaning of section 2 and the reasoning of the SCA and its interpretation of the section (p.65-75: judgment paras [24]-[38]).

52. The SCA correctly held that section 2 does introduce a mandatory requirement to have regard to redressing certain wrongs of the past and that if the Chief Director were to fail to heed this injunction, he would fail in his duty and his decision would be open to attack. However, the Applicant would have it that the decision-maker must take active steps to implement transformation initiatives each time that the Minister and any organ of state exercises its powers under the MLRA. This is plainly not what the section provides. (Contrast for example section 2(1)(a) of the Housing Act, as discussed above, which provides for the type of positive obligation which the Applicant contends is provided for in the MLRA.) In any event as the facts show, transformation was given effect to in the 2002 fishing rights allocation process.

53. The Applicant sets out certain factors which in its view need to be taken into account in assessing whether the Department has complied with its section 2(j) obligations in the deep sea trawl fishery (p.21-31: paras [51]-[86]). For the Applicant, transformation will only be achieved by taking more tonnage away from the pioneer participants and allocating it to the Applicant.

54. In its assessment of whether section 2(j) has been complied with, the Applicant displays no understanding of the nature of the hake deep-sea trawl industry or the fishing industry as a whole. I have set out some of the salient features of the hake deep sea trawl industry above. I shall not repeat them here. I shall, however, deal below with certain of the paragraphs in the Applicant's affidavit dealing with this aspect.

55. Ad paragraphs 10 to 16

55.1 The Applicant boasts about its empowerment credentials, which it claims stand in "*stark contrast*" with those of I&J and Sea Harvest (p.28: para [79]). The Applicant, however, overstates its empowerment pedigree, while unfairly downplaying the benefits to HDPs that flow from rights allocations to I&J and Sea Harvest.

55.2 I have dealt above with Bato Star's allegedly impeccable HDP-status. I should merely reiterate that when Bato Star reflects its shareholders as the SA Amalgamated Union Fishing (Pty) Ltd ("SAAUF") as to 70% and *"management"* as to 30% (p.7: para [11]), it does not reveal that the 30% held by *"management*" is divided between the W A and H D Lewis Childrens' Trust ("The Lewis Trust") (26%) and a director, Mr P Rogers (4%). Neither W A Lewis nor P Rogers is an HDP. Furthermore, the management of Bato Star is, as mentioned, not dominated by HDPs: only one of the four top or senior managers at Bato Star is an HDP.

55.3 As regards the empowerment credentials of I&J and Sea Harvest, I refer to paragraphs [2], [8] and [17] of the SCA judgment, with paragraphs [2] and [8] in particular warranting emphasis:

"*[2] … Inevitably there is tension between the large established companies (also the 'pioneer' companies) and the small new aspirants coming from the ranks of the hdp. There is a tendency to describe these two groups stereotypically. As with most generalizations, stereotypes are apt to be misleading. Prosperous the established companies may be, but if one looks more closely into them one finds, in varying degrees, how they improve the lives of hdp as co-owners, shareholders, managers, skippers, crews, other sorts of employees, factory workers, consumers and the like. Also if one examines some of the hdp companies more closely one finds that they are not entirely composed of the archetypal necessitous fisherman. …*"

and

"*[8] Leaving aside the procedures for the moment, I draw attention to what has been said in para [2] above as to transformation. To illustrate how internal transformation might take place, I take the example of Sea Harvest, which achieved the highest score for transformation. For all operations wholly owned by Sea Harvest, 96.3% of the employees are from 'designated groups' as defined by the Employment Equity Act 55 of 1998 ('black people, women and people with disabilities). 38% of management comes from 'designated groups'. Of the board of nine, three (including the chairman) are hdp. 5.3% of Sea Harvest's shares are in the hands of employees. 73.2% of Sea Harvest is owned by Tiger Brands Ltd ('Tiger'). Tiger is owned as to 38% by pension funds (13% of this is owned by the Public Investment Commissioner. He invests, i.a., on behalf of government service retirement funds, the Unemployment Insurance Fund and the Workmens' Compensation Fund). I will not go into further detail. Mr. Penzhorn, the managing director of Sea Harvest, accordingly says 'It is therefore naïve and incorrect to categorise Sea Harvest as a "white-concerned entity"'. I&J also took meaningful transformation steps which it is unnecessary to detail.*"

55.4 The Applicant's contention (at p.28, para [78]) that the almost 40% of Tiger that is owned by pension funds should be disregarded, seemingly because Bato Star suspects that the bulk of the pensioners are not HDPs, is completely untenable and shows the callous indifference of Bato Star's directors (who as I have mentioned are themselves almost exclusively white). For a start, section 2(j) of the MLRA does not refer to race. But in any event, a responsible decision-maker could not disregard the hardship that would be caused to pension funds by a significant diminution in the value of a company in which they have invested.

