



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

Case No: 11413/2023

In the matter between:

PUFFIN FISHING CC

First Applicant

RIVER QUEEN TRADING 499 CC

Second Applicant

and

**MINISTER OF FORESTRY, FISHERIES
AND THE ENVIRONMENT**

First Respondent

**DEPUTY DIRECTOR-GENERAL: FISHERIES
MANAGEMENT BRANCH**

Second Respondent

ADVOCATE RADIA RAZACK N.O.

Third Respondent

**AND THE 4th TO 135th RESPONDENTS LISTED
IN ANNEXURE A TO THE FOUNDING AFFIDAVIT**

Coram: Justice J Cloete

Heard: 12 February 2024, supplementary notes delivered on 14 and 19 February
2024

Delivered electronically: 11 March 2024

JUDGMENT

CLOETE J:**Introduction**

- [1] The applicants ("Puffin" and "River Queen" respectively) are close corporations which conduct business in the tuna pole fishing industry. On 12 July 2023 they launched this application in two parts. In Part A they sought certain interim relief pending the determination of Part B. The Part A relief was ultimately not pursued and Part B came before me.
- [2] In their revised Part B they seek the review and setting aside of certain decisions taken by the third respondent delegated authority ("DA") and subsequently by the first respondent ("Minister") pursuant to their internal appeals, together with substitution relief. The application is opposed by the Minister, second respondent and DA. The other respondents are right holders in the same industry. No relief is sought against them since according to Puffin and River Queen the orders sought do not impact on any of their fishing rights or the number of crew they are presently allocated. They are thus cited merely as potentially interested parties and they have not participated in these proceedings.

Relevant factual background

- [3] On 28 January 2022 Puffin and River Queen each applied for commercial tuna pole fishing rights for the period 1 March 2022 until 28 February 2037 in terms of s 18 of the Marine Living Resources Act ("MLRA")¹ in response to an

¹ No 18 of 1998.

invitation by the Minister issued in Government Gazette 45504 of 19 November 2021. Both Puffin and River Queen were Category A applicants (i.e. one who held rights in the fishery during the period 2006 to 2020 for which it was re-applying, apparently extended until 31 December 2021 and thereafter until 31 March 2022).

- [4] On 28 March 2022 Puffin was notified by the DA that its application was unsuccessful since it scored below the available effort allocated to Category A applicants. "Available effort" means the required measure of fishing intensity based on historic performance. The DA also provided a scoresheet in which she commented separately (i.e. without reference to any scoring) that *'[t]here is a brother sister relationship between the applicant and another Category C applicant, Hotline Fishing CC ["Hotline"]. In accordance with the General Policy, a right may be granted to only one such applicant. Hotline Fishing CC scored higher and was granted the right'*.
- [5] On 5 April 2022 Puffin lodged an internal appeal with the Minister in terms of s 80 of the MLRA. The Minister agreed with Puffin that it was erroneously scored, but determined that the appeal should nonetheless fail on the basis that a brother-sister relationship exists between Puffin and Hotline. She (incorrectly) found that the DA made *'a decision'* on such a relationship, but nothing much turns on this since it is common cause that an internal appeal of this nature, being a wide appeal, is essentially a rehearing *de novo*. In particular the Minister determined that *'[i]n light of the shareholding of the two companies I am of the view that the majority shareholders have controlling interests in both*

entities which goes against the intention in the General Policy' (my emphasis).

I will accept that the Minister intended to refer instead to "close corporations" and "members interests".

- [6] On 22 March 2022 River Queen was notified by the DA that its application had been excluded for failing to effectively utilise its tuna pole-line ("TPL") right since it had not harvested the required minimum of 25 tons of tuna annually or a cumulative amount of 175 tons over the period 2014 (when it was first granted a right) until 2020.

- [7] On 4 May 2022 River Queen lodged an internal appeal with the Minister in terms of s 80 of the MLRA. Its grounds of appeal were essentially that, as submitted in its application to the DA, its catches were lower than the required minimum because (a) it targets tuna for the sashimi and high-end international markets as was clear from its fishing plan, and as such its fishing strategy and targets are not '*volume driven but quality driven*'; (b) given its '*business and financial models*' it spent considerable time, finances and resources sourcing and gearing the right type of vessel over a period of 4 years, until finally by 2021 a vessel was successfully deployed and produced 26 tons of high quality tuna over a period of 90 days of fishing; and (c) the '*rigid implementation*' of an annual minimum of 25 tons failed to recognise these factors.

