



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number 11914/17

In the matter between

DYER EILAND VISSERYE (PTY) LTD

Applicant

And

THE MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES First Respondent

THE DEPUTY DIRECTOR-GENERAL, FISHERIES MANAGEMENT,

DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES Second Respondent

JUDGMENT DELIVERED ON 13 NOVEMBER 2018

THULARE AJ

[1] The second respondent took a decision to revoke the applicant's long term fishing right in the hake long-line sector. On appeal, the first respondent upheld

the decision of the second respondent. This is an application for an order to set aside the decision of the first respondent. The applicant sought an order declaring the revocation unlawful and a declaration that the applicant is a holder of that right or a remittance of the appeal to the first respondent to decide the appeal afresh.

[2] The relevant provisions of the first respondent's decision are couched in the following terms:

"3. DECISION

3.1 In reaching my decision I have fully considered the appeal documentation, the MLRA, the Regulations there-under, the 2005 General Policy on the Allocation and Management of Long Term Commercial Fishing Rights ("the General Policy") and the 2005 Policy on the Allocation and Management of Long Term Commercial Fishing Rights in the Hake Longline fishing sector, the 2015 fishing permit conditions for Hake, Sole, Horse Mackerel and Demersal Shark and 2015 permit conditions for Hake Longline (West Coast) fishery.

3.2 I am convinced that the arguments presented by the appellant do not warrant setting aside of the decision of the Delegated Authority due to the following reasons:

(a) ...

(b) The argument provided in paragraph 5 is not correct. The vessel "I DO" had a valid Local Commercial License (NO. 25342) from 25/11/2014 until 17/08/2015 issued in terms of section 23 of MLRA. On the expiration date of the vessel licence no. 25342, the appellant applied for another Local Commercial Vessel Licence (No. 26716) issued and valid for the period 02/09/2015 until 06/06/2016 whilst the vessel was in Mauritius and in possession of the fishing licence (foreign vessels) (licence no. FCF001/2015) issued under the Fisheries and Marine Resources Act, 2007 of Mauritius from 28 August 2015 to 25 November 2015.

(c) The Vessel Monitoring System (“VMS”) report received from the Department’s Compliance Unit maintains the reasons contained in the Section 28 Notice and it is evident that the vessel “I DO” was fishing in the Mauritius waters from 31 October 2015 to 07 November 2015 having both valid South African Local Commercial Vessel Licence and the Mauritius Foreign Fishing Vessel Licence.

(d) The Department is in agreement that the Port of Richards Bay is not a fishing harbour as defined in section 27 of the MLRA, however, the Department contracted KwaZulu Natal Ezemvelo Wildlife to act as Fishery Control Officers to monitor fishing activities in the Richards Bay area. Furthermore, in terms of the 2015 Sector permit conditions, the appellant’s area of operation was in the West Coast, hence Richards Bay as a landing site does not reflect in the permit conditions. Therefore, vessel “I DO” did not notify the KwaZulu Natal Ezemvelo Wildlife when it entered Richards Bay harbour, hence it is concerning the Department as they do not have any records on what was on board the vessel and landed.

(e) Paragraph 4.2 of the Sector permit conditions for 2015 states that “The Permit Holder shall immediately cease fishing once the full allocation as indicated in this permit had been caught and shall hand his/her original permit and certified copies to an Fishery Control Officer (FCO) for cancellation”.

The Department has no records of neither originals nor certified copies which were handed to the FCO for cancellation. According to data reports received and verified from the Department’s Chief Directorate: Fisheries Research and Development, they confirm the reasons contained in the Section 28 Notice and it is evident that the appellant exceeded their 2015 allocation in catch landings and they did not cease fishing once the full allocation was caught as indicated in their permit. This has been verified against the 2015 Total Allowable Catch (TAC) allocation issued against the 2015 permits and the catch landing signed by the Appellant and the authorised Department’s monitors. Dyer Eiland Visserye (Pty) Ltd also under declared noticeable margins

on their landings. Accordingly, a fishing permit issued in terms of Section 1 of MLRA cannot be valid for a period not exceeding a year.