55.5 It should be noted, too, that 80% of I&J is owned by Anglovaal Industries (Pty) Ltd, a public company listed on the JSE. 78% of Anglovaal is currently owned by financial institutions: life insurance companies, pension funds and unit trusts. The remaining 20% of I&J is owned by 3 black empowerment companies, with Anglovaal having committed itself to ensuring that at least a further 10% is acquired by HDPs. Five of I&J's thirteen directors are black (including the chairman), while 86% of its employees are HDPs. 45.4% of its middle and senior management are from "*designated groupings*", as defined under the Employment Equity Act.

56. Ad paragraph 52

It is correct that the hake deep sea trawl sector is the "*jewel in the crown*" of the fishing industry to the extent that it is the biggest and most lucrative sector of the industry. It is also highly capital intensive as I have mentioned above. But what must not be lost sight of is that the large "*pioneer participants*" play an important part in the industry's success and are largely responsible for the international demand for South Africa's hake through having developed high quality products and effective international marketing and distribution (p.62: judgment para [16]).

57. Ad paragraph 53

Transformation was given effect to in the 2002 rights allocation process in the hake deep sea trawl sector. Moreover, a notable proportion of the hake deep sea trawl TAC was allocated to deserving applicants. But, in any event, section 2(j) of the

MLRA requires equity within all branches of the fishing industry. The hake branch of the fishing industry is comprised of inshore and offshore trawl as well as the handline and longline sectors (p.52: judgment para [1]). The hake sectors other than the deep sea trawl sector are more accessible to new entrants, particularly those from historically disadvantaged sections of society. One of the methods of transformation in the hake branch has therefore been to shift quota from the deep sea trawl sector to the other sectors of the hake industry (p.62: judgment para [15]). Deep-sea trawl should thus not be assessed in isolation from the hake branch as a whole.

58. Ad paragraphs 54 to 55

The Applicant seems to suggest that I&J and Sea Harvest must be "*punished*" for any advantages they may have had before by having their quotas reduced (and presumably redistributed to Bato Star). Such an approach would not be fair or equitable (a concept found in section 2(j) of the MLRA), or in the interests of the hake branch. Moreover, it is akin to suggesting an expropriation of rights, given that the pioneer participants have made substantial capital investments in the industry. Transformation and redressing the wrongs of the past can in any event be achieved by internal transformation of rights holders as well as the introduction of new entrants. As recognized by the SCA, both Sea Harvest and I&J have taken meaningful transformation steps to address the imbalances of the past (pp.57: 58, judgment para [8]). In addition, they have willingly contributed to the redistribution of quota, as evidenced by the agreement referred to in paragraph [14] of the judgment (which has been referred to above and will be mentioned again below).

59. Ad paragraph 56

59.1 The Applicant contends that any changes in the industry which pre-dated the MLRA are at best of peripheral significance. However, again, the Applicant misconstrues the meaning of section 2 of the MLRA. A decision-maker is required to have regard to the need to redress historical imbalances when exercising powers under the MLRA. Transformation steps taken prior to the commencement of the MLRA would be a factor in assessing the need to redress imbalances.

59.2 I have referred earlier, when dealing with the nature of the hake deep sea trawl industry, to some of the changes effected since 1992. By way of further illustration, I shall merely summarise what has happened in relation to I&J since 1979. In 1979, I&J had a hake deep sea quota of 64 125 tonnes (out of a hake deep sea TAC of 135 000 tonnes). By 1992, I&J's quota had dropped to 54 989 tonnes (out of a hake deep sea TAC of 130 921 tonnes). By 2001, I&J's quota had decreased to 47 662 tonnes (notwithstanding the fact that the hake deep sea TAC had risen to 138 495 tonnes and the total hake TAC (i.e., including hake inshore, long line and hand line) had increased to 165 000 tonnes). (This decrease was substantially attributable to the 4513.8 tonnes voluntarily surrendered by I&J in 1999, in terms of the hake industry agreement). In 2002, I&J's quota dropped to 45 431 tonnes (while the hake deep sea TAC remained the same). I&J's percentage of the hake deep sea TAC thus dropped over 14% from 47,5% of the hake deep sea TAC in 1979 to 33% of the hake deep sea TAC in 2002.[25] In excess of 18 000 tons has been lost by I&J for redistribution to new entrants. This represents a loss of turnover of approximately R240 million and a loss of profit of approximately R90 million. Self-evidently, this information had to be taken into account when the medium-term hake deep sea trawl allocations were made.