- [8] The Minister found that River Queen '*did not deal with the reasons for its poor catch records. This is ultimately the reason for its exclusion.*' It is unclear from the appeal decision whether the Minister was referring to the alleged failure to

provide reasons for the poor catch records or to the poor catch records themselves. The Minister noted that River Queen had caught a cumulative total of 69 tons or an average of 10 tons per annum during the period of the previously allocated right.

- [9] She also noted the Sector Policy² provides that applicants who have failed to effectively utilise their TPL right for the relevant period will be excluded '*unless exceptional and compelling reasons exist*'; River Queen had raised the changing of vessels but failed to provide her with supporting documentation on how this impacted its fishing performance. She determined that:

'2.2.14 I find that the Appellant has not furnished exceptional and compelling circumstances which warrant its exemption of the application of paragraph 6.1(d) of the Sector Policy. To the contrary, the Appellant seems to labour under the impression that it should be exempt from the Sector Policy due to its perceived unique selling proposition, being the international markets it purportedly supplies.'

2.2.15 Therefore, I am of the view that the Appellant has failed to provide me with the necessary evidence demonstrating why it failed to effectively utilise its Tuna Pole-Line right.'

2.2.16 I accordingly find that there are no exceptional and compelling circumstances which warrant the decision of the Delegated Authority being overturned.'

² Tuna Pole-Line Fishery Policy: 2021.

Puffin review

[10] In paragraph 8.3 of the Tuna General Published Reasons ("GPR") issued earlier by the DA on 28 February 2022 she listed all those entities '*which are suspected of having brother-sister relations amongst them*'. Puffin and Hotline were not on that list.

[11] Clause 8.6.2 of the General Policy³ provides that:

8.6.2 Brother-Sister Cooperation

If two or more companies which are owned and controlled by the same shareholders apply for a commercial fishing right in any fishing sector, the Delegated Authority will consider allocating a fishing right to one of the companies if two or more of the brother-sister companies qualify for a fishing right in that particular sector. The Delegated Authority may also consider dividing one fishing right between the brother-sister companies if they all qualify for a fishing right in the fishing sector applied for.'

[12] In the case of Puffin there are five members, three of whom are Mr Jendrik Heyn (10%), Ms Pauline Braun (30%) and Mr David Dawson (10%). Accordingly in total they make up 50% of Puffin's members interest. In the case of Hotline there are three members, Mr Jendrik Heyn (20%), Ms Pauline Braun (60%) and Mr David Dawson (20%), who thus make up 100% of the members interest.

³ General Policy on the Allocation of Fishing Rights: 2021 published in GG 45504 of 19 November 2021, also referred to in relation to the invitation at para 3 of this judgment.

[13] According to the DA and Minister, Puffin and Hotline are owned and controlled by the same members, namely Heyn, Braun and Dawson. The Minister relied squarely on this reason in dismissing Puffin's appeal. However in the answering affidavit deposed to by the second respondent she maintained that *'the significant overlap'* between Puffin and Hotline is also supported by the fact that they share the same physical and postal addresses. This could not have been a reason for the Minister's dismissal of the appeal since it does not feature in her decision. It is thus fair to infer that it is an attempt to construct an *ex post facto* rationalisation for a decision, which is not permissible.⁴

[14] On the plain wording of clause 8.6.2 there are two prerequisites for a brother-sister relationship, namely: (a) ownership; and (b) control, by the same shareholders. Again, I accept that "shareholders" may reasonably be construed to also mean "members". The point however is that Puffin and Hotline do not meet the Minister's own requirement since the three members of Hotline cumulatively hold 50%, and no more, of the members interest in Puffin. Put differently a cumulative 50% members interest in an entity would at best confer a right to veto a decision, resulting in a deadlock. This does not equate to control.

[15] In the founding affidavit Puffin asserted that the Minister's decision on this score was unlawful since it was *'factually and legally unsustainable'*. The specific ground in s 6 of PAJA⁵ was not identified, and is often the case in PAJA reviews,

⁴ *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para [27].

⁵ Promotion of Administrative Justice Act 3 of 2000.

the court is left in the unenviable position of having to “box” the ground of complaint into one or more of the s 6 grounds. However on the facts it appears that s 6(2)(e)(i) is most apposite, namely that the decision was taken for a reason not authorised by the empowering provision (i.e. clause 8.6.2 of the General Policy).