(f) Hence the fishing season for Hake Longline sector starts from 1 January to 31 December in any year and the fishing period is also displayed in the catch permit which was issued to the Appellant with conditions. The Department dispute strongly that the last two entries in respect of landing dates of 19th January 2015 and 9 January 2015 were incorrect and should be excluded on the cumulative totals. Paragraph 6.4 of the Sector permit conditions states that "Permit holders whose vessel docks on the 15th December of one year (current year) and the 15th of January the following year, may elect to have their entire catch (or part thereof) deducted from their allocation of either year, provided that the quantum transferred between allocation years is less than 10% of the Right Holders entire allocation in that year. The above mentioned landings were indeed for 2015 as it can also be ascertained from the catch landings sheets signed by both the Skipper of the vessel and the Departmental monitors.

(g) The information as listed in paragraph 10 of the General permit conditions in respect of prescribed levies confirms that for fish landed levies should be paid on monthly basis. The report received from the Department's Finance Directorate maintains the reasons contained in the Section 28 Notice and proves that the appellant did not pay Hake Longline levies from February 2015 to December 2015. Levies for the months of February to December 2015 were only paid on 30 March 2016 and 23rd April 2016 and levies for the month of January 2015 are still outstanding.

(h) Paragraph 10.1 of the 2015 General permit conditions states, "the Permit Holder shall pay prescribed levies for the fish landed for the prescribed species as stipulated in the Government Gazette". Furthermore paragraph 10.2 of the General permit conditions states that "all levies and fees shall be paid monthly in arrears and by the last working day of the month following the month in which fish was harvested." But the appellant chose to breach the above mentioned

conditions for the whole year (2015) in that no single payment was done though the fish was landed several times.

- (i) *Paragraph 11.1 of the 2015 General permit conditions states that: “A breach of the provisions of the MLRA or these permit conditions by the Permit Holder may result in the initiation of legal proceedings (which may include section 28 proceedings and or criminal proceedings). A breach includes, but is not limited to furnishing information to which the Department is entitled, which is not true or is not complete”*

[3] The true issue between the parties is whether the applicant had exceeded its hake longline fishing allocation for the 2015 season. Applicant’s case is that the landings in January 2015 (2, 9, 15 and 19 January 2015) had been allocated to the 2014 season. Applicant’s case is that its 2015 catch, after its transfer of its January 2015 catches to the 2014 season, amounted to only 74, 598 kilograms against an allocation of 81, 432 kilograms.

[4] The applicant, in its grounds for review, submits that it was only when the Minister made his decision that it became aware of what the case against it was, having not been informed as early as the section 28 notice. I am unable to agree with the submission. The relevant provisions of the section 28 notice reads as follows:

“NOTICE IN TERMS OF SECTION 28 OF THE MAIRNE LIVING RESOURCES ACT, 1998 (ACT NO. 18 OF 1998)

1. *It has come to the Department’s attention that Dyer Eiland Visserye Ltd has contravened section(s) 28 (1)(b) of the Marine Living Resources Act, 1998 (Act No. 18 of 1998) (“the MLRA”) in that:*

(e) Also, the right holder contravened the 2015 permit conditions for Hake Longline (West Coast) fishery in particular, clauses 2.1, 2.3, 4.1, 4.2, 4.3, 6.1, 6.3 and 7.2.4. In light of the above findings, it is evident that the right holder has failed to comply with 2015 permit conditions. This constitutes a breach of the Marine Living Resources Act, 1998 (Act No. 18 of 1998) (“MLRA”).”

[5] The Sector Specific Permit Conditions, Hake Longline (West Coast) fishery for the fishing season of 2015 provides as follows in clause 4.2:

“4. CATCH CONTROLS AND LIMITATIONS

4.2 The permit holder shall immediately cease fishing once the full allocation as indicated in this permit has been caught and shall hand his/her original permit and certified copies to an Fishery Control Officer (FCO) for cancellation.”

The section 28 notice informed the applicant that the Department’s case against it was that it had contravened amongst others clause 4.2 of the 2015 season permit conditions of the Hake Longline (West Coast) Fishery in breach of the Marine Living Resources Act, 1998 (Act No. 18 of 1998) (the MLRA).