60. Ad paragraph 57

As far as the Industry Respondents are aware, the Department has not developed a long-term fishing rights allocation framework, save to provide that long-term rights will be allocated for a period of 10 to 15 years from 2006.

61. Ad paragraph 59

Transformation was given effect to in the 2002 rights allocation process. The balance achieved between stability and transformation creates the appropriate "*platform*" for the long-term allocations. The criteria and framework for such rights should not be pre-empted.

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[25] Phambili Record: Vol 21: 1318-1319 annex LP2, Vol 21: 1339 par 15.

62. Ad paragraph 60

The medium-term rights allocations created a balance between transformation and stability. Transformation was given effect to in the creation of the equity pool and it was further given effect to by increasing the TAC allocated to other branches of the hake sector which more readily permit HDP new entrants (pp.74: 75, judgment paras [36], [37]).

63. Ad paragraph 61

I repeat the contentions in paragraph 61 above. Furthermore, there is no obligation on the Department to furnish any explanation at this stage as to how it will conduct the allocation of long-term rights in 2006.

64. Ad paragraph 62

I fail to see how the 1999 agreement does not constitute a meaningful step to effect restructuring of the sector. The 10 000 tonnes of hake given up by the larger quota holders is a significant amount. As a result of the fact that eight of the larger rights holders (including six of the Industry Respondents) agreed to reduce their quotas by a total of 10 000 tonnes to assist in the restructuring of the hake industry, three new entrants (Bato Star, Calamari and Offshore fishing) were able to be admitted to the sector in 1999, and one further new entrant (Ntshonalanga) was able to gain access to the industry in 2000 (all with an initial quota of 750 tonnes). Offshore and Ntshonalanga, both of whom are Industry Respondents, are among the rights holders in the hake deep sea sector who are wholly black owned and managed. 3 000 tonnes of the 10 000 tonnes surrendered in 1999 by the eight rights holders (including I&J and Sea Harvest) were moreover distributed pro rata to the remaining rights holders, who accordingly received an increase from their 1998 tonnage, notwithstanding a marginal drop in the hake deep sea tonnage. The first allocation under the MLRA in 1999 thus saw a notable restructuring and redistribution in the hake deep sea sector and a significant reduction in the allocations of I&J, Sea Harvest and Atlantic Trawling (three of the pioneer participants).

65. Ad paragraph 63

The second allocation, subsequent to the coming into effect of the MLRA, was indeed in 2000. The quotas of I&J, Sea Harvest and Atlantic Trawling were reduced by, respectively, 1 560 tonnes, 1 315 tonnes and 400 tonnes. This was despite the fact that there was a thorough assessment of all applicants who were scored on the basis of a number of criteria, the most important being transformation. All three of these entities received full marks for transformation. Phambili received an increase of 326% in tonnes even though the hake deep sea TAC was increased by only 589 tonnes in total.

It is correct that the 2000 rights allocations were rolled over pursuant to the MLRA Amendment Act, 2000, because the new allocation procedure was not yet ready to be introduced. As a consequence of an increase in the hake TAC and thus to the hake deep sea TAC, all rights holders enjoyed a pro rata increase in their 2000 rights allocations. This included both Phambili and Bato Star. This was also why there was no restructuring in the 2001 season. It is notable, however, that neither Bato Star nor any other hake deep sea rights holder, challenged the *"roll-over"* of rights from 2000 to 2001.

66. Ad paragraphs 72-74

The Applicant argues that there can be no rational basis for a policy which attempts to transform the fishery by consigning small rights holders, such as the Applicant, to the periphery of this sector through allocating them quotas which are not economically viable. It further states that it *"appeared"* to be common cause in the trial court that for the Applicant to upgrade one vessel profitably it would be required an allocation of approximately 2,500 tonnes (in para [73]). This is denied. On Bato Star's version an allocation of 2 500 tonnes is required for a viable allocation. On this basis rights holders who have been successfully participating in the industry for approximately 15 (fifteen) years having been doing so without a viable rights allocation. Bato Star's allegations of non-viability are also belied by the fact that, to give just one example, one of the smallest rights holders, Dyer Island Visserye, which has a 2002 quota of 480 tonnes, is currently building a hake trawl vessel. Small quotas are capable of successful exploitation and experience shows that some

holders of small quotas have put them to fruitful use by forming joint ventures or concluding co-operative arrangements, or by buying additional quota from other holders (p.40: judgment para [63]). Moreover, the concept of a "*minimum viable quota*" was rejected in the ESS study (commissioned by the Department) and disregarded by scientists as of no practical value.