[16] Another ground of complaint, not pursued with any vigour in argument, was that the Minister *‘irrationally and unlawfully failed to ensure that the appeal process she adopted was fair and compliant with section 33 of the Constitution’* in that she was allegedly required to provide *‘access to competitor applications, evaluations and scoresheets and regulation 5(3) appeal reports’* which somehow apparently constituted a *‘fatal violation’* of Puffin’s right to a fair and rational appeal process.

[17] The short answer to this is that Puffin singularly failed to motivate why it was entitled to those records and how the so-called failure to provide them adversely impacted on its internal appeal. Moreover as Puffin itself was constrained to point out, on appeal the Minister increased its total score from 62.24% to 66.61% *‘confirming further that Puffin Fishing more than qualifies for a tuna-pole fishing right’*. It follows that this ground of complaint is devoid of merit.

[18] The last ground of complaint was that its fishing right application was impermissibly delegated to the DA to determine, since she was not qualified to do so on the basis that she was *‘certainly no expert in the field of fisheries management, let alone the tuna-pole fishing sector’*. This complaint also has no

merit because on Puffin's own version the DA relied on experts in the industry approved by Puffin itself to assist her in reaching her decision.

River Queen review

[19] The same grounds of complaint in respect of procedural fairness and impermissible delegation were raised by River Queen and my findings in relation to Puffin pertain equally to these grounds.

[20] The pertinent complaint of River Queen is encapsulated in the founding affidavit as follows:

'52. *Had the Delegated Authority considered River Queen's fishing plan which was appended to its application form as Annexure 5.1 (and appended hereto marked "FA11"), it would have been patently clear that River Queen's entire business and operating model is predicated on the harvesting of tunas for the high-end sashimi export markets. Its focus is not bulk harvesting of tunas but the selected harvesting of specific tunas for a very specific market.'*

[21] It is contended that had the DA done so, a non-rigid and flexible interpretation of clause 6(1)(d) of the Sector Policy would have been applied. The PAJA grounds relied on are 6(2)(e)(iii), i.e. the failure to take relevant considerations into account, and s 6(2)(f)(ii)(cc), i.e. the decision was not rationally connected to the information before her. A similar complaint is made in respect of the Minister's decision to dismiss the appeal but on the broader basis that she failed to consider the reasons advanced in the appeal as well as the fishing plan.

- [22] Clause 4 of the Sector Policy sets out its objectives, amongst others *'the need to ensure optimal, long-term and justifiable use of marine living resources in order to ensure sustainable development of the fishing sector to achieve inclusive economic growth... and to create sustainable employment consistent with the development objectives of National Government...'* (my emphasis). The MLRA obliges the responsible authorities to achieve these objectives. In turn, one of the specific goals for the allocation of fishing rights in the tuna pole-line industry is the improvement of catch performance to promote increases in future allocations (clause 4(c)).
- [23] Clause 6.1 of the Sector Policy provides that the DA will exclude applicants that fail to meet certain requirements *'unless exceptional and compelling circumstances exist'*. One of these exclusionary criteria is clause 6.1(d) which reads in relevant part as follows:

(d) Non-utilization

Category A Applicants that failed to effectively utilise their Tuna Pole-line fishing right between the period 2014 to 2020 and/or have not collected a catch permit for any particular reason will be excluded.

Effective utilisation shall mean activation and be issued with a permit to undertake commercial fishing for tuna by means of the pole-line method, landing of catch and subsequent submission of catch data for at least six years during the period 2014-2020. In addition, during the same period, previous Tuna Pole-line right holders will be expected to have landed at least a total of 25 tonnes of large pelagic species (tuna) for every fishing season that they were active or a cumulative catch of ≥ 175 tonnes...

- [24] The founding affidavit makes clear that, in respect of the DA's determination, River Queen relies only on its fishing plan. It did not annex its full application which served before the DA, and merely annexed its fishing plan to the founding affidavit without identifying the portions thereof upon which reliance was placed. This is impermissible, as is established law.⁶ The fishing plan is comprised of four pages. After setting out its harvesting process, on-board handling and storage, offloading and processing methods, River Queen described its target market and pricing as follows:

'Target market

Premium quality Yellowfin tuna is aimed at the high end sushi market. There is both a local and international client base for this.

Longfin tuna also has a large fresh export component. The Longfin that gets frozen and shipped to Spain is manufactured into tinned tuna.

Pricing

Our whole process revolves around the delivery of the best possible fish so that we can achieve the best possible financial returns to make sure our boat investments are sustainable.'