[6] The applicant was entitled to have the second respondent set out the allegations that creates the basis for a section 28 notice. The applicant was entitled to be informed by the charges against it with precision, or at least with a reasonable degree of clarity, what the case is that it had to meet – [*S v Hugo* 1976 (4) SA 536 (AD) at 540E]. The second respondent did not set out the factual considerations which motivated him to act against the applicant in his section 28 notice. However, in my view, the applicant understood the substance of the complaint. It stood the applicant free to seek further information and the circumstances under which the complaint was found if this was lacking. However,

the applicant directly answered the complaint in the following terms through its attorneys in a letter to the Department dated 29 June 2016:

“3.5.13 DAFF alleges numerous breaches of Dyer Eiland’s Permit Conditions for Hake Longline (West Coast) (Section C) (“Section C Permit Conditions”). We, accordingly, address each and every alleged contravention thereof hereunder:

(c) Ad Permit Condition 4.1-4.3: These Permit Conditions relate to catch controls imposed upon a permit holder when the vessel “is operating in terms of the provisions of this permit”. ... In respect of all catches landed by the Vessel (caught in South African waters) pursuant to any valid catching permit issued by DAFF on –board the Vessel during the 2015 season, Dyer Eiland did, however, comply with the aforesaid permit conditions. In the circumstances Dyer Eiland denies breaching permit conditions 4.1-4.3.”

[7] Be it as it may, in his decision in which he revoked the fishing rights allocated to applicant in terms of section 28 of the MLRA, the second respondent said the following in paragraphs 9-11.

“9. According to data report from Directorate Fisheries Research and Development, the vessel “I DO” last landed Hake for Dyer Eiland on the 20th June 2015 in Gansbaai. At that time their total landings for 2015 was 138 tons which far exceeds their 2015 allocation (81.432 tons). The fishing trip which landed fish on the 20th June 2015 in Gansbaai was illegal as Dyer Eiland had already landed all their fish on the 26th February 2015. The amount landed by the 26th February 2015 was 88.7 tons which exceeds the 81. 432 tons allocated to Dyer Eiland in 2015 fishing season. As per Section B of fishing permit conditions for Hake, Sole, Horse Mackerel and Demersel Shark, clause 2.2.2 stipulates that all the Hake Longline Permits for 2015 shall expire thereafter as the quantum of fish allocated to the Permit Holder (as specified in Section A) was caught in full. (See attached 2015 Catch Landing Data for Dyer Eiland Visserye (Annexure A).

10. In addition, the report from Department’s Finance Directorate showed that Dyer Eiland did not pay any Hake Longline levies in 2015, therefore, the appellant is in breach of the permit conditions (see attached Annexure B).

11. Paragraph 11.1 of the 2015 Permit Conditions for Hake, Sole, Horse Mackerel and Demersal Shark Sectors states that:

“A breach of the provisions of the MLRA or these permit conditions by the Permit Holder may result in the initiation of legal proceedings (which may include section 28 proceedings and or criminal proceedings). A breach includes, but is not limited to furnishing information to which the Department is entitled, which is not true or is not complete”

The arguments presented by the applicant do not change the matter that Dyer Eiland Visserye (Pty) Ltd has breached the permit conditions as indicated above.”

[8] One expected of the applicant to engage the second respondent, as applicant's case presented a different set of facts. The applicant elected not to challenge the facts upon which the second respondent's decision was based, and to seek the second respondent to consider those new and different facts. Instead, the applicant elected to raise those alternative facts on appeal of the decision of the second respondent, with the first respondent. The alternative facts are set out in the following terms in applicant's grounds of appeal:

“Ad paragraph 9 of the DDG's Decision

...

49. The appellant denies that it over caught and/or exceeded its total allocated tonnage for the 2015 season. The appellant furthermore specifically denies the accuracy of the figures stated in paragraph 9.

50. The DDG alleges various instances of over catching by the Appellant and relies on Annexure A to her decision to substantiate same. We however submit that the figures stated in Annexure A with respect to the nominal weight of the hake landed, on which the DDG purportedly relies, are incorrect. In amplification hereof we note the following:

i. The last three entries in Annexure A (in respect of landing dates 19 January 2015, 9 January 2015 and 2 January 2015) were allocated to the 2014 season. Accordingly such are to be excluded from the cumulative total of Annexure A;