67. Ad paragraph 77

The Industry Respondents do not agree that the SCA gave undue weight to the internal transformation of the dominant companies in the industry. The Applicant again indulges in its tendency to describe stereotypically the pioneer companies and the small new aspirants from the ranks of the HDP, something that the SCA commented on disapprovingly (p.2: judgment para [2]). As the Applicant would have it, rights holders should be divided along the lines of either being *"white"* or *"black"*. This is an extremely crude analysis of the transformation imperative and does not accord with the legislative imperative in section 2(j), the policy guidelines adopted by the Department for the rights allocation process or the process of transformation that has and continues to take place in the industry. Transformation includes internal transformation of existing rights holders and awarding quotas to new entrants.

68. Ad paragraphs 77, 78, 79 and 81

The Applicant only focuses on HDP ownership. Transformation includes not only ownership by HDPs, but employment equity, distribution of wealth to HDPs, skills transfer, and the like.

Ground 2: Failure to consider the merits of Bato Star's application

69. The Applicant contends that the Chief Director's decision in relation to the allocation of fishing rights ought to be set aside on the grounds that he failed to take into account relevant considerations, and in particular the tonnage applied for and the ability of the applicant to optimally utilise such tonnage (para [107]).

70. This issue was considered in full by the SCA (judgment p.38: para [61]). The judgment correctly points out that the statement that the Chief Director considered each application on its merits, was uncontroverted. The judgment also correctly

points out that the Chief Director's decision in respect of the determination of the quantum of the allocations to the successful applicants, was ultimately decided in accordance with a general policy.

71. It is permissible and indeed often desirable for administrative decision-makers to adopt and apply general, guiding principles to assist them in speedily, fairly and wisely exercising their discretionary powers, provided that they remain open in every case to depart from the general policy if departure is justified.

72. In respect of the allocation of fishing rights in the deep sea trawl sector, the policy adopted by the Chief Director was not only rational and accordingly permissible, but was indeed more appropriate than any other approach suggested either by the Applicant or Phambili. I respectfully submit in this regard the approach struck a fair balance between the need for stability, transformation, fairness and consistency.

73. It is also apparent from the record that each individual application was indeed considered on its merits. The distribution of the equity pool was distributed amongst rights holders in proportion to their scoring in the comparative balancing exercise.

74. Lastly, it should be noted that 51 of the 54 2001 rights holders were successful, after a comparative scoring exercise had been conducted. The tonnage applied for by the successful rights holders greatly exceeded the hake deep sea trawl TAC. The Department was thus forced to make some hard choices. It decided to use the 2001 allocations as a starting point. That was logical and reasonable given the capital intensity of the industry and the need for stability. Adjustments were then made based on individual merit. There is nothing objectionable in this, and the SCA rightly, it is submitted, held as much. The Applicant does not suggest what other approach should have been adopted, other than a substantially increased allocation to it at the expense of others.

Ground 3: Undisclosed policy change

75. The Applicant claims that its right to procedurally fair administrative action was infringed by the Department's failure to disclose its change of policy in regard to the transformation of the hake deep sea trawl sector. As mentioned, this argument first

emerged in a "*legitimate expectation*" form, but has now been reshaped into a procedural fairness challenge. It is, however, none the stronger in its current guise.

76. This argument was dealt with at some length in the judgment (judgment p.43-47: para [70]-[74]). The Industry Respondents respectfully agree with the conclusions and reasoning set out in the judgment. In particular, the Industry Respondents support the conclusion that there was in fact no change in policy by the Department. The Chief Director, when allocating rights in the hake deep sea trawl sector, gave effect to section 2(j) of MLRA and gave effect to the need for transformation within the policy guidelines published for the rights allocation process. Everything that was done by the Chief Director was consistent with the provisions of the MLRA and the published criteria which governed the allocation process. Draft discussion documents, press releases and the like which pre-dated the publication of the policy guidelines are irrelevant, and were correctly found to have been so by the SCA (see judgment p.40-43: para [64]-[67]). The only relevant touchstone is what appeared in the Government Notice of July 2001 and the Policy Guidelines. These were complied with, as the SCA (with respect, correctly) held.

<u>Relief</u>

77. Accordingly, there is no reasonable prospect that Applicant will succeed should the above Honourable Court grant special leave to appeal and it is not in the interests of justice for such leave to be granted. The Industry Respondents ask that leave to appeal be refused with costs, including the costs of two counsel.

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TIMOTHY WINFRIED REDDELL

I certify that:-

1. The deponent has acknowledged that:-

   1.1 he knows and understands the contents of this declaration;

   1.2 he has no objection to taking the prescribed oath;

   1.3 he considers the prescribed oath to be binding on his conscience.

2. The deponent thereafter uttered the words: "I swear that the contents of this declaration are true, so help me God".

3. The deponent signed this declaration in my presence at the address set out hereunder on this day of 2003.

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COMMISSIONER OF OATHS