- [25] It is hardly surprising, in these circumstances, that the DA reached the decision she did, since what is contained in River Queen's fishing plan is skeletal at best. In its appeal to the Minister, River Queen submitted in relevant part that:

'Our client's application form (section 5) demonstrates that [it] applied for its fishing permits, reported its catches and submitted all catch levy returns. Its

⁶ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324F-G, since followed consistently in a long line of cases.

catches are lower than the annual minimum of 25 tons for the following reasons:

- *Our client targets tunas for the sashimi and high-end international markets as is clear from its fishing plan. As such, its fishing strategy and fishing targets are not volume driven but quality driven. The rigid implementation of a minimum annual catch of 25 tons is irrational and unreasonable as it fails to take into account that smaller vessels like that owned by our client targets a very high value, high-end tuna buyer and customer.*
- *The rigid implementation of an annual minimum of 25 tons fails to recognise that (and demonstrates that the delegated authority and her advisers do not know or understand the tuna pole fishery) the fishery essentially comprises two categories of boat owners. Those large vessels that target tunas principally for the frozen tuna and canned tuna markets; and those smaller boat owners like the applicant that targets yellowfin tunas for the sashimi markets. This latter category of fisher does not target volumes as it would harm access to the high value sashimi market.*
- *Finally, because the applicant's business and financial models are to produce tunas for a sashimi market, it spent considerable time, finances and resources sourcing and gearing the right type of vessel. This occurred over a period of 4 years as it first attempted to use the MFV Amber Rose which proved financially unviable. The applicant thereafter refitted the 40ft Northern Star but that vessel failed to perform adequately. By 2021, the MFV Maverick was finally successfully deployed and produced 26 tons of high quality tunas over a period of 90 days of fishing.*

What is apparent is that the DA failed to reasonably and properly apply her mind to our client's application and read our client's submissions in Sections 1 and 5.'

[emphasis supplied: The reference to 'Sections 1 and 5' are presumably to the application itself, which as previously stated was not placed before the court.]

- [26] Although in this review River Queen relies only on its fishing plan and subsequent motivation furnished to the Minister, annexed to the answering affidavit was its “application form”. The second respondent pointed out that when regard is had to that form, it is apparent that River Queen has only two permanent, and four part-time, employees in the fishing industry. Also annexed to the answering affidavit were copies of River Queen’s annual financial statements for the years ended February 2019 to February 2021 inclusive, and it was further pointed out that, when considered cumulatively, River Queen had been trading at a loss since 2016. This is relevant to what the DA stated in the regulation 5(3) report:

‘...the rationale behind the policy is to exclude recreational fishers/fishers who catch TPL as a side business, who go out a few times and take in big catches and don’t fish regularly. They should be relying on the fishery for income and creating stable permanent employment by going out to fish consistently. This is why the Policy set criteria for applicants to meet the catch threshold of 175 tons cumulative and 25 tons annual (which is very low) and for utilisation for at least 6 years out of the 7, which shows commitment to the fishery.’

- [27] The undisputed evidence of the second respondent was further that the amount of 25 tons was determined based on the average cumulative catch in the tuna pole-line fishery during the previous FRAP (Fishing Right Allocation Process) period, and also taking into account that many previous right holders rarely utilised their commercial tuna pole-line fishing rights. The 25 tons are therefore a tonnage that can be achieved by the average vessel in the fishery. While dependent on the fishing vessel, 25 tons can be achieved within 5 trips.

Evidently, very little is required of a right holder to meet the effective utilisation requirement.

[28] According to the Minister she took into account that the Sector Policy aims to address the issue of under-utilisation as well as inefficient utilisation of the resource given the poor performance during the previous period. She determined that consistent application of the exclusionary criteria is important. She was of the view that it is not punitive but has a broader important policy objective meant to ensure that South Africa remains competitive internationally, and further that recreational fishers are excluded. As set out in her appeal decision, the Minister determined that River Queen failed to provide exceptional and compelling circumstances which warrant its exemption from the application of clause 6.1(d) of the Sector Policy for the reasons contained therein.

[29] Given that there is a review before me, not an appeal, I can do no better than repeat what was held by the Constitutional Court in *Bato Star*.⁷

[48] In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field... Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result

⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC).

in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision...