- ii. The landing dated 7 February 2015 (by the MFV Amoria on the right of the Appellant) should reflect the amount of 8943 kgs, not 9868 kgs, as alleged in Annexure A;*
- iii. The landing dated 10 February 2015 (by the Vessel on the right of the Appellant) should reflect the amount of 8614 kgs, not 8769 kgs, as alleged in Annexure A;*
- iv. The landing dated 16 February 2015 (by the MFV Amoria on the right of the Appellant) should reflect the amount of 7541 kgs, not 8115 kgs, as alleged in Annexure A;*
- v. The landing dated 26 February 2015 (by the Vessel on the right of the Appellant) should reflect the amount of 8614 kgs, and not 10 909 kgs, as alleged in Annexure A;*
- vi. The landing dated 6 march 2015 (by the MFV Amoria on the right of the Appellant) should reflect the amount of 7516 kgs, and not 11563 kgs, as alleged in Annexure A;*
- vii. The landing dated 9 March 2015 (by the Vessel on the right of the Appellant) should reflect the amount of 8614 kgs, not 10932 kgs, as alleged in Annexure A;*
- vii. The landing dated 20 June 2015 (by the Vessel on the right of the Appellant) should reflect the amount of 23 253 kgs, not 27 633 kgs, as alleged in Annexure A;*

51. To substantiate such submissions, annexed hereto marked "A2" and "A3" respectively, find the Annual Summary of Landings in respect of MFV "Amoria" and the Vessel submitted by the Appellant to DAFF in respect of the 2015 season. It is noted that the figures stated in the subparagraphs above (in relation to kilograms landed per trip) are recorded therein.

52. From annexure "A2" it is noted that the MFV "Amoria" landed a total of 24 000,00 kgs of hake against the hake long line allocation of the Appellant during the 2015 season, whilst from Annexure "A3" it is evident that the Vessel landed a total of 50 598, 00 kgs of hake against the hake long line allocation of the Appellant during the 2015 season. Cumulatively, the total quantity of hake landed by the Appellant against its hake long line allocation for the 2015 season amounted to 74 598,00 kgs.

53. The appellant was allocated a total tonnage of 81 432,00 kgs for the 2015 season. In the circumstances, the Appellant did not over catch during the 2015 season or exceed its allocated tonnage.”

[9] It seems to me that the true issues between the parties were not properly crystallised before the decision of the second respondent was made. The facts upon which the alleged contravention of Paragraph 4.2 of the Sector permit conditions for 2015 were based were not disclosed in the section 28 notice by the second respondent. The true facts upon which the second respondent based his decision were only put up in his section 28 decision. Having answered the notice without that information, and noting that the facts were untrue or that the applicant had an adequate explanation possible to be given, the applicant did not seek leave of the second respondent to answer them. The applicant did not request to be given an opportunity by the second respondent, to deal with those facts.

[10] In my view, it was incumbent upon the applicant to respond specifically to the facts which it deemed untrue and the applicant should have sought second respondent's leave to answer the case against it. It was only after the decision of the second respondent on the section 28 notice was made that the factual dispute was properly set out by the applicant in the grounds of appeal. The applicant chose to challenge the correctness of the facts upon which the second respondent based his decision, on appeal to the first respondent. Nevertheless, the importance of these facts must have been apparent to the applicant and one would have expected that any material evidence to gainsay these facts would

have been tendered to the second respondent – [*Residents of Joe Slovo Community v Thubelisha Homes* 2010 (3) SA 454 at para 74].

[11] In my view, it cannot be said that the second respondent made a decision on the disputed facts that the applicant raised with the Department. The decision of the second respondent was made before the applicant provided its alternative facts and obviously those new different facts were not considered by the second respondent in his decision. It follows that when the matter served before the Minister, it could not have been a process where the Minister was engaged with a function of correcting a factual or legal error or clarifying or interpreting the law applicable to the dispute between the parties as regards the ruling of the second respondent on that dispute. There was simply no legal ruling on the dispute by the second respondent. There was no intelligent decision rendered by the second respondent on the merits which was final such that nothing more could be decided.

[12] The report of the second respondent in terms of Regulation 5(3) of the Regulations issued in terms of the MLRA, after the applicant lodged its appeal does not take the matter any further. Regulation 5(3) reads as follows:

“5. Procedure for Appeals

(3) The appeal contemplated in sub-regulation (2) shall be served by the appellant on the person against whose decision the appeal is made, and that person shall submit a report on the appeal to the Minister within 30 days after the appeal had been served on him or her.”