- [30] On the evidence before me I am unable to find that either the DA or the Minister took a decision which would not: (a) reasonably result in the achievement of the objectives contained in the Sector Policy; (b) reasonably be supported on the facts; or (c) be reasonable in light of the reasons given. This dispenses with the contention that both the DA and the Minister should have applied a more flexible approach.
- [31] However for the sake of completeness I deal briefly with River Queen's related complaint that in two other instances the Minister overturned the DA's decision to exclude another historic right holder for failing to adequately utilise its tuna pole fishing right. The first is that of Gold Medallion Investments (Pty) Ltd; but since River Queen singularly failed to provide the court with even a broad overview as to why this entity's appeal was successful, I am unable to consider it.
- [32] The other is Pelagic Trading (Pty) Ltd. It is clear however from the relevant appeal decision that the Minister determined the existence of exceptional and compelling circumstances since *'the Appellant was only allocated a right on appeal and started fishing in 2017 and thereafter managed to land an average catch of 25 tons annually. I am convinced that this is evidence of the existence of exceptional and compelling circumstances that warrant the Appellant to be exempted from the application of clause 6.1(d) of the Sector Policy'*. Nothing to

this effect was contended by River Queen and moreover the successful Pelagic Trading appeal demonstrates that despite effective utilisation remaining an important consideration, the Minister considered each appeal on its particular facts, which lends credence to her assertion that she applied her mind in the exercise of her discretion in the instant matter. It follows that the River Queen review must fail.

Puffin: substitution or remittal, and if remittal whether to Minister or DA

- [33] In the founding affidavit it was submitted that should the reviews be upheld the court should substitute *'the impugned decision'* with one granting Puffin and River Queen a commercial tuna pole fishing right *'on the same terms as those determined by the Minister as being applicable to current right holders'* together with an order directing that permits to this effect be issued within 10 days.
- [34] Given my findings in respect of River Queen it is only necessary to consider whether it would be appropriate to make such an order in relation to Puffin. During argument counsel for Puffin appeared to accept that the court cannot do so, since according to the second respondent there are presently 131 right holders in the fishery who are cumulatively permitted to operate 140 vessels, and this court has no idea of what the terms of their fishing rights are.
- [35] In any event, in my view this is one of those cases where a substitution of this nature would definitely cross the line in breach of the separation of powers doctrine, since by no stretch of the imagination could I be considered in as good a position as the functionary concerned to determine the terms of a tuna pole

fishing right for a Category A applicant. The furthest I can go is to grant Puffin a right in terms of s 18 of the MLRA and defer (i.e. remit) to the functionary what its terms should be (including allocation of effort and permit conditions in terms of s 13 of the MLRA). This is particularly so given the level of expertise required and policy-laden nature of these allocations.

- [36] Counsel for Puffin submits that I should remit to the Minister since it is she who corrected the DA's erroneous scoring and granted Puffin an increased final score of 66.61%. This makes sense since at least to this extent the DA is *functus officio*, and it was not the DA, but the Minister, who made the determination on the brother-sister relationship. I thus disagree with counsel for the Minister, second respondent and DA that I should instead remit to the DA for, amongst others, Puffin and Hotline 'to be rescored', given also that Hotline elected not to participate in the review despite surely having been aware that Puffin scored higher on appeal. In any event it is Puffin which has willingly forfeited its right to any internal appeal against a determination by the DA in seeking a remittal only to the Minister, and which will again be limited to approaching court for a further review if dissatisfied with the outcome.

Costs

- [37] The applicants have only been partially successful. In addition various points and grounds of complaint were effectively abandoned during argument, and for reasons which are unexplained both applicants took it upon themselves to make unseemly and unwarranted *ad hominem* attacks on both the DA and the

Minister. In the circumstances the appropriate order to make is the one that follows.

[38] **The following order is made:**

- 1. The decision by the first respondent to refuse the first applicant a commercial tuna pole fishing right on the basis that it is related by application of the "brother-sister" relationship criterion to Hotline Fishing CC is reviewed and set aside;**
- 2. The first applicant is granted a commercial tuna pole fishing right in terms of section 18 of the Marine Living Resources Act 18 of 1998 ("MLRA") for the period 1 March 2022 until 28 February 2037 on such terms as the first respondent may determine in terms of section 13 of the MLRA;**
- 3. Save as aforesaid the application is dismissed; and**
- 4. Each party shall pay their own costs.**



J I CLOETE

For applicants: Adv S Moolla

Instructed by: Smith & Associates (Mr D Smit)

For first to third respondents: Adv J De Waal SC with Adv R Matsala

Instructed by: State Attorney (Mr L Manuel)