In my view, once the applicant had filed their papers on appeal, it was incumbent upon the second respondent to consider the grounds of appeal and then amongst others file a statement in response to the appellant’s allegations. Nowhere does

second respondent set out the issues between the parties, which were already clear and known at the time of the compilation of the report. It does not demonstrate any intelligible engagement with the issues between the parties. The report shows no understanding of the facts and advanced no reasons to guide the Minister in understanding why the Department arrived at the decision it did and why that decision was to be preferred and accepted and the case of the applicant rejected.

[13] The report represents a classic case of failure by a senior official of a Department to guide a Minister on an appeal against an administrative decision. After seven (7) pages of writing, not a single syllable is facile enough to convey the reasons for the conclusion which reads:

"3. CONCLUSION

I hereby confirm the reasons for my decision as contained in the letter dated 8th February 2017."

Regulation 5(3) placed a duty on the second respondent to provide the two sides of the case in order to assist the Minister in his consideration of the issues presented by the Department and the appellant. The facts, the dispute, the reasons for the Department's decision, the grounds for appeal against the Department's decision and the arguments relating to those questions should have been concisely stated in the report. The second respondent had a duty to discuss and show how the findings made were arrived at, on what basis the rulings were made, the errors in the applicant's case and demonstrate why the applicant was wrong in arguing that the decision of the Department was erroneous.

[14] On the other hand, it is not sufficient for the Minister to make a general statement that in *“reaching my decision I have fully considered the appeal documentation.”* The record of the decision of the Minister should evidence a detailed examination of the elements and structure of the dispute. The process through which the Minister separated the constituent parts of the whole case, contrasting the striking difference between the cases of the Department and the appellant before him, and the reasons for the acceptance of one case or legal argument over another must appear from the record. The appellant may not agree with, but should understand why the Minister rejects the contention that the decision of the Department was erroneously made. There has to be a demonstrable record that the Minister reviewed the controlling issues in the dispute. I am unable to find any evidence of such industry on the record of the decision of the Minister on appeal. I am unable to conclude that the applicant’s case was properly considered, if at all by the Minister.

[15] Some of the reasons advanced by the applicant to upset the decisions of both the Department and the Minister did not deserve the dignity of a comment, but for the entitlement to lawlessness which they advocate for. The applicant appears to pride itself and many other rights holders in the fishing industry to conduct which in my view is unconscionable. The poor are prosecuted in our district courts for theft of a tin of fish worth about R11-00. The applicant identifies itself as a well-established business with land and sea-based investments worth over R65 million. When the Department and the Minister enjoins them to declare the correct catches and to harvest marine living resources in line with their allocation and to pay their levies, they claim that the Department is biased because it is

practice in the industry not to pay levies on time or at all. The applicant finds it acceptable that right holders exceed their limits of catches and are not being held to account and complains when it is called to order. In applicant's world morality, accountability and punishment is for the poor, maximizing profits and excluding loss at all cost is business, and government must leave business alone.

[16] It is unclear to me what the Minister means when the Minister, after three paragraphs of discussing the "I DO" vessel and its Mauritius fishing trips and landings at places other than where the Department expected, said "*it is concerning to the Department as they do not have any records on what was on board the vessel and landed.*" I do not know whether the Minister made any findings and rulings on this question, and to what extent if any this influenced his decision on the appeal.

[17] For these reasons, I make the following order:

1. The decision of the first respondent in which he affirms the decision of the second respondent, is set aside.
2. The decision of the second respondent in which the fishing rights allocated to the applicant in the Hake Longline Sector (HLLM00612) was revoked, is set aside.

3. The matter is remitted back to the second respondent to consider the applicant's answer to the allegations against it and having regard thereto, to make a decision afresh in terms of section 28 of the MLRA.
4. No cost order is made.

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DM THULARE
ACTING JUDGE OF THE HIGH COURT

Counsel

Appellant: Advocate D Melunsky

Respondent: Advocate E De Villiers - Jansen

Instructing Attorneys

Appellant: DAWSON EDWARDS AND ASSOCIATES

Respondent: LEON MANUEL (STATE ATTORNEY)

JUDGMENT READ AND DAY(S) IN COURT: 13 November 2018